2007

At the Intersection of Race and History: The Unique Relationship Between the Davis Intent Requirement and the Crack Laws

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TABLE OF CONTENTS

* I would like to thank Professor Charles Lawrence and the entire Fall 2004 Critical Race Theory class at the Georgetown University Law Center for your inspiration, commentary, critique, and camaraderie. Special thanks to Matthew Cregor for spending time with this piece and providing much needed encouragement and intellectual support.

> *The racially disproportionate nature of the drug war is not just devastating to [B]lack Americans. It contradicts faith in the principles of justice and equal protection of the laws that should be the bedrock of any constitutional democracy; it exposes and deepens the racial fault lines that continue to weaken the country and belies its promise as the land of equal opportunity; and it undermines faith among all races in the fairness and efficacy of the criminal justice system. Urgent action is needed, at both the state and federal level, to address this crisis for the American nation.*[1]

INTRODUCTION

There may be no greater disaster in the development of criminal justice legislation and policy than the sentencing disparity between crack and powder cocaine. Under federal drug laws, selling 1,000 grams of powder cocaine gets the same mandatory ten-year sentence as selling ten grams of crack cocaine. Powder cocaine is more likely to be consumed by White drug offenders, while crack cocaine is more likely to be consumed by Black offenders. The result has been an explosion in the federal prison population, particularly among Black prisoners. This phenomenon and its unfortunate consequences are known as racialized mass imprisonment. Its permanence and growth mocks and threatens the legitimacy of the American legal system and is at the center of a host of social ills affecting communities throughout the country.

Racialized mass imprisonment is a social, economic, and political process spurred by draconian anti-drug abuse sentencing legislation that simultaneously impacts the viability of the Black community, the legitimacy of the criminal justice system, and the health of American democracy. While conventional wisdom holds that people who commit crimes must "do the time," the definition of crime and the principles buttressing conceptions of appropriate sentencing are not neutral or objective factors. History and contemporary politics reveal that popular conceptions of crime, punishment, and justice are shifting and unstable political constructs that reflect broader patterns of power and subordination in society. The stubborn, protracted racial struggles endemic to American society only complicate this. The politics of race in the post-segregation era, however, often obscure the ways in which the processes of racial subjugation have changed or remain un-

1. HUMAN RIGHTS WATCH, *Punishment and Prejudice: Racial Disparities in the War on Drugs* (2000).

changed. Post-segregation-era society is defined not only by its misguided and naïve colorblind ambitions, but also by its determination to forget, obscure, and de-politicize America's racial past. This tenuous myth of race neutrality, however, is easily unraveled when mass incarceration is examined in its proper social, political, and historical context.

The relationship between race and incarceration needs little introduction.[2] The seriousness and enormity of the problems racialized mass imprisonment presents, however, go beyond the unprecedented numbers of men and women of color warehoused in state and federal penal institutions. It encompasses more than narrow conceptions of crime and punishment and has disastrous consequences for Black communities and all of American society. Racialized mass imprisonment affects such broad socio-economic factors as labor force participation, political power, family organization, education, marriage rates, and public health.

At the core of the public policy driving racialized mass imprisonment are the crack laws—the body of legislation passed through the Anti-Drug Abuse Act of 1986[3] and the Omnibus Anti-Drug Abuse Act of 1988.[4] The Anti-Drug Abuse Act of 1986 introduced mandatory minimum penalties for the possession and distribution of crack cocaine, and established sentencing requirements 100 times

2. A considerable body of literature interrogating the links between incarceration and race exists. *See, e.g.*, Theodore G. Chiricos & Charles Crawford, *Race and Imprisonment: A Contextual Assessment of the Evidence*, *in* ETHNICITY, RACE, AND CRIME: PERSPECTIVES ACROSS TIME AND PLACE 281-309 (Darnell F. Hawkins ed., 1995) (reviewing the empirical evidence of racial bias in the decision to incarcerate); DAVID COLE, NO EQUAL JUSTICE: RACE AND CLASS IN THE AMERICAN CRIMINAL JUSTICE SYSTEM 16-62, 132-57 (1999) (discussing racial profiling, police brutality, and the politics and policy of mass incarceration); BAKARI KITWANA, THE HIP HOP GENERATION: YOUNG BLACKS AND THE CRISIS IN AFRICAN-AMERICAN CULTURE 51-84 (2002) (discussing the impact of racialized mass imprisonment on the hip-hop generation); MANNING MARABLE, THE GREAT WELLS OF DEMOCRACY: THE MEANING OF RACE IN AMERICAN LIFE 147-164 (2002) [hereinafter GREAT WELLS] (discussing the political dimensions of mass imprisonment in the Black community); MANNING MARABLE, HOW CAPITALISM UNDERDEVELOPED BLACK AMERICA 105-32 (2000) [hereinafter CAPITALISM UNDERDEVELOPED] (discussing the history of racialized mass imprisonment and the economic aspects of its theory and methods); MASS IMPRISONMENT: SOCIAL CAUSES AND CONSEQUENCES (David Garland ed., 2001) (covering several dimensions of mass imprisonment and its relationship to larger patterns and processes of economic, racial, and political struggle); MARC MAUER, RACE TO INCARCERATE (1999).

3. Anti-Drug Abuse Act of 1986, 100 Stat. 3207 (codified as amended at 21 U.S.C.A. § 841 (2004)).

4. The Omnibus Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4390 (codified as amended at 21 U.S.C.A. § 848(l) (2004)).

greater than similar sentencing penalties for powder cocaine.[5] The 1988 Anti-Drug Abuse Act extended these penalties to the charge of conspiracy to distribute crack cocaine.[6] As a result, these laws impose a five-year mandatory minimum sentence for crimes involving five grams of crack, while possession of 500 grams of cocaine is necessary to trigger the same sentence. This tremendous disparity between the sentencing for crack and powder cocaine offenses—different forms of the same drug stereotypically associated with poor Blacks and middle to upper-income Whites, respectively—has been the subject of considerable controversy since the Act's passage. Such a wide sentencing disparity has led to a distinct and unprecedented racialized explosion in the American prison population.[7]

Legal challenges to the crack laws have focused primarily on their equal protection implications; however, the courts have consistently denied relief.[8] In denying these equal protection claims, courts routinely rely on the Supreme Court's holding in *Washington v. Davis.*[9] In *Davis*, Black candidates challenged the racially discriminatory effects of the Washington, D.C., Police Department's facially neutral hiring exam, Test 21. The Supreme Court held that the Constitution does not prohibit unintentional acts of discrimination that have racially disparate impacts.[10] This principle is now known as the intent requirement and has emerged as a formidable judicial standard for adjudicating cases involving discriminatory effects arising from seemingly innocuous legislation. By upholding the constitutionality of the crack laws, the intent requirement has, in many ways, functioned as the jurisprudential anchor for a system of racialized mass imprison-

5. *Compare* § 841(b)(1)(A)(ii)(II) (Anyone in possession of "5 kilograms or more of a . . . a detectable amount of . . . cocaine . . . shall be sentenced to a term of imprisonment which may not be less than 10 years or more than life and if death or serious bodily injury results . . . not less than 20 years . . . .") *with* § 841(b)(1)(A)(iii) (Anyone in possession of "50 grams or more of a mixture or substance described in clause (ii) which contains cocaine base . . . shall be sentenced to a term of imprisonment which may not be less than 10 years or more . . . .").

6. *See* Omnibus Anti-Drug Abuse Act of 1988.

7. *See, e.g.,* MAUER, *supra* note 2, at 1 ("[T]he national prison population [has] risen 500 percent since 1972 . . . in the ten-year period beginning in 1985, federal and state governments had opened a new prison a week to cope with the flood of prisoners.").

8. *See, e.g.*, United States v. Patterson, 258 F.3d 788 (8th Cir. 2001); United States v. Thomas, 2000 U.S. App. LEXIS 11899 (8th Cir. 2000); United States v. Banks, 130 F.3d 621, 626 (4th Cir. 1997); United States v. Singleterry, 29 F.3d 733 (1st Cir. 1994); United States v. Stevens, 19 F.3d 93, 96-7 (2d Cir. 1994); United States v. Coleman, 24 F.3d 37 (9th Cir. 1993); United States v. Frazier, 981 F.2d 92 (3d Cir. 1992); United States v. Watson, 953 F.2d 895 (5th Cir. 1992); United States v. Lawrence, 951 F.2d 751 (7th Cir. 1991); United States v. Avant, 907 F.2d 623 (6th Cir. 1990); United States v. Thomas, 900 F.2d 37 (4th Cir. 1990).

9. Washington v. Davis, 426 U.S. 229 (1976).

10. *See id.* at 238-48.

ment that, in the post-segregation era, has replaced Jim Crow as the literal and symbolic tool of Black subjugation.[11]

The intent requirement of *Davis* has spawned a considerable body of progressive, critical legal scholarship and journalism.[12] Perhaps the most renowned criticism of the *Davis* intent requirement is *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism* by Charles Lawrence.[13] Lawrence presents a cultural meaning test that questions the focus of the intent requirement by placing the intent inquiry into its proper historical and social context.[14]

There remains, however, a link between racialized mass imprisonment and the intent requirement of *Davis* scarcely explored in discussions about either issue. Racialized mass imprisonment is typically seen as a byproduct of the war on drugs and racism. Discussion of the crack laws, particularly in legal scholarship, reached its peak in the mid to late 1990s, and has largely subsided.[15] The intent requirement of *Davis* is typically viewed relative to issues of judicial review[16] and,

11. *See generally* Loic Wacquant, *Deadly Symbiosis: When Ghetto and Prison Meet and Mesh*, *in* MASS IMPRISONMENT: SOCIAL CAUSES AND CONSEQUENCES, *supra* note 2, at 82-120 (discussing the links between slavery, Jim Crow, the ghetto, and prisons).

12. *See, e.g.*, Barbara J. Flagg, *Was Blind, But Now I See: White Race Consciousness and the Requirement of Discriminatory Intent*, 91 MICH. L. REV. 953 (1993); Alan Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049 (1978); Charles R. Lawrence, III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987); Yoav Sapir, *Neither Intent Nor Impact: A Critique of the Racially Based Selective Prosecution Jurisprudence and a Reform Proposal*, 19 HARV. BLACKLETTER L.J. 127 (2003); Reshma M. Saujani, *The Implicit Association Test: A Measure of Unconscious Racism in Legislative Decision-Making*, 8 MICH. J. RACE & L. 395 (2003); Christopher J. Schmidt, *Analyzing the Text of the Equal Protection Clause: Why the Definition of "Equal" Requires a Disproportionate Impact Analysis When Laws Unequally Affect Racial Minorities*, 12 CORNELL J.L. & PUB. POL'Y 85, 95-97 (2002).

13. Lawrence, *supra* note 12.

14. *See id.* at 355-81.

15. *See, e.g.*, Jesseca R.F. Grassley, *Federal Cocaine Sentencing Policy Following the 1995 Cocaine Report: Issues of Fairness and Just Punishment*, 21 HAMLINE L. REV. 347 (1998); David A. Sklansky, *Cocaine, Race, and Equal Protection*, 47 STAN. L. REV. 1283 (1995); William Spade, Jr., *Beyond the 100:1 Ratio: Towards a Rational Cocaine Sentencing Policy*, 38 ARIZ. L. REV. 1233 (1996); Margaret P. Spencer, *Sentencing Drug Offenders: The Incarceration Addiction*, 40 VILL. L. REV. 335 (1995); Cristian M. Stevens, *Criticism of Crack Cocaine Sentences Is Not What It Is Cracked Up To Be: A Case of First Impression Within the Ongoing Crack vs. Cocaine Debate*, 62 MO. L. REV. 869 (1997); William J. Stuntz, *Race, Class, and Drugs*, 98 COLUM. L. REV. 1795 (1998).

16. Most of the discourse on *Davis* and the intent requirement has focused on the issue of judicial review. The concern of the Constitution and the Fourteenth Amendment, however, is with equality rather than judicial review. The discussion of *Davis* and the intent requirement reveals this fundamental breakdown in the law's ability to realize the Constitution's broad and deep potential for bringing about true equality. Realizing this potential requires a historical approach to both understanding the equal protection clause and, more specifically, the context surrounding the *Davis* Court. The latter consideration requires a departure from the traditional legal-theoretical approach to one of political theory and history.

more broadly, post-segregation-era developments in the direction and scope of anti-discrimination jurisprudence. In the 1990s, the intent requirement and racialized mass imprisonment intersected in the legal battles challenging the constitutionality of the crack laws. During these struggles, the intent requirement emerged as a mechanism for preserving an adapted post-Jim Crow racial logic fashioned for the contemporary terrain of race, crime, and punishment. It is, therefore, necessary to trace the common history of racialized mass imprisonment and the intent requirement—a process that will reveal *Davis*'s essential role in perpetuating Black subjugation in the post-segregation era.

This Article endeavors to chronicle the history of *Davis* and racialized mass imprisonment in a way that shows the connections between the politics behind the construction of law—in both public policy and common law—and social developments commonly understood as tangential to constitutional interpretation as opposed to both the impetus for and the intended result of certain modes of constitutional interpretation. The historical record, when viewed in this regard, is not merely a sequential chain of events occurring alongside the development of constitutional interpretation. Instead, the record details a long-standing logic, at times deployed to protect entrenched racial and class power by masquerading it as a legitimate framework of constitutional analysis.

The *Davis* decision will be chronicled and analyzed for its role in maintaining pre-existing patterns of racialized power and privilege across American society's transition from a regime of formal and substantive inequality (Jim Crow) to one of formal, facial equality, but persistent, substantive inequality (racialized mass imprisonment).[17] This analysis hinges on reviewing the development of race politics, the Supreme Court, and social policy in the immediate post-segregation era. This analysis reveals that the intent requirement established in *Davis* is evidence of conscious judicial activism aimed at creating a very specific and indelible roadblock to racial progress in the post-segregation era, thus severely limiting a quarter century of anti-discrimination law in the courts. These calculations formed the fertile

17. For a discussion on how racialized mass imprisonment imposes the same burdens and stigmas as a system of Jim Crow laws or any other method of racial subjugation, see David Cole, *The Paradox of Race and Crime: A Comment On Randall Kennedy's "Politics of Distinction*," 83 GEO. L.J. 2547 (1995) and Randall Kennedy, *The State, Criminal Law, and Racial Discrimination: A Comment*, 107 HARV. L. REV. 1255 (1994).

ground for the logic of the crack laws, while simultaneously giving them, and other racist legislation and state action, cover from equal protection attacks.

Before investigating the concurrent historical forces that led up to the intent requirement and the growth of racialized mass imprisonment, the *Davis* decision must be understood in relation to its impact on anti-discrimination law and the cyclical nature of race struggles in American society. Part I of this Article presents the seldom discussed similarities between the decision in *Davis* and the decision in *Plessy v. Ferguson*.[18] Specifically, Part I frames the discussion of the intent requirement and racialized mass imprisonment by paralleling the political work the *Plessy* decision performs with that of the *Davis* decision. Part I concludes with an analysis of the *Davis* decision.

Part II seeks to connect several developments that, while occurring simultaneously in the immediate post-segregation era, are rarely thought of as interrelated in legal analyses of either the intent requirement or racialized mass imprisonment. The analysis begins with a presentation of the political climate surrounding the 1968 presidential election and President Richard Nixon's appointments to the Supreme Court. It continues by exploring the Court's consciousness in purposefully bringing about a transformation in the reach and scope of anti-discrimination law and policy. Part II also follows the development of a post-segregation-era theory of social control that resulted in the War on Drugs of the 1980s and 1990s. Part II concludes by contemplating racialized mass imprisonment as a modified method of racial subjugation.

Part III examines the recent legal struggles that challenged the constitutionality of the crack laws on equal protection grounds and the response of the courts. Specifically, Part III revisits the first federal case that found the crack laws in violation of the Equal Protection Clause and the logic the appellate court used to reverse the decision and uphold the laws' constitutionality. The courts' decisions on these issues provide the clearest illustration of the conscious and unconscious racial motives driving the contemporary understanding of race and interpretations of the intent requirement.

18. Plessy v. Ferguson, 163 U.S. 537 (1896).

I. RACIAL REDUX: *DAVIS* AND *PLESSY* IN CONTEXT

In order to understand the unique relationship between the intent requirement of *Davis* and the crack laws, *Davis* must be situated within its proper historical context. Given the functions that the intent requirement performs relative to racialized mass imprisonment in the post-segregation era, *Davis* is best likened to the historic case, *Plessy v. Ferguson*.[19] In this case, Homer Plessy, a Black man, argued that Louisiana's Separate Car Act violated the Thirteenth and Fourteenth Amendments to the Constitution.[20] The Act segregated railroad passengers to separate cars based on race. Plessy lost the case, and through its decision, the Supreme Court made "separate but equal" the law of the land.[21] Moreover, the decision in *Plessy* occurred during the aftermath of several ineffective legislative attempts to retain the manner in which White supremacy limited the civil rights and liberties of Blacks nationwide, specifically the passage of the Thirteenth,[22] Fourteenth,[23] and Fifteenth[24] Amendments to the Constitu-

19. *Plessy*, 163 U.S. 537.

20. *See generally id.* at 540-41.

21. *See id.* at 544.

> Laws permitting, and even requiring, their separation in places where they are liable to be brought into contact do not necessarily imply the inferiority of either race to the other, and have been generally, if not universally, recognized as within the competency of the state legislatures in the exercise of their police power. The most common instance of this is connected with the establishment of separate schools for White and colored children, which has been held to be a valid exercise of the legislative power even by courts of States where the political rights of the colored race have been longest and most earnestly enforced.

Id.

22. U.S. CONST. amend. XIII, § 1 ("Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.").

23. *Id*. amend. XIV, § 1.

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Id.

24. *Id*. amend. XV, § 1 ("The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.").

tion, the Civil Rights Act of 1866,[25] and the Civil Rights Acts of 1870-1875.[26]

In the years following emancipation, Blacks ascended to public office, acquired private property, founded colleges and universities, and voted in elections.[27] These and other developments were the result of Black self-determination and ingenuity in the immediate aftermath of the Civil War. The expectations these rapid achievements engendered in Black society inevitably clashed with an impoverished, embittered, and embarrassed southern White populace. Jim Crow was White society's response to the very aggressive demands Blacks were making for substantive equality. *Plessy* came on the heels of these developments with the explicit intent of rationalizing the backlash and constitutionalizing the growth of Jim Crow.[28] Similarly, *Davis* followed a series of legislative enactments and socio-political shifts that instantly removed judicial sanction and constitutional support for

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25. *See, e.g.*, Act of Apr. 9, 1866, 14 Stat. 27 (1866).

> The Civil Rights Act (1866) was passed by Congress on 9th April 1866 over the veto of President Andrew Johnson. The act declared that all persons born in the United States were now citizens, without regard to race, color, or previous condition. As citizens they could make and enforce contracts, sue and be sued, give evidence in court, and inherit, purchase, lease, sell, hold, and convey real and personal property. Persons who denied these rights to former slaves were guilty of a misdemeanor and upon conviction faced a fine not exceeding $1,000, or imprisonment not exceeding one year, or both.

Spartacus Educational, http://www.spartacus.schoolnet.co.uk/USAcivil1866.htm (last visited Feb. 21, 2007).

26. *See, e.g.*, Civil Rights Act of 1875, 18 Stat. 335 (1875); The Civil Rights Cases, 109 U.S. 3 (1883).

> The essence of the [Civil Rights Act of 1875] is not to declare broadly that all persons shall be entitled to the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances, and theatres; but that such enjoyment shall not be subject to any conditions applicable only to citizens of a particular race or color, or who had been in a previous condition of servitude. In other words, it is the purpose of the law to declare that, in the enjoyment of the accommodations and privileges of inns, public conveyances, theatres, and other places of public amusement, no distinction shall be made between citizens of different race or color, or between those who have, and those who have not, been slaves. Its effect is to declare, that in all inns, public conveyances, and places of amusement, colored citizens, whether formerly slaves or not, and citizens of other races, shall have the same accommodations and privileges in all inns, public conveyances, and places of amusement as are enjoyed by White citizens; and vice versa. The second section makes it a penal offence in any person to deny to any citizen of any race or color, regardless of previous servitude, any of the accommodations or privileges mentioned in the first section.

The Civil Rights Cases, 109 U.S. at 9-10; *id*. at 16 ("[T]he 'Civil Rights Bill,' originally passed April 9, 1866, and re-enacted with some modifications in sections 16, 17, 18, of the Enforcement Act, passed May 31, 1870."); DERRICK BELL, RACE, RACISM, AND AMERICAN LAW 40-46 (2004).

27. *See, e.g.*, BELL, *supra* note 26, at 46.

28. *See, e.g.*, Kimberle Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimization in Anti-discrimination Law*, *in* CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT 103-22 (Kimberle Crenshaw et al. eds., 1995).

Jim Crow. The Civil Rights Acts of 1964 and 1968,[29] the Voting Rights Act of 1965,[30] and the racially progressive developments they promised constituted a second reconstruction and laid the groundwork for the movement of Blacks into the American mainstream.

Though substantively different, the timeline of events surrounding both *Plessy* and *Davis* proceeds as follows: a major social upheaval forever alters the balance of racial power and the status of Blacks; organized mass action influences legislation and social developments that solidify a new social order; a backlash develops that quickly adapts its modus-operandi to the new racial discourse and conventional wisdom; political and legal contests reflecting the tension between the new social order and the backlash increase in number and intensify; the Supreme Court intervenes to settle the tension; and finally, new arrangements, masked as compromise, constrain the potential of the initial social upheavals and restore what is left of the previous social arrangement. This life cycle nurtures both *Plessy* and *Davis*. In both cases, it is the period immediately after this process that is most detrimental to racial progress.

A. *Davis* and *Plessy*

Introducing the parallels between *Davis* and *Plessy* allows the *Davis* decision to be cast against a set of historical processes that are cyclical in nature. American history is replete with examples of different groups of Whites, embroiled in conflict over the meaning and status of race, who settle a dispute and establish or reestablish amicable relations by striking compromises that conflict with the interests of Blacks.[31] For instance, the question of whether slavery would expand into the free states was a highly contested issue, with Whites in the Free Land Movement calling for the abolishment of slavery in the new

29. The Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 253 (codified as 42 U.S.C. § 2000d (2000)); The Civil Rights Act of 1968, Pub. L. No. 90-284, 82 Stat. 73 (codified as 42 U.S.C.S. § 3601 (2004)).

30. The Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (1965) (codified as 42 U.S.C.A. §§ 1971, 1973 to 1973bb-1 (2004)).

31. *See* BELL, *supra* note 26, at 37.

> In the main, poor Whites in the seventeenth century were ready to trade their economic demands for racism, and even two hundred years later in the post-Civil War period, the efforts of some leaders of the Populist Party to unite poor Southern [W]hites and [B]lacks against the ruling Bourbons were shattered by the continued inability of poor [W]hites to surrender racism even for responsive political power. Their susceptibility had not lessened midway through the twentieth century, as Dr. Martin Luther King's Southern Christian Leadership Conference discovered during the 1968 Poor People's Campaign.

Id. (internal citations and quotations omitted).

states and territories.[32] The issue partly revolved around the fact that poor and working class Whites simply could not compete with free Black labor. Allowing White elites and industrialists to bring slaves into the new states rendered opportunities for the White poor and working class virtually non-existent. The *Scott v. Sandford*[33] decision ultimately settled this issue and temporarily bolstered the power of southern White slaveholders.[34] The decision divided the nation and was one of the primary drivers of Southern secession, thrusting the nation into the Civil War.[35] Once the war was over, the newly freed Black population rapidly asserted its citizenship in all areas of society. The 1877 Hayes-Tilden Compromise,[36] however, saw the convergence of Northern and Southern White interests in restoring White supremacy in the South and opening new markets for Northern industrialists.[37] This reconciliation was solidified less than ten years later in *Plessy*.[38]

The rapid social, political, and economic ascension of Blacks in the years between the end of the Civil War and *Plessy* increased economic competition in the poor and working classes and dramatically altered existing social arrangements. Similarly, the period following the demise of Jim Crow, but before the *Davis* decision, saw Blacks making new demands for substantive equality. Just as during Reconstruction, White supremacy was strong and virulently opposed to

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32. *See generally* Bill Cecil-Fronsman, *Advocate the Freedom of White Men, as Well as that of Negroes: The Kansas Free State and Antislavery Westerners in Territorial Kansas*, 20 KAN. HIST., Summer 1997, at 102.

33. 60 U.S. 393 (1857).

34. *Id*. at 404-05.

> The question before us is, whether the class of persons described in the plea in abatement compose a portion of this people, and are constituent members of this sovereignty? We think they are not, and that they are not included, and were not intended to be included, under the word "citizens" in the Constitution, and can therefore claim none of the rights and privileges which that instrument provides for and secures to citizens of the United States. On the contrary, they were at that time considered as a subordinate and inferior class of beings, who had been subjugated by the dominant race, and, whether emancipated or not, yet remained subject to their authority, and had no rights or privileges but such as those who held the power and the Government might choose to grant them.

Id.

35. *See, e.g.*, HOWARD ZINN, A PEOPLE'S HISTORY OF THE UNITED STATES 1492-PRESENT 167-205 (1995).

36. *See generally* BELL, *supra* note 26, at 37-39 (discussing the 1876 Hayes-Tilden Presidential election and the deal struck between Democrats and Republicans, which brought about the removal of U.S. troops from the South, effectively ending Reconstruction and clearing the way for the development of Jim Crow); *see also* ZINN, *supra* note 35, at 200 (discussing the 1877 compromise and the reconciliation of Southern and Northern elites).

37. *See generally* BELL, *supra* note 26, at 37-39.

38. *See generally* Plessy v. Ferguson, 163 U.S. 537 (1896).

many dimensions of the new social order. The post-segregation-era opposition to school integration and the rise in claims of reverse discrimination in response to affirmative action signaled a coming convergence of interests among disparate groups of Whites: (1) the liberal integrationists, many of them elites, who saw the end of Jim Crow necessary for global and domestic capitalistic expansion[39] and (2) the White working and poor classes who clung to Whiteness, their only claim to status and privilege, in the face of the encroaching demands of the Black community.[40] Like *Plessy*, decided almost a century before, *Davis* came on the heels of these developments with the explicit intent of rationalizing the backlash to these developments and restraining the Constitution's ability to intervene in the post-segregation era's racial conflicts.

The effects of *Plessy* cannot be directly correlated with those of *Davis*, but relative to their respective location in the historical development of race in America, the two decisions perform some of the same work in four important ways. First, the rationale of the *Davis* intent requirement denies the purpose behind racialized mass imprisonment in the same manner *Plessy* denied the purpose behind Jim Crow. Second, both decisions deny the stigma attached to Blacks through the process and consequences of segregation and racialized mass imprisonment. The decisions also attempt to rationalize the popular backlash to racial progress in their respective periods. Third, both decisions intentionally seek to dehistoricize and depoliticize these systems, dislodging them from their rightful positions in a continuing process of racial subjugation. Lastly, both cases anticipate the potential directions of anti-discrimination law at their respective mo-

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39. *See, e.g.,* ADOLPH REED, JR., STIRRINGS IN THE JUG: BLACK POLITICS IN THE POST-SEGREGATION ERA 63 (1999).

> The alliance of corporate liberalism and Black protest was evident in the aggressive endorsement of civil rights activity that was mobilized by the New Deal coalition. Major labor organizations and enlightened corporate elements immediately climbed aboard the freedom train through the progressive wing of the Democratic Party and private foundations.

Id.

> To the extent that it blocked individual aspirations, segregation was seen as artificially restricting social growth and progress. Similarly, by raising artificial barriers, such as the constriction of Blacks' consumer power through Jim Crow legislation and indirectly through low Black wages, segregation impeded, so the argument went, the free functioning of the market.

See id. at 64.

40. *See* Derrick A. Bell, Jr., *Brown v. Board of Education and The Interest Convergence Dilemma*, *in* CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT, *supra* note 20, at 20-29.

ments; specifically, the potential for large-scale political and economic realignment.

Like *Plessy*, the logic of *Davis* had to acknowledge the racial progress made to date, while simultaneously constructing race-neutral principles out of grossly discriminatory and oppressive situations. Reconciling these aims required not just an indifference to the reality of race relations in 1896 or 1976, but it also required a reconstruction of that reality in a colorblind manner that dehistoricized the competing claims of liberty made by White and Black communities in a racialized society. For instance, the *Plessy* Court is explicit about its rationalizations of the discrimination brought on by Jim Crow laws. The Court boldly states,

> We consider the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it. . . . The argument also assumes that social prejudices may be overcome by legislation, and that equal rights cannot be secured to the Negro except by an enforced commingling of the two races. We cannot accept this proposition. If the two races are to meet upon terms of social equality, it must be the result of natural affinities, a mutual appreciation of each other's merits and a voluntary consent of individuals.[41]

Likewise, the *Davis* Court is historically blind and politically naïve in its consideration of the efficacy of race-neutral statutes in settings where race has historically been an issue and, in the immediate post-segregation era, is *the* issue.

> The test is neutral on its face and rationally may be said to serve a purpose the Government is constitutionally empowered to pursue. Even agreeing with the District Court that the differential racial effect of Test 21 called for further inquiry, we think the District Court correctly held that the affirmative efforts of the Metropolitan Police Department to recruit Black officers, the changing racial composition of the recruit classes and of the force in general, and the relationship of the test to the training program negated any inference that the Department discriminated on the basis of race or that "a police officer qualifies on the color of his skin rather than ability."[42]

41. *Plessy*, 163 U.S. at 551.

42. Washington v. Davis, 426 U.S. 229, 246 (1976). *But see id.* at 270 (Brennan, J. dissenting).

Both *Plessy* and *Davis* reflect the concerns that the natural course of the social upheavals of the 1860s and the 1960s, respectively, would lead to sweeping alterations in the balance of power and privilege upon which American society depended. The threat of Reconstruction and the Civil Rights Movement lay not just in their potential for transforming the landscape of race relations in the country, but also in their natural connections to larger movements for social justice and more substantive economic and political realignments.[43] This is the impetus behind the *Davis* Court's concern for the "parade of horribles" that disparate impact claims could produce.[44] Consequently, both the *Plessy* and *Davis* decisions find the Court aggressively defining the legal meaning of racial discrimination, so as to shift the constitutional understanding of race at the time.

It is highly unlikely that when deciding *Davis* in 1976, ten years before the passage of the crack laws, the Court foresaw the crack laws and designed the intent requirement in *Davis* to defend such injustice. Taking such a position is unnecessary to make the point at hand. The Court's decision to craft the intent requirement in *Davis* must be considered relative to the trajectory of the Court's historic role in racial justice. The era of anti-discrimination law, initiated by *Brown v. Board of Education*,[45] coincided with various movements for social change, upheaval, and revolution in America and throughout the world. The policy and social reforms accomplished by the time of Dr. Martin Luther King, Jr.'s, assassination in 1968 ushered in new social

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> Sound policy considerations support the view that, at a minimum, petitioners should have been required to prove that the police training examinations either measure job-related skills or predict job performance. Where employers try to validate written qualification tests by proving a correlation with written examinations in a training course, there is a substantial danger that people who have good verbal skills will achieve high scores on both tests due to verbal ability, rather than job-specific ability. As a result, employers could validate any entrance examination that measures only verbal ability by giving another written test that measures verbal ability at the end of a training course. Any contention that the resulting correlation between examination scores would be evidence that the initial test is job related is plainly erroneous. It seems to me, however, that the Court's holding in this case can be read as endorsing this dubious proposition.

Id. (internal citations and quotations omitted).

43. *See, e.g.*, JACK M. BLOOM, CLASS, RACE, AND THE CIVIL RIGHTS MOVEMENT (1987).

44. *See Davis*, 426 U.S. at 248.

> A rule that a statute designed to serve neutral ends is nevertheless invalid, absent compelling justification, if in practice it benefits or burdens one race more than another would be far reaching and would raise serious questions about, and perhaps invalidate, a whole range of tax, welfare, public service, regulatory, and licensing statutes that may be more burdensome to the poor and to the average [B]lack than to the more affluent [W]hite.

Id.

45. 347 U.S. 483 (1954).

and political arrangements, effectively ending Jim Crow. The path set out by these movements brought into question structures of power and privilege deeply ingrained in the American social fabric. Anti-discrimination law was poised to continue fighting these constructs. Those in power were aware.[46]

By the 1970s, racism was a dirty word and Americans were slowly becoming self-conscious of being labeled as racist, even if their social behavior and political choices suggested otherwise. With overt racial discrimination no longer fashionable in the formal language of public policy, discriminatory intent would now be practically impossible to find except through an examination of policy outcomes via a disparate impact analysis. The intent requirement of *Davis* severely limits such an analysis. Therefore, the *Davis* decision effectively transitions between one era of subjugation, Jim Crow apartheid, to another, racialized mass imprisonment. By providing the legal underpinning and justification for a range of facially neutral yet invidiously racist laws—most notably the crack laws—the *Davis* intent requirement has emerged as an essential pillar to the maintenance of a new regime of subjugation.

In the same manner that *Plessy* provided a blueprint for racists to structure the formal contours of the Jim Crow system, *Davis* empowered modern-day policy makers to devise the logic, craft the legislation, and enforce the policies that could mask racial and discriminatory intent behind a façade of objectivity. By anticipating the likely progression of anti-discrimination law in both periods, *Plessy* and *Davis* illustrate the Court's conscious construction of a rationale for balancing racial power. *Davis* functions as a blueprint for the creation of new laws and policies that reproduce existing hierarchies and inequalities, while appearing to rest on neutral and objective (non-racial) principles. Making the connection between *Davis* and *Plessy* helps to clarify the continuity of the racialized thinking out of which both decisions arise.

B. The *Davis* Decision and the Challenges to the Crack Laws

In *Davis*, the Court held that a job qualifications examination given by the District of Columbia Metropolitan Police Department did not unlawfully discriminate on the basis of race under either constitutional or statutory standards, despite the fact that the test had a

46. *See, e.g.*, Freeman, *supra* note 12.

disparate impact on the hiring of Black officers.[47] The Court held that only facial or intentional discrimination was subject to strict scrutiny under equal protection analysis and that even if a policy had a disparate racial effect, it must be upheld if: (1) the policy was race-neutral on its face; and (2) the policy served a legitimate public function.[48] The Court also cited a "slippery slope" concern; the adoption of a disparate impact analysis, the Court argued, would call into question a wide variety of tax, welfare, public service, regulatory, and licensing statutes that have disparate impacts on minorities and other groups.[49]

At the time the *Davis* decision was rendered, it stood in stark contrast to an earlier precedent that dealt with race discrimination in employment. In *Griggs v. Duke Power Co*.,[50] the Court held that a facially neutral employment requirement that served to discriminate against Blacks was impermissible.[51] The Supreme Court granted certiorari in *Griggs*, in part, to resolve whether an employment criterion was constitutional when it operated to exclude Blacks from employment.[52] Chief Justice Burger, speaking for a unanimous court, commented on Title VII of the 1964 Civil Rights Act stating, "Congress directed the thrust of the Act to the consequences of employment practices, not simply the motivation."[53] Therefore, the *Davis* Court, five years after *Griggs*, was forced to make an illogical distinction between its statutory jurisprudence, Title VII barring racial discrimination in employment and its constitutional jurisprudence, the Equal Protection Clause barring racial discrimination.

47. *See Davis*, 426 U.S. at 242.

> Nevertheless, we have not held that a law, neutral on its face and serving ends otherwise within the power of government to pursue, is invalid under the Equal Protection Clause simply because it may affect a greater proportion of one race than of another. Disproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination forbidden by the Constitution. Standing alone, it does not trigger the rule . . . that racial classifications are to be subjected to the strictest scrutiny and are justifiable only by the weightiest of considerations.

Id. (internal citations and quotations omitted).

48. *See id*.

49. *See id*. at 248; s*ee also* BELL, *supra* note 26, at 661-87.

50. 401 U.S. 424 (1971).

51. *See id.* at 430 (stating "practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices").

52. *See id.* at 425-26.

53. *See id.* at 431.

Davis was followed and reinforced by the Court's decision in *Personnel Administrator of Massachusetts v. Feeney*[54] and *Village of Arlington Heights v. Metropolitan Housing Development Corp*.[55] In *Feeney*, a sex discrimination case, the Court rejected a claim for a heightened standard of review whenever the foreseeable impact of a governmental action was to place a protected class at a disadvantage.[56] In *Arlington Heights*, a zoning ordinance was challenged on the grounds that it was racially discriminatory. The Court used the *Davis* intent standard to decide the case, recognizing that historical factors could be taken into consideration when finding evidence of discriminatory intent, but ultimately requiring that a discriminatory purpose be a motivating factor in the zoning scheme for it to be unconstitutional.[57] Both decisions weakened the fleeting gains of the Civil Rights Movement and rationalized the growing backlash to social change. Through its application in subsequent cases, *Davis*'s logic quickly became normalized in anti-discrimination cases.[58]

The *Davis* Court makes a textualist separation of powers argument for avoiding a disparate impact analysis, while undermining its previous holdings that adhered to a textualist interpretation of the Equal Protection Clause in order to find disparate impact evidence of discriminatory intent.[59] The *Davis* Court recognizes that a disparate

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54. 442 U.S. 256, 272 (1979) (holding that "even if a neutral law has a disproportionately adverse effect upon a racial minority, it is unconstitutional under the Equal Protection Clause only if that impact can be traced to a discriminatory purpose").

55. 429 U.S. 252 (1977).

56. *Feeney*, 442 U.S. at 256. For a discussion of the impact of *Davis* and *Feeney*, see EARL M. MALTZ, THE CHIEF JUSTICESHIP OF WARREN BURGER, 1969-1986, at 190-91 (2000).

57. *See* 429 U.S. at 266-67 (1977).

> Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available. The impact of the official action whether it bears more heavily on one race than another . . . may provide an important starting point. Sometimes a clear pattern, unexplainable on grounds other than race, emerges from the effect of the state action even when the governing legislation appears neutral on its face . . . . The evidentiary inquiry is then relatively easy. But such cases are rare. Absent a pattern as stark as that in *Gomillion* or *Yick Wo*, impact alone is not determinative, and the Court must look to other evidence. . . . The historical background of the decision is one evidentiary source, particularly if it reveals a series of official actions taken for invidious purposes. . . . The specific sequence of events leading up to the challenged decision also may shed some light on the decision-maker's purposes.

Id. (internal citations and quotations omitted).

58. *See, e.g.*, BELL, *supra* note 26, at 662; *see also* Firefighters Local Union No. 1784 v. Stotts, 467 U.S. 561 (1984) (holding that an injunction against firing minority firefighters under a supposedly bona fide seniority system was impermissible because the seniority system was not implemented with discriminatory intent); Memphis v. Greene, 451 U.S. 100 (1981) (holding that a street closing that prevented Blacks from the full use and enjoyment of their property was permissible because it was not evident that it was implemented with discriminatory intent).

59. *See* Washington v. Davis, 426 U.S. 229, 246-47 (1976).

impact analysis has been used to invalidate similar laws, but shifts direction and reviews subsequent claims based on a lower standard of review. This rationale is further complicated by the Court's subsequent decision in *Arlington Heights*, where the Court says,

> [I]t is because legislators and administrators are properly concerned with balancing numerous competing considerations that courts refrain from reviewing the merits of their decisions, absent a showing of arbitrariness or irrationality. But racial discrimination is not just another competing consideration. When there is a proof that a discriminatory purpose has been a motivating factor in the decision, this judicial deference is no longer justified.[60]

By drawing a questionable distinction between statutory and constitutional equal protection jurisprudence, the *Davis* Court established a new and questionable standard for understanding the Equal Protection Clause.

> Under Title VII, Congress provided that when hiring and promotion practices disqualifying substantially disproportionate numbers of Blacks are challenged, discriminatory purpose need not be proved, and that it is an insufficient response to demonstrate some rational basis for the challenged practices. It is necessary, in addition, that they be validated in terms of job performance in any one of several ways, perhaps by ascertaining the minimum skill, ability, or potential necessary for the position at issue and determining whether the qualifying tests are appropriate for the selection of qualified applicants for the job in question. However this process proceeds, it involves a more probing judicial review of, and less deference to, the seemingly reasonable acts of administrators and executives than is appropriate under the Constitution where special racial impact, without discriminatory purpose, is claimed. We are not disposed to adopt this more rigorous standard for the purposes of applying the Fifth and the Fourteenth Amendments in cases such as this.

Id. (internal citations and quotations omitted).

> [F]or the cases present the ordinances in actual operation, and the facts shown establish an administration directed so exclusively against a particular class of persons as to warrant and require the conclusion, that, whatever may have been the intent of the ordinances as adopted, they are applied by the public authorities charged with their administration, and thus representing the State itself, with a mind so unequal and oppressive as to amount to a practical denial by the State of that equal protection of the laws which is secured to the petitioners, as to all other persons, by the broad and benign provisions of the Fourteenth Amendment to the Constitution of the United States. Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution.

Yick Wo v. Hopkins, 118 U.S. 356, 373 (1886); Gomillion v. Lightfoot, 364 U.S. 339, 347-48 (1960) ("Acts generally lawful may become unlawful when done to accomplish an unlawful end, and a constitutional power cannot be used by way of condition to attain an unconstitutional result.") (internal citations and quotations omitted).

60. *Village of Arlington Heights*, 429 U.S. at 265.

II. RACIALIZED MASS IMPRISONMENT: RESHAPING AND REMAKING THE PECULIAR INSTITUTION

Without a comprehensive investigation of racialized mass imprisonment, it is possible to underestimate its status as rivaling Jim Crow, both in its design and consequences for Black society and contemporary race relations. It is no overstatement that racialized mass imprisonment replaces Jim Crow as the post-segregation-era tool of Black subjugation. If viewed only in the narrow context of the criminal justice system, comparing Jim Crow to racialized mass imprisonment appears to be hyperbole. After all, the adjudication of proven crimes is a necessary and reasonable component of any well-functioning democracy. Reasonable people can agree on what should be neutral principles of law, order, justice, equality, and punishment. Racialized mass imprisonment, however, does not begin in the courtroom nor with the legal process itself. In actuality, the courtroom is the inevitable end result of a variety of conditions and circumstances that lead poor Black communities into cycles of criminality that mainstream society has characterized as worthy of the harshest penalties.[61]

An obvious counter-argument, however, would challenge any over-reliance on structural arguments to explain all, or even a majority, of Black criminality and, accordingly, call into question any comparison between racialized mass imprisonment and Jim Crow. It could be argued that Jim Crow was a political and social system forced upon Black people, but the criminal activity at the root of racialized mass imprisonment in the post-segregation era is largely a set of actions, behaviors, and choices individual Black people bring upon themselves. Furthermore, Black criminality victimizes Black communities in the same way as Jim Crow. So, how is it possible to place equal significance on these two systems, racialized mass imprisonment and Jim Crow, when evaluating Black disadvantage and subjugation?

While compelling on their face, these arguments rely on a logic that dislocates Black criminality in the post-segregation era and the particular economic, political, and social conditions that characterize it from similar conditions that grew out of Jim Crow. Furthermore, these arguments confuse Black criminality with the disproportionate and draconian social and institutional responses to non-violent crimes, such as drug abuse and trafficking, that drive concerns around racial-

61. *See, e.g.*, THE MANY COLORS OF CRIME: INEQUALITIES OF RACE, ETHNICITY, AND CRIME IN AMERICA (Ruth D. Peterson et al. eds., 2006).

ized mass imprisonment. At the heart of racialized mass imprisonment are questions regarding the appropriateness of non-violent offender sentencing. Those questions arise against a backdrop of a specific and particularly recent racial history. Jim Crow and racialized mass imprisonment are essentially part of the same historical processes and race-based logic. This history and logic forged the context for the community breakdowns that framed the economic and social context for Black criminality in the post-segregation era. When viewed in this manner, racialized mass imprisonment appears even more sinister and deliberate because it emerges as an extension of Jim Crow cloaked in the rhetoric of progress and neutrality, creating an indisputably deliberate system of racial subjugation.[62]

The term racialized mass imprisonment appropriately and accurately characterizes the trends in American incarceration since 1970, the immediate post-segregation era. The defining features of racialized mass imprisonment are: (1) the social, political, economic, and psychological preconditions that trap Black communities in cyclical poverty, isolate them from mainstream society, and, invariably, foster criminality;[63] (2) the sheer numbers of Black men and women represented in the American prison population; (3) the racialization of crime and poverty in the mainstream mind; (4) the collateral socioeconomic and cultural effects of racialized mass imprisonment; and (5) the mainstream rationalization that perceives Black people as

62. This is not to suggest that Black criminality in the crime-ridden urban ghettoes of 1970s and 1980s America is wholly the problem of systems, processes, and institutions based outside of the community and looming ominously over it. Such a perspective can only cast Black communities as helplessly controlled by the whims and designs of others—namely Whites—and incapable of exercising any agency in shaping the direction of their communities or their individual lives. Furthermore, it is as blind and short-sighted as the opposite perspective—the one that dominated social science discussion of the day and continues to characterize the mainstream consensus—that Black criminality was entirely the result of Black agency, specifically weak family structures and a generally morally bankrupt culture. Any consideration of Black criminality in any period, but especially the immediate post-segregation era, should consider both the influence of structure and the influence of individual agency. But individual agency, to some considerable extent, occurs within certain structures—people make decisions within the context of certain environments and histories. In the immediate post-segregation era, countless institutional forces defined and confined Black self-determination and are seldom given proper consideration in analyses of Black criminality. This becomes especially clear when considering the sentencing laws established in the 1980s to target low-level Black drug offenders.

63. The "criminality" that is fostered is specifically related to the underground drug economies that have flourished in poor Black inner city communities since the 1970s. The toll that drug abuse has taken on Black communities should not be underestimated, but the policing and public policy designed to address these social issues was largely racist in its penchant for racial profiling, police brutality, a rampant disregard for civil liberties, and the design and imposition of the harshest penalties for crimes known to be committed disproportionately by poor Blacks.

hyper-criminal and consequently prefers draconian and harshly retributive methods to punish them.[64]

While a coherent narrative regarding the manner in which Jim Crow circumscribed Black opportunity exists, racialized mass imprisonment exists on the periphery of the post-segregation-era consciousness. Its racist foundation and the manner in which it cripples Black social, political, economic, and cultural institutions and potential are not widely understood. It is not clear to most Americans whether racialized mass imprisonment is the fault of criminally prone Black people, aberrational racial profiling in policing, or something more calculated and sinister. There is, however, a specific history of racialized mass imprisonment interwoven with the social, economic, and political reorganizations of the post-segregation era.

A. Getting "Tough on Crime": Laying the Foundation

In a 1968 Harris poll, 81% of respondents believed that law and order had broken down because of "communists" and "Negroes who started the riots."[65] Blacks in large inner cities rioted considerably during the late 1960s, largely in response to rampant police brutality, grossly unequal employment opportunities, and growing impatience with a perceived accommodationist, slow-moving, and elitist Civil Rights Movement.[66] Against this backdrop, the Vietnam War sparked increasing protests, a sexual revolution challenged traditional patriarchy, and the Warren Court handed down a number of progressive criminal justice decisions, including *Gideon v. Wainwright*[67] and *Miranda v. Arizona*.[68] Consequently, in a time of rising rebellion and disorder, a liberal Court actively using the Constitution to reshape American society curtailed the police powers of the state.

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64. *See*, e.g., CAPITALISM UNDERDEVELOPED, *supra* note 2, at 105-32 (discussing the history of racialized mass imprisonment and the economic aspects of its theory and methods); COLE, *supra* note 2, at 16-62, 132-57 (discussing racial profiling, police brutality, and politics and policy of mass incarceration); GREAT WELLS, *supra* note 2, at 147-64 (discussing the political dimensions of mass imprisonment in the Black community); MASS IMPRISONMENT, *supra* note 2 (covering several dimensions of mass imprisonment and its relationship to larger patterns and processes of economic, racial, and political struggle); MAUER, *supra* note 2.

65. *See* CHRISTIAN PARENTI, LOCKDOWN AMERICA: POLICE AND PRISONS IN THE AGE OF CRISIS 7 (1999).

66. *See, e.g.*, ZINN, *supra* note 35, at 450-57.

67. 372 U.S. 335 (1963) (holding that the poor have a right to public defense).

68. 384 U.S. 436 (1966) (establishing procedural safeguards to protect against self-incrimination during a police interrogation).

Up until the end of the 1960s, indeterminate sentencing and an emphasis on rehabilitation characterized the corrections system.[69] In 1973, the final report of the National Advisory Commission on Criminal Justice Standards and Goals recommended that "no new institutions for adults should be built and existing institutions for juveniles should be closed."[70] That same year, New York passed the Rockefeller Drug Laws.[71] The wide sweeping drug laws established a fifteen-year prison term for anyone convicted of selling two ounces or possessing four ounces of narcotics, regardless of the offender's criminal history.[72] Judges previously had wide discretion to consider an offender's criminal history and other subjective factors.[73] This shift in conventional wisdom can be attributed, in large part, to the destabilized landscape of race, class, and politics that characterized the 1970s.[74]

Similarly, the demise of Jim Crow coincided with new patterns of large-scale economic restructuring and social reorganization in the 1960s and 1970s.[75] This restructuring created a crisis not just among the ranks of poor and working class urban Blacks, but also within the White working class. Amidst the backdrop of the 1960s Civil Rights and Voting Rights Acts and the gradual integration of public schools, dramatic changes were taking shape on the American residential landscape.[76] This decade saw shifts in the allocation of public funds, loca-

69. *See* Marc Mauer, *The Causes and Consequences of Prison Growth in the United States*, *in* MASS IMPRISONMENT, *supra* note 2, at 5.

70. *See id*. at 4-5 ("By 1973, the final report of the National Advisory Commission on Criminal Justice Standards and Goals recommended that 'no new institutions for adults should be built and existing institutions for juveniles should be closed' and concluded that 'the prison, the reformatory, and the jail have achieved only a shocking record of failure.'" (citing NATIONAL ADVISORY COMMISSION ON CRIMINAL JUSTICE STANDARDS AND GOALS 358 (1973))).

71. *See* N.Y. PENAL § 220.00–220.65 (2006).

72. *See* Mauer, *supra* note 69, at 5; *see also* Drop the Rock, http://www.droptherock.org (last visited Mar. 2, 2007).

73. Such discretion did not always favor the fair administration of justice and prior to mandatory minimums some called for such predictability in sentencing to curtail the freedom of racist judges. *See generally* Shawn D. Bushway & Anne Morrison Piehl, *Judging Judicial Discretion: Legal Factors and Racial Discrimination in Sentencing*, 35 LAW & SOC'Y REV. 733 (2001).

74. *See generally* WILLIAM J. WILSON, WHEN WORK DISAPPEARS: THE WORLD OF THE NEW URBAN POOR 25-50 (1996).

75. *See e.g.,* PARENTI, *supra* note 65, at 29-38 (discussing the social and economic developments reshaping the perceptions of and appropriate social responses to race and crime at the onset of World War II through the 1980 election of Ronald Reagan for U.S. President); *see also* WILSON, *supra* note 74, at 25-50.

76. *See, e.g*., K. Crowder, *The Racial Context of White Mobility: An Individual-Level Assessment of the White Flight Hypothesis*, 29 SOC. SCI. RES., June 2000, at 223 (presenting research that indicates that the likelihood of Whites leaving a neighborhood increases significantly with the size of the minority population in the neighborhood and that Whites are especially likely to

tion of capital investments by the public and private sectors, and spatial isolation of inner city poverty. These factors were related, in large measure, to the changes brought on by the social and economic reorganizations of the era. Their primary and most visible result, however, was the emigration of Whites from cities.[77]

As the non-violent protests of the Civil Rights Movement gave way to the Black Power movement and the urban riots of 1968, the specter of violent, angry, and uncontrollable poor urban Blacks served as a powerful trope for mobilizing suburban Whites around law and order themes. Not only was it growing increasingly unfashionable to be openly racist, the Warren Court made it clear that overt racial discrimination would no longer receive judicial sanction.[78] Conservatives realized that racism would have to be coded in a manner that satisfied middle America's need to feel non-racist, while still maintaining the vestiges of White superior status. For conservatives who vocally opposed the racial implications of the liberal social agenda of the 1950s and 1960s, reconstructing the mainstream conception of crime to fit the new racial agenda would lay the groundwork to transition out of the 1960s into the post-segregation era, while shoring up what remained of White privilege.[79]

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leave neighborhoods containing combinations of multiple minority groups); George C. Galster, *White Flight from Racially Integrated Neighbourhoods in the 1970s: The Cleveland Experience*, 27 URB. STUD. 385 (1990) (presenting econometric research indicating that segregationist sentiment was a primary driver in white emigration from racially integrating neighborhoods).

77. *See generally* BARRY SCHWARTZ, THE CHANGING FACE OF THE SUBURBS (1976); *see also* WILSON, *supra* note 74, at 25-50 (discussing the various factors characterizing the development of an isolated and economically disadvantaged ghetto underclass).

78. *See, e.g.*, Brown v. Board of Education, 347 U.S. 483 (1954).

> We conclude that in the field of public education the doctrine of "separate but equal" has no place. Separate educational facilities are inherently unequal. Therefore, we hold that the plaintiffs and others similarly situated for whom the actions have been brought are, by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment. This disposition makes unnecessary any discussion whether such segregation also violates the Due Process Clause of the Fourteenth Amendment.

Id. at 495 (citations omitted); s*ee also* Loving v. Virginia, 388 U.S. 1, 13 (1967) (Stewart, J. concurring) ("I have previously expressed the belief that 'it is simply not possible for a state law to be valid under our Constitution which makes the criminality of an act depend upon the race of the actor.'") (citation omitted).

79. *See, e.g.*, PARENTI, *supra* note 65, at 38-44. In addition to the expansion of constitutional protection to issues concerning race, the Republican agenda was also opposed to the War on Poverty, which reflects a class consciousness and certain ideological beliefs about the role of government in the economy. The War on Poverty shifted considerable government resources to traditionally marginalized groups, many of which were democratic constituencies. By redistributing resources to these groups, their ability to organize and mobilize increased, empowering radical movements and organized labor.

Initially, the social rebellion of the late 1960s was the political issue that fueled the emergence of law and order rhetoric from such conservative politicians as Barry Goldwater and Richard Nixon.[80] In the 1968 Presidential election, the Republican platform—most successfully through Richard Nixon's Presidential campaign—developed a "tough on crime" rhetoric targeted specifically at White suburban voters. Nixon and the Republicans realized that galvanizing the new White suburban voting class could be achieved, in part, by appealing to the fears at the very core of their identity. For a community formed around a backlash to specific racial and social "disorder," Republicans realized that reconstructing this idea of "disorder" as "crime," and advocating for new methods of social control to address "crime" was an effective political strategy.[81] Therefore, law and order became the central rhetoric of the new conservative movement.[82]

Nixon was well aware of the currency a "tough on crime" message could have with the new class of exiled White suburban voters. Shortly after his 1968 victory, Nixon wrote his mentor, Dwight Eisenhower, about the power of anti-crime rhetoric and its racial content. Nixon wrote, "I have found great audience response to this [law and order] theme in all parts of the country, including areas like New Hampshire where there is virtually no race problem and relatively little crime."[83] Nixon essentially gave birth to this racially-driven law and order fear-mongering as an effective political strategy. In his diary, Nixon's Chief of Staff, H. R. Haldeman, wrote: "[President Nixon] emphasized that you have to face the fact that the whole prob-

80. *See e.g.*, PARENTI, *supra* note 65, at 6-7.

81. For a discussion on race and the formulation of the early conservative movement, including Nixon's 1968 Presidential campaign, see DAN T. CARTER, FROM GEORGE WALLACE TO NEWT GINGRICH: RACE IN THE CONSERVATIVE COUNTERREVOLUTION, 1963-1994 (1999).

82. *See id.* At the 2005 NAACP National Convention, the National Republican Party Chairman Ken Mehlman apologized for the Republican "Southern Strategy" of using racial polarization to mobilize White voters in the South. Mehlman said, "Some Republicans gave up on winning the African-American vote, looking the other way or trying to benefit politically from racial polarization. I am here today as the Republican chairman to tell you we were wrong." Bob Herbert, *An Empty Apology*, N.Y. TIMES, July 18, 2005 (quoting Ken Mehlman, Chairman, Nat'l Republican Party, Address at the Annual Convention of the NAACP (July 14, 2005)). The apology was largely viewed as empty considering that exploiting racial polarization played a significant role in the 1988 campaign of George H.W. Bush and the 2000 campaign of George W. Bush, both Republicans. The "southern strategy" hinged on law and order rhetoric and preached "conservative" values to signal a return to American life before the 1960s social upheavals. Herbert, *supra*.

83. *See* PARENTI, *supra* note 65, at 7, (citing DAN BAUM, SMOKE AND MIRRORS: THE WAR ON DRUGS AND THE POLITICS OF FAILURE 11 (1996)).

lem is really the Blacks. The key is to devise a system that recognizes this while not appearing to."[84]

While the Watergate scandal and Nixon's resignation slowed down the Republicans' "tough on crime" rhetoric, the ideology driving its popularity remained in tact and gained momentum. By the 1980 presidential election, the country was reeling in a massive recession and the liberal war on poverty appeared a misguided venture and tainted President Carter's re-election hopes. Ronald Reagan capitalized on these issues in his Presidential campaign and instituted dramatic changes once in office. Specifically, Reagan employed two major policy shifts: (1) the adoption of a monetary policy that resulted in a dramatic increase in interest rates, and (2) the evisceration of social services (war on poverty spending).[85] The Reagan era set the stage for an increase in urban blight. During the same period, White and middle class flight from cities increased and jobs followed.[86] There was consequently an explosion in the number of urban census tracts that qualified as ghettos.[87] These ghettos were overwhelmingly Black and trapped within the confines of cyclical, crippling poverty, against a shrinking domestic industrial base.

The public discourse about this new underclass was dominated by neo-conservative rhetoric and dogma.[88] While there has always been a racialized discourse on the culture of poverty within the elite ranks of the social science industry,[89] the combination of a failed war on poverty, the end of Jim Crow, and the dramatic socio-economic shifts of the 1970s brought a new culture of poverty conversation to the forefront—one that linked recent racial liberalism with the poverty

84. *See* PARENTI, *supra* note 65, at 12 (quoting H.R. HALDEMAN, THE HALDEMAN DIARIES: INSIDE THE NIXON WHITE HOUSE 53 (1994)).

85. *See, e.g.*, *id.* at 38-41 (discussing how higher interest rates squeezed business growth and weakened labor and how social services cuts further eroded the working and poor classes, reducing social support for the poor and working poor); ALICE O'CONNOR, POVERTY KNOWLEDGE: SOCIAL SCIENCE, SOCIAL POLICY, AND THE POOR IN TWENTIETH CENTURY U.S. HISTORY 242-45 (2001) (discussing the impact of the Omnibus Budget Reconciliation Act of 1981; the Reagan recession of 1981-1982, which drove poverty to over 15%; and cuts in the agencies and organizations supporting President Johnson's War on Poverty).

86. *See* WILSON, *supra* note 74, at 42-48 (discussing the transformation of once predominately non-poor White areas to poor Black ones).

87. *See id*. at 14 ("In the nation's one hundred largest central cities, nearly one in seven census tracts is at least forty percent poor. The number of such tracts has more than doubled since 1970.").

88. *See, e.g.*, O'CONNOR, *supra* note 85, at 246-59 (discussing both the development of neo-conservative rhetoric and a neo-liberal discourse that formed a new "welfare consensus" constructed around conceptions of the "deserving" and "underserving" poor and government approaches to their plight).

89. *See generally id*. at 74-123.

and despair that characterized life for more than a third of the Black community. It was not shy about race either. This new culture of poverty discussion, held mostly in the press and news media, focused almost exclusively on the behavior and agency of the Black poor.[90]

As deindustrialization took hold, urban poverty replaced social rebellion as the political context for tougher crime laws. Black discontent over civil rights in the 1960s shifted to economic inequality in the 1970s. During the social upheavals of the 1960s, Blacks placed demands on the government for better employment, political, and social opportunities. By the 1980s, deindustrialization and inner city isolation forced Blacks to place new demands on the government to intervene in what had emerged as a new system of social and economic racial exclusion. It was clear that one system of subjugation had been replaced by another—one equally as virulent and disenfranchising. This new form of subjugation, however, was still in its infancy and lacked a coherent methodology for its policies and politics.

B. The Law as Politics: The Court in Transition

As society changed and reacted to the new race rules and concurrent macro economic developments, the Supreme Court also changed in a manner that both shaped the new social arrangements and ignited counter movements that impacted the political forces shaping the

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90. *See, e.g.*, Myron Magnet, *America's Underclass: What to Do?*, FORTUNE, May 11, 1987, at 130.

> Disproportionately Black and Hispanic, [members of the underclass] are still a minority within these minorities. What primarily defines [the underclass] is not so much their poverty or race as their behavior-their chronic lawlessness, drug use, out-of wedlock births, nonwork, welfare dependency, and school failure. Underclass describes a state of mind and a way of life. It is at least as much a cultural as an economic condition. . . . The great paradox is that the underclass is a byproduct of two decades of extensive Black success.

Id.

> What went wrong for the 4 million Black Americans still trapped in festering inner-city ghettos? Why do one-third of all Black families remain mired in poverty? Why is the jobless rate for Black teenagers 40%? Why are 60% of all Black children born out of wedlock? And why has the American ghetto become a self-perpetuating nightmare of fatherless children, welfare dependency, crime, gangs, drugs and despair?

Walter Shapiro, *The Ghetto: From Bad to Worse; the Wounds of the 1967 Riots Still Fester*, TIME, Aug. 24, 1987, at 18.

> Why is it that two decades of visible Black progress, with billions spent in welfare and training, have also seen the explosive rise of an alienated Black underclass whose rootlessness, violence and debased values dominate the ghetto? . . . crime and the fear of crime, drug and alcohol abuse, arson, vandalism, a dilapidated bombed-out physical environment and a way of life utterly separate from the American mainstream have become associated with poor city Blacks more than any other group . . . [t]he truth is we are up against the limits of public policy. At the heart of the disaster there is a vacuum of values.

Mortimer Zuckerman, *The Black Underclass*, U.S. NEWS & WORLD REP., Apr. 14, 1986, at 78.

Court. The instrumentalist nature of the Warren Court drew both praise and criticism from scholars, legal practitioners, and laypeople alike. The cases decided during the Warren era rightly characterized the Court's activist nature, for, in many ways, the Court directed the law and the interpretation of the Constitution in the image of a changing and evolving society.[91] The historic *Brown v. Board of Education*[92] decision laid the legal foundation for the Civil Rights Movement by overturning the doctrine of "separate but equal." Criminal law cases such as *Gideon* and *Miranda* expanded the protections afforded under the Bill of Rights, and targeted repressive and excessive police power.[93] *Loving v. Virginia*[94] made miscegenation illegal and even called out its true intent through the use of the term "White supremacy."[95] Some opposed the Warren Court's activism out of racism, fear, or the loss of political power. Others feared that the Court had become both lawmaker and law interpreter.[96]

Chief Justice Warren was well aware of the conservative backlash to his tenure as Chief Justice. Fearing a Nixon victory in 1968, Chief Justice Warren resigned, well in advance of the election, in order to allow Johnson the opportunity to appoint his successor.[97] Johnson nominated Associate Justice Abe Fortas, one of the most liberal members of the Warren Court.[98] The strategy backfired, however, and amidst revelations of improprieties in his professional and personal conduct, Justice Fortas was ultimately forced to resign his seat as Associate Justice.[99] Consequently, his nomination to Chief Justice cost liberal activists two seats on the Court.

With the liberal Court now in jeopardy, the 1968 presidential campaign increased in significance. Against this backdrop, Richard

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91. *See, e.g.*, Robert Henry, *The Players and the Play*, *in* THE BURGER COURT: COUNTER-REVOLUTION OR CONFIRMATION? 13 (Bernard Schwartz ed., 1998).

92. 347 U.S. 483 (1954).

93. *See generally* Gideon v. Wainwright, 372 U.S. 335 (1963); Miranda v. Arizona, 384 U.S. 436 (1966).

94. 388 U.S. 1 (1967).

95. *Id.* at 11-12.

> The fact that Virginia prohibits only interracial marriages involving White persons demonstrates that the racial classifications must stand on their own justification, as measures designed to maintain White Supremacy. We have consistently denied the constitutionality of measures which restrict the rights of citizens on account of race. There can be no doubt that restricting the freedom to marry solely because of racial classifications violates the central meaning of the Equal Protection Clause.

Id. (footnote omitted).

96. *See, e.g.*, Henry, *supra* note 91, at 13.

97. *See* MALTZ, *supra* note 56.

98. *See id.*

99. *Id.* at 8.

Nixon's 1968 presidential campaign championed law and order and promised to nominate "strict constructionists" to the Court.[100] Nixon was open about setting in motion a counterrevolution to the Warren Court era. While the Warren Court elevated the Fourteenth Amendment as the primary constitutional tool for guaranteeing individual rights, the Nixon administation had the opportunity to remake the Court in a manner that would stifle further progress in that direction. Nixon was afforded the opportunity to appoint four justices in close succession: Warren Burger, Harry Blackmun, Lewis Powell, Jr., and William Rehnquist.[101]

Historians generally regard 1968 as a turning point in the course of the New Deal and civil rights political coalition.[102] The appointment of Warren Burger to the position of Chief Justice coincides with this historic political shift. The Warren Court, through numerous decisions in an array of legal areas, created new rights that challenged entrenched status and placed new demands on the distribution of resources—particularly where the government and the private sector were concerned.[103] Race was central to these new demands, and the movement of Blacks into employment, educational, and political spaces previously unavailable to them threatened entrenched White monopolies and White working- and middle-class power. The specter of the riots of the late 1960s signaled, to many, that racial advancements had either gone too far or that Blacks wanted something Whites were unwilling to share.[104]

The Burger Court actually proved to be more of an activist body than the Warren Court, and it is not clear from the whole of the Burger Court's decisions that Nixon accomplished his intended counterrevolution.[105] For example, the Burger Court decided *Roe v. Wade*[106]

100. *See, e.g.*, Henry, *supra* note 91, at 13.

101. MALTZ, *supra* note 56, at 1, 10; *see also* DAVID G. SAVAGE, TURNING RIGHT: THE MAKING OF THE REHNQUIST SUPREME COURT 41-42 (1992). Justice William H. Rehnquist was nominated by Nixon for his conservative views on criminal justice, his advocacy of judicial restraint, and his legal support for Republican causes. For further discussion, see Henry, *supra* note 91. Warren Burger was sworn in as the fourteenth Chief Justice of the Supreme Court on June 23, 1969. Powell and Rehnquist were nominated to the Court after the 1971 deathbed retirements of Justices Hugo Black and John Marshall Harlan.

102. *See* Mark Tushnet, *The Burger Court in Historical Perspective: The Triumph of Country-Club Republicanism*, *in* THE BURGER COURT, *supra* note 91, at 204.

103. *See id.*

104. *See id.* at 206.

105. In the same amount of time as the tenure of the Warren Court, the Burger Court struck down 31 federal and 288 state laws, compared to the 21 federal laws and 150 state laws the Warren Court struck down. Ironically, some of the Burger Court's activist decisions were in cases related to the Watergate scandal. *See, e.g.*, Henry, *supra* note 91, at 30-32.

and ousted Nixon from office.[107] Its racial jurisprudence, however, mostly reflected the 1970s conservative ideology. In spite of this mixed bag of outcomes, what is clear is that Nixon's appointment of four avowedly conservative Supreme Court justices caused a considerable shift in the direction of the Supreme Court and ultimately the direction of anti-discrimination law.[108]

C. The War on Drugs

In 1963, the Presidential Advisory Commission on Narcotic and Drug Abuse released a report on its findings, recommending the relaxation of mandatory minimum sentences, increased appropriation for research into all aspects of drug abuse, and the dismantling of the Federal Bureau of Narcotics. In addition, the Commission recommended an allocation of its functions to the Justice and Health, Education, and Welfare departments.[109] Over the next four Presidential administrations, the Commission's recommendations were adopted in one form or another.[110] Reconceptualizing drug abuse as a problem requiring treatment and education, as opposed to one warranting punitive and retributive responses, was a developing trend throughout the 1960s and promised progressive approaches to drug abuse.

Political pressure to deliver major drug legislation to fulfill campaign promises of law and order, however, was mounting during the Nixon administration. For politicians, the drug issue encompassed several hot-button issues—crime, poverty, and middle class youth—that made it a politically attractive focus. At a time when the Civil Rights Movement, the anti-Vietnam War Movement, and the growth of various subcultures threatened the conservative values of the American middle class, drug use was viewed as embodying the worst consequences of the new "counterculture." Politicians realized that major drug legislation would allow various political interests to claim a victory for law, order, traditional values, and the general welfare of American society. With the exception of New York's Rockefeller Drug Laws, the 1970s saw a general lowering of sentences for a variety

106. 410 U.S. 113 (1973).
107. *See* United States v. Nixon, 418 U.S. 683 (1974).
108. *See generally* Tushnet, *supra* note 102, at 203.
109. *See* DAVID F. MUSTO, THE AMERICAN DISEASE: ORIGINS OF NARCOTIC CONTROL 238 (3d ed. 1999).
110. *See* DAVID F. MUSTO & PAMELA KORSMEYER, THE QUEST FOR DRUG CONTROL: POLITICS AND FEDERAL POLICY IN A PERIOD OF INCREASING SUBSTANCE ABUSE, 1963-1981, at 7-8 (2002).

of offenses. During the 1970s, eleven states decriminalized marijuana following the Carter administration's relaxed polices.[111] Despite the Administration's relatively liberal stance, the awareness of drug abuse and illegal activity quickly became a major political issue. Drug use was also rising. In 1980, a National Institute on Drug Abuse study revealed that 68% of young adults had tried marijuana, up from a mere 4% in 1962,[112] and a third of young adults experimented with harder drugs like cocaine.[113]

The Presidency of Ronald Reagan, like Nixon's, was anchored upon the premise that new conservative leadership was necessary to transform American culture and usher in a return to more traditional notions of family, society, and morality.[114] Given the recent advancements in rights for women, minorities, and the poor, "traditional" and "conservative" could only mean a return to the recently banished forms of subjugation. The drug issue, however, provided a rhetorical cover for this avowedly conservative agenda. Reagan brought the "war on drugs" into the American lexicon and put the full force of the federal government behind a massive anti-drug campaign. To fight this war, federal, state, and local governments spent over $100 billion during the Reagan and Bush administrations.[115] During the 1980s, the federal anti-drug budget grew nine-fold to almost $13 billion a year, approximately twice the budget of the Environmental Protection Agency.[116] Reagan's supply-side economic ideology was reflected in his approach to drug use—only 30% of the federal drug budget addressed the demand for drugs by rehabilitating users and educating nonusers about the dangers of drugs.[117]

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111. *See* MUSTO, *supra* note 109, at 260-61. The Carter administration chose to remove federal penalties for small amounts of the drug in 1977. *See* Mary Russell, *Softer U.S. Pot Possession Law Backed*, WASH. POST, Mar. 15, 1977, at A9.

112. *See 68% of Young Adults Found To Have Tried Marijuana*, N.Y. TIMES, June 20, 1980, at A12.

113. *Id*.

114. After getting the Republican Party nomination Ronald Reagan praised states' rights in his first speech made in Philadelphia, Mississippi, the site of the 1964 Klu Klux Klan murders of three young civil rights workers: Michael Schwerner, James Cheney, and Andrew Goodman. Reagan ranted about welfare queens supposedly riding around in Cadillacs. He even said people were homeless by choice. Reagan's remarks were made at a Neshoba County, Mississippi fair where for generations White Mississippi politicians gathered to initiate their campaigns. Before the civil rights movement took hold in Mississippi, the fair was a forum where one White politician after another called for states' rights, a long recognized code phrase for the right of states to maintain and enforce Jim Crow laws. *See, e.g.*, *Race Issue in Campaign: A Chain Reaction*, N.Y. TIMES, Sept. 27, 1980; *Reagan Campaigns at Mississippi Fair*, N.Y. TIMES, Aug. 4, 1980.

115. Dan Baum, *Tunnel Vision: The War on Drugs, 12 Years Later*, 79 A.B.A. J. 70 (1993).

116. *Id.*

117. *Id.*

Overnight, documenting and reporting the dangers of drug abuse and its rise among all segments of American society, especially amongst the poor and racial minorities, consumed the media. By 1984, the use of "rock cocaine," as it was called, was a recognized trend sweeping America's inner cities. The Washington Post reported that rock cocaine users were buying the drug with welfare money in Los Angeles' "city neighborhoods south of downtown."[118] Police attention focused on underground operations and television shows like *Miami Vice* glorified the crime-fighting efforts of law enforcement against the international drug trade. By the summer of 1986, reports from medical examiners in twenty-five metropolitan areas showed that 185 cocaine-related deaths were reported in 1981, 580 in 1984, and an even higher number was expected for 1985.[119] That same summer, all three major television networks broadcast seventy-four evening news segments about drugs, more than half of them about crack.[120] Both *Newsweek* and *Time* magazine called crack the biggest story since Vietnam and Watergate, and dubbed it the "Issue of the Year" for 1986.[121] Admissions to hospital emergency rooms for cocaine-related health problems at 700 hospitals rose to approximately 10,000 in 1985, from roughly 3,300 in 1981.[122]

The war on drugs was the centerpiece of Reagan's "tough on crime" mantra.[123] One of Reagan's first major crime-related policy initiatives was the Sentencing Reform Act of 1984 (SRA).[124] The SRA achieved four major objectives: (1) it abolished parole for federal offenders; (2) it limited the amount of "time off" for good conduct offenders could earn, setting a maximum of fifty-four days per year served; (3) it required offenders to serve a term of "supervised release" upon discharge from prison; and (4) it required the development, promulgation, and adoption of sentencing guidelines that would

118. Jay Matthews, *Drug Abuse Takes New Form; Rock Cocaine Is Peddled to the Poor In Los Angeles*, WASH. POST, Dec. 23, 1984, at A15.

119. Joe Brinkley, *U.S. Says Cocaine Related Deaths are Rising*, N.Y. TIMES, July 11, 1986, at A1.

120. PARENTI, *supra* note 65, at 56.

121. *See id.* at 56-57 (citing CRAIG REINARMAN & HARRY G. LEVINE, *The Crack Attack*, *in* CRACK IN AMERICA: DRUGS AND SOCIAL JUSTICE 20 (1997)).

122. *See* Brinkley, *supra* note 119.

123. *See generally* WILLIAM N. ELWOOD, RHETORIC IN THE WAR ON DRUGS: THE TRIUMPHS AND TRAGEDIES OF PUBLIC RELATIONS (1994) (discussing the war on drugs through the rhetoric deployed by the Reagan and Bush administrations and the public perceptions it created).

124. The Sentencing Reform Act of 1984, Pub. L. No. 98-473 (codified as amended at 18 U.S.C.A. §§ 3551-3559, 3561-3566, 3571-3574, 3581-3586, 28 U.S.C. §§ 991-998 (Supp. III 1985)).

structure the sentencing decisions of federal judges.[125] The SRA set up the Sentencing Commission, which directed and authorized the creation of sentencing guidelines that were presumptively mandatory.[126] Ted Kennedy called the bill "the most far reaching law enforcement reform in our country."[127]

The Sentencing Commission was ostensibly geared to reduce sentencing disparities by eliminating the broad discretion enjoyed by federal judges. The establishment of the Sentencing Commission was not without controversy. Within a year of the Commission's creation, 244 federal judges nationwide had ruled on challenges to its constitutionality.[128] Central to the opposition was the fact that the Sentencing Commission contained federal judges amongst its ranks, thereby giving the judges both judicial and executive powers.[129] The SRA required that three of the seven Presidential appointees to the commission were judges. Critics charged that this violated separation of powers and the case was heard before the Supreme Court in *Mistretta v. United States*.[130] The Sentencing Commission was ultimately found constitutional and was the dominant force in federal sentencing until the 2005 Supreme Court decisions in *United States v. Booker*[131] and *United States v. Fanfan*.[132]

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125. *See* Sentencing Reform Act of 1984.

126. *See id.*

127. *See* PARENTI, *supra* note 65, at 50.

128. Katherine Bishop, *U.S. Appeals Court Upsets Federal Rules on Sentencing*, N.Y. TIMES, Aug. 25, 1988, at A16.

129. *See id.*

130. 488 U.S. 361 (1989).

> The Constitution's structural protections do not prohibit Congress from delegating to an expert body located within the Judicial Branch the intricate task of formulating sentencing guidelines consistent with such significant statutory direction as is present here. Nor does our system of checked and balanced authority prohibit Congress from calling upon the accumulated wisdom and experience of the Judicial Branch in creating policy on a matter uniquely within the ken of judges. Accordingly, we hold that the Act is constitutional.

Id. at 412.

131. 543 U.S. 220 (2005).

> The question presented in each of these cases is whether an application of the Federal Sentencing Guidelines violated the Sixth Amendment. In each case, the courts below held that binding rules set forth in the Guidelines limited the severity of the sentence that the judge could lawfully impose on the defendant based on the facts found by the jury at his trial. In both cases the courts rejected, on the basis of our decision in *Blakely v. Washington*, the Government's recommended application of the Sentencing Guidelines because the proposed sentences were based on additional facts that the sentencing judge found by a preponderance of the evidence. We hold that both courts correctly concluded that the Sixth Amendment as construed in *Blakely* does apply to the Sentencing Guidelines.

Id. at 226-27 (citation omitted).

132. 542 U.S. 955 (2004).

When the Sentencing Reform Act of 1984 was passed, Republicans had no idea that current events would align Reagan's "tough on crime" legislative agenda with the Democrats. On June 19, 1986, Len Bias, a rising twenty-two-year old Black basketball star at the University of Maryland College Park, was found dead in his dorm room from an apparent overdose of cocaine.[133] Bias's death came two days after the Boston Celtics made him the second pick in the National Basketball Association draft.[134] Eight days later, on June 27, 1986, Don Rogers, a twenty-three-year old Black defensive back with the Cleveland Browns, died after slipping into a cocaine-induced coma.[135] Instantly, their stories became a tragic reflection of a drug culture and epidemic gone too far. Their race only solidified the public perceptions of the connection between race and drugs.

The timing of the deaths of Bias and Rogers provided an ideal context for political opportunists. The mid-term Congressional elections were set to occur in November of 1986, and the Democrats were determined to maintain their stronghold in the House of Representatives. The Speaker of the House, Massachusetts Democratic Congressman Tip O'Neill, was set to retire that year. The Congressman was deeply affected by Bias's death. Bias had been set to move to Massachusetts and join the Boston Celtics. After the July 4, 1986, recess and only days after the deaths of Bias and Rogers, O'Neill called the Democratic Congressional leadership together and announced his intention to use the drug issue to catapult the party to success in the 1986 mid-term elections.[136] The writing of the drug legislation demanded by O'Neill took place during the August 1986 recess.[137] The Judiciary Subcommittee suggested the inclusion of mandatory minimums in the new drug legislation.[138] Without hearings or input from experts, the bill was written in subcommittee with mandatory minimums as its signature feature.

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133. Joe Pichirallo & Mark Asher, *Freebasing Suspected in Bias Death; Athlete Probably Smoked Cocaine, Md. Official Says*, WASH. POST, July 10, 1986, at A1.

134. *Id*.

135. Dave Sell, *Cocaine Killed Rogers, Toxicologist Says*, WASH. POST, June 30, 1986, at D1.

136. *See* MAUER, *supra* note 2, at 62.

137. *Id*.

138. Interview with Eric Sterling, President, Criminal Justice Policy Found., in Boston, Mass. (Feb. 5, 2003). Mr. Sterling is a former counsel to the House Judiciary Committee and drafted the 1986 Anti-Drug Abuse Act. Mr. Sterling recently weighed in on the 100-to-1 ratio in a Los Angeles Times op-ed that calls the sentencing disparity a "disaster" and proposes more sensible policy reforms. *See* Eric E. Sterling, *Take Another Crack at that Cocaine Law*, L.A. TIMES, Nov. 13, 2006, at A17.

The 1986 Anti-Drug Abuse Act was initially intended to target drug kingpins—those responsible for selling and trafficking major quantities of illegal drugs. In the original report issued by the House Judiciary Committee, the triggering quantities for drug violations were five kilograms of cocaine and 100 grams of crack cocaine for a minimum sentence of ten years and one kilogram of cocaine or twenty grams of crack cocaine for a minimum sentence of five years.[139] The final Senate version of the bill lowered the amount of crack cocaine necessary to trigger the ten-year mandatory minimum sentence from 100 grams to fifty grams.[140] The bill also imposed twenty-nine new mandatory minimum sentences, resulting in a 100:1 ratio between the triggering quantities necessary for powder cocaine and crack cocaine sentencing.[141]

All but eighteen lawmakers voted for the Anti-Drug Abuse Act of 1986.[142] The 1986 mid-term elections saw the Democrats sweep the House of Representatives and the Senate, prompting Tip O'Neill to declare, "[I]f there was a Reagan revolution, it's over."[143] Nevertheless, the return of mandatory minimum sentencing policies and the implementation of unprecedented sentencing disparities was, in effect, a conservative victory that would transform the criminal justice system for the remainder of the twentieth century.[144]

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139. *See* Sterling, *supra* note 138.

140. *See id.*

141. *See* PARENTI, *supra* note 65, at 57.

142. *Id.*

143. *See* Paul Taylor, *Senate to Have 55 Democrats; Party Gains in House, Loses 8 Governorships to the GOP*, WASH. POST, Nov. 6, 1986, at A1.

144. The 1986 Anti-Drug Abuse Act did not end the development of "tough on crime" drug policies at the federal level. The Omnibus Anti-Drug Abuse Act of 1988 was the third major enactment borne out of the mounting "war on drugs." The 1988 Act made drug conspiracy offenses subject to the same mandatory minimums as the substantive trafficking offenses. The ability of the "conservative" victory to occur within a Democratic congress also reflects the politics of the day. After the 1984 presidential campaign successes of Jesse Jackson, Democrats were under pressure to appear more conservative (*i.e.*, less beholden to Black interests). While Democrats still embraced a more liberal social policy agenda than Republicans, winning favor with conservative and moderate Whites helped swell the mid-term success. The Democratic Party used inner city Blacks as a scape-goat, restoring a sense of moral authority and mainstream credibility within liberal White politics. With the public perception of the drug problem linked to crack cocaine, and crack linked to poor Blacks, the Democratic Party's co-optation of the tough on crime strategy, in many ways, reconciled the interests of liberal and conservative Whites after a protracted period of ideological conflict concerning race and criminal justice. For a discussion of the impact of Jesse Jackson's 1984 and 1988 presidential campaigns on the direction of the Democratic Party in the 1980s and 1990s, specifically the formation of the Democratic Leadership Council and calls for "moderation" within the party's policy, see JoAnn Wypijewski, *The Rainbow's Gravity: Twenty Years After Jesse Jackson's Historic Run for President, What Does It All Mean?*, NATION, Aug. 2, 2004, at 33.

D. Racialized Mass Imprisonment: Statistics and Facts

President Reagan signed the 1986 Anti-Drug Abuse Act into law on October 27, 1986, and, in doing so, allocated $97 million to build new prisons.[145] The war on drugs has undoubtedly contributed to a dramatic rise in the prison population. The United States has the highest rate of incarceration in the world, imprisoning 714 persons per 100,000 residents.[146] An estimated 98,000 Blacks were incarcerated in 1954, the time of the historic *Brown v. Board of Education* decision.[147] At that time, the federal prison population was 330,000.[148] By 2002, that population had increased to 2.1 million and the number of incarcerated Black men was 884,500.[149] Drug offenders in state and federal prisons represent one of the largest sources of prison population growth in the past twenty years, increasing from 23,700 in 1980 to 319,600 by 1999.[150] Sixty-eight percent of federal criminals are ethnic minorities—39% Black and 29% Latino.[151] In 2002, 81% of the offenders sentenced for crack trafficking were Black.[152] The average sentence was 119 months for crack defendants and 78 months for powder cocaine defendants.[153]

Drug use and crime are commonly viewed as minority problems, but that is not the case. The National Institute of Drug Abuse survey of high school seniors in 1998 to 1999 showed that White students use cocaine at seven to eight times the rate of Black students and heroin at seven times the rate of Black students.[154] The racial bias in drug

145. *See* Thirty Years of America's Drug War: A Chronology, FRONTLINE, *available at* http://www.pbs.org/wgbh/pages/frontline/shows/drugs/cron/ (last visited Feb. 21, 2007).

146. *See* SENTENCING PROJECT/NEW INCARCERATION FIGURES: GROWTH IN POPULATION CONTINUES (2006), *available at* http://www.sentencingproject.org/Admin%5CDocuments%5Cpublications%5Cinc_newfigures.pdf.

147. *See* MARC MAUER & RYAN SCOTT KING, SENTENCING PROJECT, SCHOOLS AND PRISONS: FIFTY YEARS AFTER *BROWN V. BOARD OF EDUCATION*, 1 (2004), at 1, *available at* http://www.sentencingproject.org/Admin%5CDocuments%5Cpublications%5Crd_brownvboard.pdf.

148. *See id*. at 3.

149. *See id*. at 1.

150. *See* SENTENCING PROJECT, NEW PRISON POPULATION FIGURES SHOW SLOWING OF GROWTH BUT UNCERTAIN TRENDS (2000), *available at* http://www.prisonpolicy.org/scans/sp/newbjs.pdf.

151. *See* SENTENCING PROJECT, THE EXPANDING FEDERAL PRISON POPULATION, *available at* http://www.sentencingproject.org/Admin/Documents/publications/inc_expanding_fedpopulation.pdf (last visited Feb. 21, 2007).

152. *See* U.S. SENTENCING COMM'N, FIFTEEN YEARS OF SENTENCING GUIDELINES, (2004), *available at* http://www.ussc.gov/15_year/15year.htm.

153. *See id*.

154. *See Drugs and Disparity: The Racial Impact of Illinois' Practice of Transferring Young Drug Offenders to Adult Court*, BUILDING BLOCKS FOR YOUTH, *available at* http://www.buildingblocksforyouth.org/illinois/illinois.html (last visited Feb. 21, 2007).

law enforcement is confirmed by the research of the U.S. Commission on Civil Rights, which found that while Blacks constitute only 14% of all drug users nationally, they account for 35% of all drug arrests, 55% of all drug convictions, and 75% of all prison admissions for drug offenses.[155]

Racialized mass imprisonment has a powerful economic component to its operation and growth. The prison industrial complex—the private sector dominated industry of prisons and prison services—commodifies the demand for prisoners and relies heavily on state and federal cooperation to maximize profits.[156] A 1998 study produced by the Correctional Association and the Justice Policy Institute illustrated how public funds had been diverted from public university budgets to prison construction in New York.[157] The report found that between 1988 and 1998, the Department of Correctional Services received a $761 million increase in funding, while funding for New York City and state university systems declined by $615 million.[158] Additionally, in 2000, the California Department of Corrections estimated that it would need to spend $6.1 billion over the next decade to maintain its more than 163,000 person prison population.[159]

Racialized mass imprisonment also affects voting power. Voting restrictions disproportionately affect minorities and are the legal vestiges of Reconstruction-era practices that kept former slaves from voting. In thirty-two states, convicted offenders on parole cannot vote. In twenty-eight states, this right is further restricted to exclude individuals on probation.[160] Thirteen states permanently disenfranchise ex-offenders who have completed their sentence, regardless of the offense.[161] As a result, it is estimated that 3.9 million Americans, 2% of the adult population, cannot vote due to felony convictions.[162] Seventy-three percent of the 3.9 million disenfranchised voters are not in

155. *See* GREAT WELLS, *supra* note 2, at 154 (citation omitted).

156. *See, e.g.,* CORRECTIONS (Crazy Hungry Fish Productions 2001), *available at* http://www.buyindies.com/listings/1/0/1002135209765.html.

157. *See* GREAT WELLS, *supra* note 2, at 154-55 (citing Robert Gangi et al., *New York State of Mind? Higher Education Funding vs. Prison Funding in the Empire State, 1988-1998*, JUSTICE POLICY INSTITUTE (1998)); Stan Choe, *The Fund-A-Mentality Difference Between Prisons and School*, BLACK ISSUES IN HIGHER EDUCATION, Jan. 7, 1999, at 12-13.

158. *See id.*

159. *See* GREAT WELLS, *supra* note 2, at 155.

160. *See id.* at 159; *see also* Marc Mauer, *Mass Imprisonment and the Disappearing Voters*, *in* INVISIBLE PUNISHMENT (Marc Mauer & Meda Chesny-Lind eds., 2002).

161. *See* Mauer, *supra* note 160, at 51.

162. *See* GREAT WELLS, *supra* note 2, at 159; *see also* Mauer, *supra* note 160, at 51.

prison, but are on probation, parole, or are ex-offenders.[163] Furthermore, 13% of Black men, or 1.4 million individuals, are disenfranchised under these laws—440,000 of whom have completed their sentences and paid their debt to society.[164]

The criminal justice system does not just affect men. In 1980, 12,000 women were incarcerated in American prisons.[165] By 1999, that figure had climbed to 90,000.[166] Over 57% of women serving time in state prisons reported sexual or physical abuse at least once before their admission to prison, compared to over 16% for men.[167] In many cases, the growth in numbers of women in the prison system is due, in part, to the consequences of survival strategies employed by girls and women to resist oppression and brutality in their homes and in their communities.[168]

The effects of racialized mass imprisonment are not confined to the realm of criminal justice. They permeate every facet of activity in the Black community. Three quarters of prisoners have a history of drug or alcohol abuse, one-sixth have a history of mental illness, and more than half of women inmates have a history of sexual or physical abuse.[169] Once incarcerated, prisoners' individual problems are almost always exacerbated. When they return to society, the collateral consequences of mass incarceration are codified in a range of federal, state, and local laws. Some of these controversial government measures include denying public assistance to persons convicted of drug crimes, evicting entire families from public housing if one member is convicted of a drug charge, and a range of other policies that harshly penalize people and families for drug-related incarcerations.[170]

E. Conclusion to Part II

The complex and simultaneous interplay between the "tough on crime" movement, Supreme Court politics, the War on Drugs, and the resulting escalation in racialized mass imprisonment, characterizes the impetus for and the inevitable consequences of the intent requirement

163. *See* GREAT WELLS, *supra* note 2, at 159; *see also* Mauer, *supra* note 160, at 51.
164. *See* GREAT WELLS, *supra* note 2, at 159-60.
165. Meda Chesney-Lind, *Imprisoning Women: The Unintended Victims of Mass Imprisonment*, *in* INVISIBLE PUNISHMENT, *supra* note 160, at 80.
166. *Id.*
167. *Id.* at 83.
168. *Id.* at 84; *see also Prisons Adapt to Female Inmates* (CNN Oct. 12, 2005).
169. *See* INVISIBLE PUNISHMENT, *supra* note 160, at 2.
170. *See id.*

of *Davis*. While similar in many aspects to the developments that led to *Plessy*, this collection of forces is uniquely characteristic of the immediate post-segregation era, particularly the demand for a race-neutral political and public policy lexicon to communicate the long-standing logic of racial subjugation and White-privilege in America.

The logic of the War on Drugs and the preference for draconian methods of incarceration contradict the conventional wisdom that predated them. The rationale for these dramatic shifts in social policy reflects the need for new methods of social control to address current social realities. It is understandable, therefore, that the logic of the War on Drugs considered that the drug problem: (1) was distinctively a problem of Black agency; (2) was a reflection of a decline in cultural values and morals, linked directly to racial liberalism and ultimately threatening to mainstream society and cultural values; and (3) required a harsh, punitive response, no matter how inexpensive the alternatives or disastrous the consequences for Black society and American democracy.

While crack was a problem in Black communities and inner cities, its popularity as a drug and the thriving underground economy that arose to support it were distinctively linked to the surplus labor force of the economically isolated and abandoned inner city. Because of the catastrophic toll drug abuse took on individuals, families, and communities, all drug abuse needed to be policed, treated, controlled, and, if necessary, punished with incarceration. Crack cocaine, however, was singled out for an unreasonably harsher sentence. The logic behind the dramatic sentencing disparities between crack and powder cocaine, given the racialized manner in which crack cocaine abuse was reported and popularly understood, can only be seen as racist and, therefore, unconstitutional on equal protection grounds.

III. TRUE INTENT: *DAVIS* AND *CLARY*

By the mid 1990s, the disparity in sentencing between crack cocaine and powder cocaine offenses emerged as a target for attack within the progressive and Black legal communities. Between 1989 and 2001, several cases challenged the crack laws; all were denied certiorari by the Supreme Court and halted in the various appellate courts. Many of these cases were brought on equal protection grounds and argued that the application of the crack laws resulted in a disparate racial impact in drug sentencing and the laws were, there-

fore, unconstitutional. Equal protection challenges to the crack laws had to contend directly with the intent requirement of *Davis*, the legal precedent used to strike down these challenges in almost every instance. Through these cases, *Davis*'s role as a stop-gap for progress in anti-discrimination law becomes clear. Despite considerable empirical evidence that the political circumstances surrounding the passage of the crack laws rationally satisfy a showing of discriminatory intent, the courts have been unmoved.

United States v. Eirby[171] is one of the most recent cases to challenge the crack versus powder cocaine sentencing disparity on equal protection grounds.[172] Defendant-appellant Eirby, a Black man, pled guilty to conspiracy to distribute cocaine base (crack), which carries a penalty of no less than five years and no more than forty years.[173] Eirby challenged the sentencing requirement on equal protection grounds, arguing that the crack laws denied Blacks equal protection of the laws.[174] Both in the trial court and on appeal, Eirby's equal protection claims were summarily dismissed.[175] The First Circuit relied on a previous holding in another case challenging the crack laws, *United States v. Singleterry*,[176] stating that it found "insufficient evidence that the distinction drawn between cocaine base and cocaine was motivated by any racial animus or discriminatory intent on the part of either Congress or the Sentencing Commission."[177]

The position that the crack laws violate the Equal Protection Clause has been expressed through several arguments. One argument is that the crack laws target Blacks through an irrational and arbitrary

171. 262 F.3d. 31 (1st Cir. 2001).

172. *See also* United States v. Patterson, 258 F.3d 788 (8th Cir. 2001); United States v. Thomas, 2000 U.S. App. LEXIS 11899 (8th Cir. 2000); United States v. Banks, 130 F.3d 621, 626 (4th Cir. 1997); United States v. Singleterry, 29 F.3d 733 (1st Cir. 1994); United States v. Stevens, 19 F.3d 93, 96-97 (2d Cir. 1994); United States v. Coleman, 24 F.3d 37 (9th Cir. 1993); United States v. Frazier, 981 F.2d 92 (3d Cir. 1992); United States v. Watson, 953 F.2d 895 (5th Cir. 1992); United States v. Lawrence, 951 F.2d 751 (7th Cir. 1991); United States v. Avant, 907 F.2d 623 (6th Cir. 1990); United States v. Thomas, 900 F.2d 37 (4th Cir. 1990).

173. *See Eirby*, 262 F.3d at 34-35; *see also* 21 U.S.C.A. § 841(b)(1)(B) (2004).

174. *See Eirby*, 262 F.3d at 41.

175. *Id*.

176. 29 F.3d 733 (1st Cir. 1994).

177. *See Eirby*, 262 F.3d 31, at 41.

> We addressed this precise issue in *United States v. Singleterry* in which we rejected the claim of unconstitutional treatment because we found insufficient evidence that the distinction drawn between cocaine base and cocaine was motivated by any racial animus or discriminatory intent on the part of either Congress or the Sentencing Commission. The appellant has offered us nothing new, and we are thus bound to follow our earlier ruling. Consequently, although we recognize the severity of the penalty paradigm vis-a-vis crack cocaine, we must uphold it.

Id. at 41 (internal citations and quotations omitted).

anti-drug policy.[178] Defendants making this claim have asserted that crack and powder cocaine are essentially the same drug and, therefore, should not be subject to different sentencing provisions.[179] Courts have held that the increased penalties for crack cocaine are rationally related to Congress' objective of protecting the public welfare.[180]

Another argument is that the sentencing rules fail the rational basis test and, therefore, call for a heightened level of scrutiny.[181] Defendants making this claim typically argue that the statutory classifications disadvantage a suspect class or impinge upon the exercise of fundamental rights.[182] Courts have relied on *Davis* and other cases to hold that disparate impact alone is insufficient to warrant strict scrutiny under the Equal Protection Clause.[183]

A third argument asserts that Congress acted with a discriminatory purpose in enacting the crack laws.[184] In response, the circuit courts have almost unanimously held that there is insufficient evidence to find racial animus or discriminatory intent on the part of Congress or the Sentencing Commission.[185] The courts have routinely invoked the premise of *Davis*, holding that Congress does not need to explicitly state its reasons for passing legislation so long as a court can divine some rational purpose.[186] Courts have held that discriminatory purpose implies that the lawmakers selected a particular course of action "at least in part or because of, not merely in spite of," its adverse effects upon an identifiable group.[187] Courts have also found a broad

178. *See, e.g.,* United States v. Patterson, 258 F.3d 788 (8th Cir. 2001); United States v. Harding, 971 F.2d 410, 412-13 (9th Cir. 1992).

179. *See Harding*, 971 F.2d at 412.

180. *See, e.g.*, United States v. Buckner, 894 F.2d 975, 980 (8th Cir. 1990).

181. *See Harding*, 971 F.2d at 412.

182. *Id.*

183. *See* United States v. Butler, 41 F.3d 1435, 1442 (11th Cir. 1995) (citing Washington v. Davis, 426 U.S. 229, 242 (1976)).

184. *See* United States v. Clary, 846 F. Supp. 768 (E.D. Mo. 1994).

185. *See* United States v. Eirby, 262 F.3d 31, 41 (1st Cir. 2001).

186. *See Harding*, 971 F.2d 410, at 412-13 (quoting United States v. Cyrus, 890 F.2d 1245, 1248 (D.C. Cir. 1989) ("A legislative body need not explicitly state its reasons for passing legislation so long as a court can divine some rational purpose.")).

187. *See, e.g.*, United States v. Byse, 28 F.3d 1165, 1169 (11th Cir. 1994). In *United States v.* Thurmond, for instance, the Tenth Circuit cites Congress' stated intentions in the Congressional record as evidence of neutral and objective justifications for the disparities in punishment. *See* United States v. Thurmond, 7 F.3d 947 (10th Cir. 1993). In keeping with the colorblind logic popular in the post-segregation era, the *Thurmond* court is apparently looking for the smoking gun of racist discriminatory intent—perhaps a record stating, "this law will do in all Black people," or something equally as unlikely.

> [T]here is ample evidence of Congress's reasons, other than race, for providing harsher penalties for offenses involving cocaine base. This is not a case where the dispropor-

and legitimate basis for punishing crack more severely than powder cocaine by relying on claims that crack is more physiologically and psychologically potent.[188] Additionally, courts have focused on the manner in which crack and powder cocaine are ingested, citing that the quicker and more addictive high gained from smoking crack warrants a stricter penalty.[189] Courts have ultimately found crack cocaine and powder cocaine to be objectively distinguishable and that the penalties attached to crack cocaine further the legitimate government interest of eliminating controlled substance distribution and abuse.[190]

One of the most renowned cases to address the constitutionality of the crack laws is *United States v. Clary*.[191] This case exemplifies intellectual rigor and judicial integrity as it boldly challenges the widely held belief that attacking the crack laws was politically unfeasible and jurisprudentially impossible. Against the overwhelming weight of judicial precedent upholding the constitutionality of the crack laws, U.S. District Court Judge Clyde S. Cahill ultimately found the crack laws unconstitutional, stating in the text of his opinion, "[T]his court accepts the Eighth Circuit's invitation to present a novel legal analysis of the adverse disparate impact on Blacks resulting from the imposition of 21 U.S.C. § 841(b)(1)(A)(iii)."[192] In *Clary*, the district court held that the crack laws were unconstitutional and supported its position with a carefully researched analysis and opinion.

> tionate impact of the statute and guidelines on African-Americans is unexplainable on grounds other than race. Rather, the government offered evidence that Congress provided for enhanced penalties for cocaine base offenses because cocaine base (1) has a more rapid onset of action; (2) is more potent; (3) is more highly addictive; (4) is less expensive than cocaine powder; and (5) has widespread availability.

7 F.3d at 952-53 (internal citations and quotations omitted). *But see* Matthew F. Leitman, *A Proposed Standard of Equal Protection Review for Classifications Within the Criminal Justice System that Have a Racially Disparate Impact: A Case Study of the Federal Sentencing Guidelines' Classification Between Crack and Powder Cocaine*, 25 U. TOL. L. Rev. 215 (1994); Sklansky, *supra* note 15.

188. *See Harding*, 971 F.2d at 413.

> Congress's decision to punish the sale of crack more severely than the sale of powder cocaine was based on a broad and legitimate basis. Although crack and powder cocaine are different forms of the same drug, the routes of administration, their physiological and psychological effects, and the manner in which they are sold set the two forms of the drug apart. Crack is normally smoked in a glass pipe, while powder cocaine is most often ingested nasally. Because it is smoked, crack has a quicker and more intense effect on the brain than powder cocaine ingested nasally, causing a greater desire for more. Crack is also sold in smaller quantities and lower unit prices than powder cocaine, thereby reducing the financial barrier which had previously limited cocaine usage.

Id.

189. *Id.*

190. *Id.*

191. 846 F. Supp. 768 (E.D. Mo. 1994), *rev'd*, 34 F.3d 709 (8th Cir. 1994).

192. *Id.*

In the opinion, Judge Cahill methodically deconstructs the arguments used to uphold the crack statute as constitutional within the traditional frameworks of equal protection jurisprudence.

Judge Cahill begins his analysis by reviewing the factors the Supreme Court has recognized for determining whether a law was motivated by racial discrimination, including the legislative history, the overall historical context of the legislation, and the presence of a racially disparate impact.[193] He acknowledges that given the trajectory of racial progress throughout American history and the new post-segregation-era regime of colorblindness, most contemporary legislation would not likely contain overtly racist referrals and would go to considerable lengths to eliminate any allusion to racial factors influencing the construction of legislation.[194] The opinion historicizes race and punishment in America, specifically concerning the drug laws.[195]

193. *See Clary*, 846 F. Sup. at 773.

> Whether or not racial discrimination was involved in legislative action that resulted in a law which, although facially neutral, still has a racially disparate impact "demands a sensitive inquiry into such circumstantial evidence of intent as may be available." Under *Arlington*, the Supreme Court set forth key factors to evaluate whether a law was motivated by racial discrimination. These factors included the presence of disparate impact, the overall historical context of the legislation, the legislative history of the challenged law, and departures from the normal legislative process. Additional legal precedent has provided the Court with more criteria for its review, such as foreseeability of the consequences of the legislation; however, *Arlington* provides the Court with the major benchmark to discover the presence of racial influence in the legislative decision making process.

Id. (internal citations).

194. *Id.* at 774.

> Overt racism, evidenced by such occurrences as "Jim Crow Laws," allowed legislators to enact racist laws without reprisals. As civil rights for *all* Americans became a reality, continued attempts to maintain racial barriers took on the form of more subtle, covert, facially neutral legislation. Examples of this type of legislation included zoning, voting and housing laws.
>
> Today most legislation would not contain overtly racist referrals and, indeed, would eliminate the slightest allusion to racial factors in the words of the legislation itself. But today, despite the fact that a law may be racially neutral on its face, there still may be factors derived from unconscious racism that affect and infiltrate the legislative result.

Id.

195. *Id.* at 774-75.

> Prior to the civil rights era, Congress repeatedly imposed severe criminal sanctions on addictive substances once they became popular with minorities. Historically, a consortium of reactionary media and a subsequently inflamed constituency have combined to influence Congress to impose more severe criminal sanctions for use of narcotics once they became popular with minorities.
>
> Media accounts and inaccurate data influenced public opinion about opium smoking. "Ambivalence and outright hostility" toward Chinese coupled with the concern that opium smoking was spreading to the upper classes, provided the foundation for the passage of the 1909 Smoking Opium Exclusion Act. "Yellow Peril" was a term used in the years between the Great Wars to express the fear that the huge population of the Far East posed a military threat to the West. This fear induced an aversion to the opium usage believed to be prevalent in Chinese communities and foisted anti-opium legislation.

Judge Cahill's analysis also includes a discussion of the impact of unconscious racism on power dynamics and the perception of crime in this society.[196] He traces the manner in which racial messages and racialized thinking operate in an unconscious manner in American society and likens it to a psychological disease.[197] Judge Cahill asserts that unconscious racism is patently evident in the crack statutes and infers that Congress' attempt to rationalize the sentencing disparity between crack and powder cocaine is evidence of unconscious racism.[198]

Following the requirements for evaluating evidence of discriminatory intent articulated in *Davis* and *Arlington Heights*, Judge Cahill sets out to show that the circumstantial evidentiary sources the Supreme Court has offered in these decisions support the unconstitutionality of crack laws.[199] He carefully goes through the Congressional record to show not only that little thought was given to the construction of the Anti-Drug Abuse Act of 1986, but also that the racialization of crack cocaine abuse through mass media and popular perception greatly influenced Congress' thinking.[200]

Congress claimed neutral objectives for incorporating the sentencing disparities into the Anti-Drug Abuse Act of 1986. Congress enhanced penalties for cocaine base offenses because crack cocaine:

> The Harrison Act of 1914, the first federal law to prohibit distribution of cocaine and heroin, was passed on the heels of overblown media accounts depicting heroin-addicted Black prostitutes and criminals in the cities.

Id. (internal citations and quotations omitted).

196. *Clary*, 846 F. Supp. at 778-79.

197. *Id*. at 778-79.

> [T]he root of racism has been implanted in our collective unconscious and has biased the ideas that Americans accept about the significance of race. Racism goes beyond prejudicial discrimination and bigotry. It arises from outlooks, stereotypes, and fears of which we are vastly unaware. Our historical experience has made racism an integral part of our culture even though society has more recently embraced an ideal that rejects racism as immoral. When an individual experiences conflict between racist ideas and the social ethic that condemns those ideas, the mind excludes his racism from his awareness.

Id. (footnotes omitted).

> The illustration of unconscious racism is patently evident in the crack cocaine statutes. Had the same type of law been applied to powder cocaine, it would have sentenced droves of young whites to prison for extended terms. Before the enactment of such a law, it would have been much more carefully and deliberately considered. After all, in these days when "toughness on crime" is a political virtue, the simplest and fairest solution would have been to make the severe punishment for powder cocaine the same as for crack cocaine. But when the heavy punishment is inflicted only upon those in the weak and unpopular minority community, it is an example of benign neglect arising from unconscious racism.

Id.

198. *See id*. at 779-80.

199. *See id*. at 783.

200. *See id*. at 783-87.

(1) has a more rapid onset of action; (2) is more potent; (3) is more highly addictive; (4) is less expensive than cocaine powder; and (5) has widespread availability.[201] Congress failed to vet the bill through the normal committee process, and Judge Cahill aptly employs the Supreme Court's acknowledgement of forseeability as an appropriate evidentiary measure to prove discriminatory intent, using the very words of Congressional members.[202] He presents compelling statistics from official and reputable sources about the impact of mandatory minimums on the Black male population; for instance, Judge Cahill quoted a Federal Bureau of Prisons report finding a direct relation between the 90% increase in the prison population during the previous years and the mandatory minimum drug sentences and the sentencing guidelines.[203]

Finding the racial intent in the Congressional debates surrounding the passage of the Anti-Drug Abuse Act of 1986 involves decoding the way in which race is discussed in the post-segregation era.[204] The irony of Judge Cahill having to consider the coded Congressional debates behind the crack statutes is that the *Davis* intent requirement, against which his opinion would be measured, was in many ways both the result and the embodiment of racial coding.

After pursuing a lengthy and thorough analysis, Judge Cahill found the disparity in crack and cocaine sentencing unconstitutional by relying on the Supreme Court's holding in *Yick Wo v. Hopkins*.[205] In *Yick Wo*, the court stated that the effect of a law may be so harsh or adverse in its weight against a particular race that an intent to discriminate is not only a permissible inference, but a necessary one.[206] After a clear showing that Congress deviated from normal procedural pat-

201. *See, e.g.*, *Hearing before the Permanent Subcommittee on Investigations of the Committee on Governmental Affairs*, 99th Cong., 72-91 (2d Sess. 1986); *see also* 132 CONG. REC. S8092 (daily ed. June 20, 1986) (statement of Sen. D'Amato); 132 CONG. REC. H22,991 (1986) (statement of Rep. Dorgan).

202. *See Clary*, 846 F. Supp. at 785.

203. *See id.* at 786.

204. *See* 132 CONG. REC. S8291 (1986); Richard Dvorak, *Cracking the Code: "De-Coding" Colorblind Slurs During The Congressional Crack Cocaine Debates*, 5 MICH. J. RACE & L. 611 (2000).

205. 118 U.S. 356 (1886).

206. *See* United States v. Clary, 846 F. Supp. 768, 787 (E.D. Mo. 1994).

> Clary argues that the statistical disparity is overwhelming proof of discrimination, and that in cases where statistical evidence of disparity is "stark," statistics alone have been accepted as the sole source of proof of an equal protection violation. This Court agrees that the statistical evidence of disparate impact resulting from crack cocaine sentences is compelling. In one of the first in a long line of cases which interpreted the equal protection clause, the Supreme Court ruled that the effect of a law may be so harsh or adverse in its weight against a particular race that an intent to discriminate is not only a

terns; failed to have a rational, thorough discussion of the impact of crack; and reacted in a frenzy initiated by racially-charged media accounts, Judge Cahill issued a finding of discriminatory intent in the construction of the crack laws.[207] Upon finding a constitutionally impermissible discriminatory classification, Judge Cahill applied the strict scrutiny standard of review rather than a rational basis standard to invalidate the federal sentencing scheme.[208] Judge Cahill ultimately sentenced the defendant, Clary, to four years for his drug charges.[209]

Judge Cahill satisfied the Supreme Court's requirement that in order for a constitutional challenge to a facially neutral statute to succeed, the racially discriminatory governmental action must "ultimately be traced to a racially discriminatory purpose."[210] In *Arlington Heights*, the Court itself stated that the presence of a racially disparate impact demands "a sensitive inquiry into such circumstantial and direct evidence of intent as may be available."[211] Judge Cahill is careful to go step-by-step in making the case that the crack statutes violate basic equal protection principles. He keeps his argument and analysis well within the bounds of equal protection jurisprudence, and rational presentations of the conditions surrounding the passage of the crack statutes. However, despite Judge Cahill's detailed analysis, the Eighth Circuit overturned his decision and found the crack statute constitutional.[212]

The Eighth Circuit's opinion is instructive for understanding the degree to which racialized notions of crime and control are embedded within the mainstream mind and the stubbornness of the colorblind logic in contemporary considerations of race. Furthermore, it is illustrative of the commitment to legitimizing a grossly racist system under transparently racist, but facially neutral policies, a mission that *Davis* and its logic works to facilitate. The court's arguments are flimsy and reactionary at best and, without providing an in-depth critique of the *Clary* case, few points stand out.[213] For instance, the court questions

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permissible inference, but a necessary one. This appears to be the effect of the crack statute challenged in this court.

Id. (internal citations and quotations omitted).

207. *Id*. (referring to the evidentiary sources of proper inquiry the Court articulated in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977)).

208. *Id.* at 797.

209. *Id.*

210. Washington v. Davis, 426 U.S 229, 240 (1976).

211. *Arlington Heights*, 429 U.S. at 266.

212. *See* United States v. Clary, 34 F.3d 709, 714 (8th Cir. 1994).

213. For more discussion on *Clary*, see Melissa C. Brown, *Equal Protection in a Mean World: Why Judge Cahill Was Right in* United States v. Clary, 11 NOTRE DAME J.L. ETHICS & PUB.

Judge Cahill's reliance on media-created stereotypes influencing the legislative process.[214] The court states that "although the placement of newspaper and magazine articles in the Congressional Record indicates that this information may have affected at least some legislators, these articles hardly demonstrate that the stereotypical images 'undoubtedly' influenced the legislators' racial perceptions."[215] Judge Cahill, however, does not merely infer that media accounts of crack influenced legislators; rather, he makes the logical connection between verifiable media accounts connecting race and crack, and various comments from several editions of the Congressional Record revealing a discourse rife with racialized references to the crack epidemic.[216]

The Eighth Circuit's analysis is confusing, however, for the court relies on Congressional testimony citing the dangers of crack cocaine, but ignores the comments in the Congressional record that reflect the influence of racial stereotypes.[217] According to the Eighth Circuit, on the one hand, Congress' contemplation of the crack laws is legitimately influenced by testimony on the heightened dangers of crack, on the other hand, the verifiable existence of racial stereotypes and misinformation in the Congressional record is not legitimate evidence of a racist intent in the development of the crack laws. Additionally, the court never resolves the unexplained relationship between the un-

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POL'Y 307 (1997) and Jason A. Gillmer, Note, United States v. Clary: *Equal Protection and the Crack Statute*, 45 AM. U. L. REV. 497 (1995).

214. *See Clary*, 34 F.3d at 713-14.

215. *Id*. It is important to note that while Judge Cahill invalidated the crack statute on equal protection grounds, he still sentenced the defendant to a considerably long time for his drug offenses. This important note counters any claim that Cahill's principled and well-reasoned analysis of the equal protection implications of the crack laws are in any way ideological or rhetorical cover for what critics may call a lenient approach to drug law enforcement.

216. *See* United States v. Clary, 846 F. Supp. 768, 783-84 nn.48-50 (E.D. Mo. 1994).

217. *See Clary*, 34 F.3d at 712 ("We referred to the Senate hearing on crack, citing statements by five Senators on the dangers of crack cocaine.") (internal citations and quotations omitted). *But see id.* at 713.

> We also question the court's reliance on media-created stereotypes of crack dealers and its conclusion that this information "undoubtedly served as the touchstone that influenced racial perceptions held by legislators and the public as related to the 'crack epidemic.'" Although the placement of newspaper and magazine articles in the *Congressional Record* indicates that this information may have affected at least some legislators, these articles hardly demonstrate that the stereotypical images "undoubtedly" influenced the legislators' racial perceptions. It is too long a leap from newspaper and magazine articles to an inference that Congress enacted the crack statute because of its adverse effect on African American males, instead of the stated purpose of responding to the serious impact of a rapidly-developing and particularly-dangerous form of drug use.

Id. (footnote omitted).

quantifiable "more dangerous"[218] nature of smoking crack and the 100:1 ratio. Why not a 10:1 ratio? The Eighth Circuit supports its position by relying on *Feeney*,[219] but only exposes the transparency of its thinking. The court acknowledges that, per *Feeney*, "a belief that racial animus was a motivating factor" is inadequate and that the equal protection clause is violated "only if that [racially disparate impact] can be traced to a discriminatory purpose."[220] The court does not address, however, Judge Cahill's detailed analysis of the history of racism in the criminal justice system, specifically concerning drug sentencing and policy design.[221] Judge Cahill's analysis is well documented and requires few, if any, inferential leaps to find that racial animus was a motivating factor in the construction of the crack laws.

Perhaps the most insulting and cynical blow to Judge Cahill's analysis and the struggle to defeat the crack laws is the Eighth Circuit's semantic juxtaposition of the terms "racial animus" and "racial consciousness." The Court argued that testimony by Eric E. Sterling, Counsel to the Subcommittee of Criminal Justice in the House of Representatives at the time the sentencing disparity was passed and an author of the Anti-Drug Abuse Act of 1986, on the crack laws acknowledged the presence of racial consciousness, but not racial animus.[222] Judge Cahill's analysis illustrates how "racial consciousness," in the context of an overwhelmingly White male legislative body that deliberately establishes dramatically different sentences for crimes (1) known to be committed primarily by Black men and (2) regarding a

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218. *Clary* 34 F.3d at 712 ("[C]rack is more dangerous than cocaine powder because as a person breathes crack vapor, an almost unlimited amount of the drug can enter the body.").

219. Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256 (1979).

220. *Clary*, 34 F.3d at 713.

221. *See generally* United States v. Clary, 846 F. Supp. 768, 774-76 (E.D. Mo. 1994).

> Almost every major drug has been, at various times in America's history, treated as a threat to the survival of America by some minority segment of society. Panic based on media reports which incited racial fears has been used historically in this country as the catalyst for generating racially biased legislation. The association of illicit drug use with minorities and the threat of it "spreading to the higher ranks" is disturbingly similar to the events which culminated in the "100 to 1" ratio enhancement in the crack statute.

Id. at 775-76 (footnote omitted).

222. *See Clary*, 34 F.3d at 713.

> Other testimony before the district court demonstrates the particular lack of support for the court's conclusion about Congress' motivation in passing the statute. The testimony of Eric E. Sterling, Counsel to the Subcommittee of Criminal Justice of the House of Representatives at the time the statutes in question were passed, is the most pertinent. Sterling stated that the members of Congress did not have racial animus, but rather "racial consciousness," an awareness that the "problem in the inner cities . . . was about to explode into the White part of the country." Sterling believed that Congress wanted the penalties to be applied wherever crack was being trafficked, although Congress was aware that crack was used primarily by minorities.

Id. (internal citations and quotations omitted).

drug that carries well-known racial associations, is almost always racial animus. He provides undisputed historical precedents and references to support that position and justifies why, given this history, we should be suspicious of the use of racialized images in such a setting. The Eighth Circuit's hair-splitting disrespects the constitutional issues in contention and is indicative of the court's dismissive attitude towards the interplay between race, crime, and punishment.

The Eighth Circuit's decision, however, ironically reflects the unconscious racism, which Judge Cahill references, and the Eighth Circuit quickly dismisses.[223] Eric Sterling's testimony that there was racial "consciousness" rather than racial "animus" lends further support to the workings of unconscious racism, particularly given Mr. Sterling's credibility on this issue and undeniably laudable activist work towards repealing these laws.[224] Whether there is any qualitative difference between racial "animus" and racial "consciousness" must be considered in the context of the racial history preceding the moment and the racial atmosphere surrounding the moment. Given the well documented racialized discourse on drug abuse in the early 1980s, the attention given the issue as a result of the back-to-back deaths of two prominent Black sports figures, and the relatively brief period of racial progress leading up to 1986, it is more than possible that there was no meaningful difference between racial animus and

223. *See Clary*, 34 F.3d at 713.

224. Mr. Sterling, an author of the Anti-Drug Abuse Act of 1986, is currently president of the nonprofit Criminal Justice Policy Foundation and has written and lobbied extensively for the repeal of the 100-to-1 ratio. He has vocally expressed his regret for authoring the bill and has called it a "terrible mistake." Criticisms of his distinctions between racial consciousness and racial animus in his testimony are made with all due respect to his noteworthy activist work on this issue. I do feel, however, that such a rationale ultimately sidesteps an opportunity to confront the racial history that framed the passage of the law and the well documented history of race in the on-going discourse on drug abuse. While it is possible that Mr. Sterling felt that injecting race into the issue would hinder the greater goal of repealing the law, diminishing the role of race in discussions on drug abuse and control in the 1980s is counterproductive to confronting the reality of racialized mass imprisonment. Mr. Sterling stands by his contention that racial animus was absent from any consideration of the Anti-Drug Abuse Act of 1986.

> Drug sentences are on the national agenda again because civil rights supporters are justifiably outraged that almost all federal crack prosecutions involve people of color. And indeed, for years no Whites were prosecuted for crack offenses in many federal courts, including those in Los Angeles, Chicago, Miami, Denver, Dallas or Boston.
>
> Because of that, the myth developed that Congress intended to punish Blacks—believed to be the crack users—with long sentences and let the White powder cocaine sniffers of Hollywood and Wall Street get away with light sentences. But that's not the case. *Congress was trying to remedy a problem it believed afflicted the [B]lack community*.

Sterling, *supra* note 138 (emphasis added). Mr. Sterling's sympathetic view of Congress' intentions lacks credibility given the history preceding the law's passage and its devastating effects.

consciousness in the 1986 Congressional debates on how to punish drug abuse. But racial stereotypes in the Congressional record and an exhaustive history of racialized approaches to criminal justice policy are unconvincing to the Eighth Circuit *because* of their essential role in shaping contemporary theories of just desserts—who deserves what in terms of crime and punishment—relative to the plight of poor urban Blacks. The rationale employed by the Eighth Circuit to reject Judge Cahill's analysis, whether consciously or unconsciously, stems from a worldview that begins with the construction of Blacks—especially poor urban Blacks—as instinctively prone to criminality if not inherently criminal. In the court's mind, it seems, the rationale employed to construct and pass the crack laws is a secondary consideration to their belief that the predominately Black crack cocaine users were criminals of a distinctly different nature than the predominately White cocaine users and consequently were deserving of the harshest penalties.

The *Davis* Court expressed policy concerns in its presentation of the slippery slope upon which a disparate impact test could lead. Policy concerns are also likely at the core of the Eighth Circuit's thinking in *Clary*. To hold that crack and powder cocaine sentencing should be equalized results in dramatic changes for the criminal justice system, and the racial make-up of its population. As the Eighth Circuit enlists *Davis* and its progeny to defend the Congressional record surrounding the passage of the crack laws, it appears that the crack laws were the opportunity the intent requirement was designed to serve. Relating *Davis* to *Plessy* exposes the replay of a detrimental history and illustrates the pitfalls of the intent requirement as spelled out in *Davis*.

The *Clary* case is the most comprehensive judicial record of the racialized intent at the core of the crack-versus-cocaine disparity. *Clary* was decided before the Sentencing Commission recommended that the disparities of the crack laws be abolished, a recommendation not only ignored by Congress and President Clinton, but opposed directly through legislation.[225] The Eighth Circuit's refusal to seriously

225. *See* U.S. SENTENCING COMM'N, SPECIAL REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY 4 (1995), *available at* http://www.ussc.gov/crack/execsum.pdf (The Commission recommended that "Congress revisit the 100-to-1 quantity ratio as well as the penalty structure for simple possession."). "The joint effort by Congress and President Clinton in passing legislation to kill the Sentencing Commission's recommendations was the first time in the Commission's seven-year history that Congress and the White House blocked one of its recommendations." Gillmer, *supra* note 213, at 502 n.31 (citing Ann Devroy, *Clinton Retains Tough Law on Crack Cocaine: Panel's Call to End Disparity in Drug Sentencing is Rejected*,

engage Judge Cahill's analysis, its manipulation of the terms of the debate as opposed to honestly examining the evidence presented, and its selective analysis of the evidence presented, amounts to an unabashed indifference to the injustice surrounding the crack laws and their disparate impact on Blacks.

CONCLUSION

If it is true that history ultimately repeats itself, and the relationship between *Plessy* and *Davis* illustrates this, then there is hope for the Black community and American democracy in the face of racialized mass imprisonment. Like the immediate aftermath of *Plessy*, the immediate aftermath of *Davis* saw the development of laws to operationalize its logic. The crack laws, among others, perform this role. But the challenges to the crack laws and racialized mass imprisonment in general are unrelenting, and support for them has recently become bi-partisan.

In December of 2001, Republican Senators Orin Hatch and Jeff Sessions introduced the Drug Sentencing Reform Act of 2001, which would have reduced the powder versus crack cocaine sentencing disparity from 100-to-1 to 20-to-1.[226] In 2002, Congress conducted hearings in conjunction with the Sentencing Commission's third report recommending changes to the 100-to-1 sentencing disparity. In its report, the Commission stated that it "firmly and unanimously believes that the current federal cocaine sentencing policy set is unjustified and fails to meet the sentencing objectives set forth by Congress in both the Sentencing Reform Act and the 1986 Act."[227] The Commission noted that the prevailing beliefs when the laws were passed—that crack was more addictive and was associated with more violent crimes—were exaggerated. The Department of Justice, however, expressed strong support for the existing ratio and no action was taken.[228]

WASH. POST, Oct. 31, 1995, at A1.); s*ee also* John Lewis & Robert Wilkins, *Fix Sentencing Guidelines: Move to End Disparity Along Racial Lines Hasn't Worked*, ATL. J. CONST., Dec. 16, 2004, at 19A.

226. *See* S. 1874, 107th Cong. (2001).

227. U.S. SENTENCING COMM'N, SPECIAL REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY 91 (2002).

228. *See* RYAN S. KING & MARC MAUER, SENTENCING WITH DISCRETION: CRACK COCAINE SENTENCING AFTER BOOKER 10 (2006).

The Supreme Court's decisions in *United States v. Booker*[229] and *United States v. Fanfan*[230] are the latest chapters in the more than twenty-year history of the Anti-Drug Abuse Acts and their unprecedented consequences. In the decisions, the Supreme Court dealt a blow to mandatory minimums. Consequently, federal judges have used the broader discretion afforded by *Booker* and *Fanfan* to reject the 100:1 ratio and call out its racially biased outcomes.[231] While many federal judges continue to employ the rationale of the crack laws, evidence shows that courts are more willing to grant the various factors of an offender's record equal deference in arriving at an appropriate sentence.[232] Congress is expected to revisit the sentencing disparity under Congressman John Conyers' chairmanship of the House

229. 2005 U.S. LEXIS 628 (2005).

> The question presented in both of these cases is whether an application of the Federal Sentencing Guidelines violated the Sixth Amendment. In each case, the courts held that binding rules set forth in the Guidelines limited the severity of the sentence that the judge could lawfully impose on the defendant based on the facts found by the jury at his trial. In both cases the courts rejected, on the basis of our decision in *Blakely v. Washington*, the Government's recommended application of the Sentencing Guidelines because the proposed sentences were based on additional facts that the sentencing judge found by a preponderance of the evidence. We hold that both courts correctly concluded that the Sixth Amendment as construed in Blakely does apply to the Sentencing Guidelines.

Id. at *15.

230. *Id*.

231. *See, e.g.*, United States v. Smith, 359 F. Supp. 2d 771, 780 (E.D. Wis. 2005) ("[N]one of the previously offered reasons for the 100:1 ratio withstand scrutiny. Perhaps most troubling, however, is that the unjustifiably harsh crack penalties disproportionately impact on Black defendants. Blacks comprise between 80% and 90% of federal crack cocaine defendants, compared to just 20% to 30% of powder cocaine offenders.") (footnote omitted). Even in this opinion, however, the judge reinforces the notion that in passing this grossly discriminatory policy, Congress did not act with discriminatory motives.

> Before the guidelines took effect, White federal defendants received an average sentence of 51 months and Blacks an average of 55 months. After the guidelines took effect, the average sentence for Whites dropped to 50 months, but the average sentence for Blacks increased to 71 months. *Although there is no indication that the legislators intended that the law have a discriminatory effect*, . . . [i]f the impact of the law is discriminatory, the problem is no less real regardless of the intent.

Id. (emphasis added, internal citations and quotations omitted); Simon v. United States, 361 F. Supp. 2d 35, 46 (E.D.N.Y. 2005).

> The current focus on a ratio to account for the additional dangers crack posed meant that "*all* crack cocaine offenders would be punished *as if* they engaged in certain more harmful conduct, even though sentencing data demonstrates that the overwhelming majority of federal crack cocaine offenders are not involved in such conduct." The "intrinsic harms posed by the two drugs (e.g., addictiveness)" and crack's heightened association with systemic crime did, however, justify some degree of difference in base offense levels, which could be reflected in a less severe ratio.

Simon, 361 F. Supp. 2d at 46.

232. *See generally* King & Mauer, *supra* note 228.

Judiciary Committee.[233] Congressman Conyers, a long-time critic of mandatory minimum sentences, favors treating both drugs equally.[234]

Legal challenges to the crack laws are unrelenting. On February 20, 2007, the Supreme Court heard oral arguments in *Claiborne v. United States* to determine whether a sentence for a low-level crack cocaine offense below the federal guideline range is "reasonable" and whether a sentence that varies substantially from the guidelines can be imposed in extraordinary circumstances.[235]

The logic of the *Davis* decision and the intent requirement it produced ultimately responds to the question of whether the challenges presented by the social upheavals of the 1950s and 1960s will be addressed through a deepening commitment to substantive equality or whether the resistance to their mandates will be rationalized through continued social and economic isolation and disenfranchisement. Decisions like the Eighth Circuit's in *Clary* illustrate the conscious and unconscious ways in which systems of racial subjugation are preserved, and the ultimate evil of the intent requirement is dramatized by its use as a tool to maintain the overtly racist policies supporting racialized mass imprisonment. As such, the crack laws and the rationales sustaining their continued use should be viewed with the same contempt as we have come to regard the "three fifths clause" and "separate but equal." However, until the weight of *Davis* and the political and social context within which it is set is popularly understood, separate but equal will continue to live on and hide behind a cloak of equality and false neutrality.

233. *See* Lynette Clemetson, *Congress is Expected to Revisit Sentencing Laws*, N.Y. TIMES, Jan. 9, 2007.

234. *See id*.

235. Supreme Court of the United States, Hearing List, *available at* http://www.supremecourtus.gov/oral_arguments/hearinglists/hearinglist_feb07.pdf (last visited Feb. 21, 2007).