The War on Drugs: 
A Legalized Form of Discrimination on the Basis of Race

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**Introduction**

In South Carolina, police in SWAT gear entered a high school, specifically targeting African American students, holding guns to students’ heads as they searched for illegal drugs. No drugs were found in this raid.\(^1\) In Texas, 15 percent of all of the young African American males living in one city were arrested in a drug sweep predicated on merely one tip from an informant. All of the men were innocent.\(^2\) Although these stories are alarming, they are not unique. All across the country African Americans are searched, detained, arrested, and incarcerated in furtherance of the War on Drugs. Masked by facially race neutral policies and procedures, the War on Drugs has become a form of legalized discrimination against minorities, specifically African Americans. We need look no farther than our jails and prisons to see the effect of the racially discriminatory policies of the War on Drugs. In some parts of the country, the majority of African Americans men under thirty-five are incarcerated.\(^3\) In addition, African Americans are four times as likely to be incarcerated than whites.\(^4\)

The policies, procedures, and choices that underlie the War on Drugs are a form of legalized discrimination against African Americans. Specifically, law enforcement policies and procedures, the disparities in the court system including prosecutorial discretion, and sentencing

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4. *Id.*
and incarceration coupled with the unwillingness of the courts to zealously protect the rights of African Americans has resulted in the War on Drugs becoming a legalized form of discrimination against African Americans. In this paper, I do not argue that the grave racial disparities evident in the War against Drugs is a conspiracy, but rather it is the product of a set of choices, some conscious and others unconscious, that create disparities along every step of the way in the criminal justice system for African Americans. The interplay of disparities at every stage of the criminal justice process produces the result of mass incarceration for African American males, which is directly traceable to the War on Drugs.

**History of the War on Drugs**

In order to understand how the War on Drugs has evolved to become a legalized form of discrimination, especially against African Americans, it is first important to understand the history and origins of the War on Drugs. The War on Drugs began in October 1982, when President Regan, seeking to fulfill his campaign promise to engage the federal government in the fight against crime, officially announced the beginning of the War on Drugs on his weekly radio address to the nation. However, in reality, the War on Drugs was more about race than drugs.

After President Regan’s announcement, he increased anti-drug spending and the United States Justice Department began to shift its attention to combating street crime. Reagan also launched a media campaign that was designed to change the public’s perception about illegal

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7 Id.
Much of Regan’s media campaign focused on the emergence of the use of crack cocaine in inner-city areas. Contrary to popular belief, there is no truth that War on Drugs was launched in response to the increased usage of crack cocaine in the country. In reality, “the Reagan administration hired staff to publicize the emergence of crack cocaine in 1985 as part of a strategic effort to build public and legislative support for the war.” However, the public and political concern over illicit drug use was not correlated with an actual increase in illegal drug use across the country. In fact, illegal drug use was actually declining when the War on Drugs began in 1982. The spike in public concern, increased federal money, and attention allocated to the war on drugs must be explained by something other than an actual increase in drug use.

The increased public attention on illegal drug use was correlated with campaign promises and partisan politics. “Beginning in the 1970s, researchers found that racial attitudes – not crime rates or likelihood of victimization – are an important determination of white support for “get tough on crime” and anti-welfare measures.” The War on Drugs was a convenient racially neutral way to actually talk about race. Regan’s media campaign was designed to ignite deeply held cultural prejudices against African Americans as he painted African Americans and other minorities as the enemy in the War on Drugs. The images from Regan’s media campaign overwhelmingly depicted drug users as minorities, specifically African Americans.

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9 Nunn, *supra* note 5, at 387.
10 Alexander, *supra* note 6, at 5.
12 Alexander, *supra* note 6, at 53.
13 Tonry, *supra* note 11.
14 Nunn, *supra* note 5, at 390.
15 Id.
overnight, the media was saturated with images of black “crack whores,” “crack dealers,” and “crack babies” – images that seemed to confirm the worst negative racial stereotype about impoverished inner city residents.”

Regan’s media campaign was ultimately successful. Public opinion immediately began to shift as the public became increasingly concerned with ridding the country of illegal drug use and placing users and dealers behind bars. By August 1986, *Time* declared crack cocaine as the issue of the year. The stage had been set to wage an all out war against the perceived enemy in the War on Drugs – African Americans.

**The Rise of Mass Incarceration**

Since the beginning of the War on Drugs, the number of people incarcerated in America has steeply risen. In 1980, about 300,000 individuals were in jail. However, by 2000, that number had risen to over 1 million. More recently, at the start of 2008, there were 2.3 million adults in prison in America. These huge increases in incarceration rates are directly traceable to the War on Drugs. “Convictions for drug offenses are the single most important cause of the explosion in incarceration in the United States.” Specifically, drug offenses account for two-thirds of the rise in the federal prison population between 1985 and 2000.

Critics often argue that the dramatic increase in incarceration rates since 1980 is due to a simple fact – an increase in crime and illegal drug use. However, statistics show that this is far from reality. Analyzing crime statistics reveals that any increase in levels of crime since 1980 fail

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16 Alexander, *supra* note 6, at 5.
17 Alexander, *supra* note 6, at 54.
19 *Id.*
20 Nunn, *supra* note 5, at 393.
21 Alexander, *supra* note 6, at 59.
22 *Id.*
to account for the sharp increase in incarceration rates.\textsuperscript{23} In addition, crime rates in the United States have recently fallen far below international norms. However, the United States still incarcerates more people than any other country in the world with an incarceration rates six to ten times greater than the incarceration rate in other industrialized countries, including China.\textsuperscript{24}

The alarming incarceration rates also have a racial component. African Americans have been the most affected by the mass incarceration caused by the War on Drugs.\textsuperscript{25} Between the 1980s and 1990s, the period when the war on drugs began, there was over a 400 percent increase in the chances that an individual arrested for a drug related offense would ultimately be sentenced to prison.\textsuperscript{26} Those arrested, sentenced, and incarcerated due to drug offenses are overwhelmingly African American. As a result, African Americans and other minorities are sentenced to incarceration at rates substantially disproportionate to whites.\textsuperscript{27} African Americans are four times as likely as whites to be under correctional control.\textsuperscript{28} Shockingly, one in nine African American males between the ages of 20-34 are behind bars.\textsuperscript{29}

Contrary to popular belief, the alarming disparities in incarceration rates between African Americans and whites is not caused by differences in usage rates of illegal drugs.\textsuperscript{30} “There has been a sharp rise in black incarceration driven by policy changes not by changes in rates of violent crime or illegal drug use.”\textsuperscript{31} In fact, whites actually use illegal drugs at higher rates than African Americans. African Americans account for about only 15 percent of drug users, but

\textsuperscript{23} Bobo and Thompson, \textit{supra} note 18, at 451.
\textsuperscript{24} Pew Center on the States, \textit{supra} note 3.
\textsuperscript{25} Bobo and Thompson, \textit{supra} note 18, at 451.
\textsuperscript{26} \textit{Id}.
\textsuperscript{27} \textit{Id}.
\textsuperscript{28} Pew Center on the States, \textit{supra} note 3.
\textsuperscript{29} \textit{Id}.
\textsuperscript{31} Bobo and Thompson, \textit{supra} note 18, at 454.
comprise 37 percent of those arrested on a drug charge, 59 percent of those are convicted of drug offenses, and 79 percent of drug offenders sent to prison.  

African Americans are also not more likely to deal drugs than whites. Social science research has shown that individuals generally purchase illegal drugs from an individual of a similar race and socio-economic status to themselves. Therefore, based on the fact that whites have higher illegal drug usage rates, there are likely more white dealers to supply to the larger number of white users. Since the striking disparities in incarceration rates between African Americans and whites cannot be explained by differences in illegal drug usage rate, the disparity must be explainable on some other ground. The disproportionate incarceration rates can be explained by the discriminatory policies and procedures that underlie the War on Drugs.

**Disparities in Sentences for Crack and Powder Cocaine**

Regan’s media campaign to gain support for the War on Drugs primarily focused on crack cocaine use by African Americans. Therefore, it is not surprising that the most striking racial disparities stemming from the War on Drugs can be seen in the sentencing disparities for crack and powder cocaine. Although there is no physiological difference in effect between powder cocaine and crack, the Anti-Drug Abuse Act of 1986 punishes crack offenses one hundred times more severely than convictions involving powder cocaine. A conviction for possession and distribution of five hundred grams of powder cocaine is subject to a five-year mandatory sentence while a conviction for possession and distribution of five grams of crack has the same sentence.

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32 American Civil Liberties Union, *supra* note 2.
33 Nunn, *supra* at note 5, at 395.
35 *Id.*
African Americans use crack more often while whites more frequently use powder cocaine. Accordingly, the impact of the sentencing disparity falls disproportionately on African Americans. Across the country, 80 percent of all sentenced crack defendants are African American.\(^{36}\) Given the fact that crack cocaine is not more dangerous than powder cocaine, there is no reason to have a one hundred to one disparity in sentencing, other than to discriminate against African Americans.

Every constitutional challenge in the federal appellate courts to the striking discrepancy in sentencing between crack and powder cocaine has failed. Defendants have argued that the law is irrational because it imposes two vastly different penalties for different forms of chemically the same substance.\(^{37}\) In addition, defendants have argued that the laws discriminate against African Americans because the vast majority of those charged with crimes involving crack are African American while those charged with crimes involving powder cocaine are white. The court has held time and time again that since Congress believed crack was more dangerous when they enacted the drugs laws, the court does not have the power to disrupt Congress’ findings.\(^{38}\)

However, recently there have been legislative steps taken to reform the law and eliminate the one hundred to one sentencing disparity between crack and powder cocaine. On March 17, 2010, the United States Senate passed the Fair Sentencing Act, introduced by Senator Richard Durbin, which reduces the disparity to an eighteen to one ratio. The legislation is now pending before the House of Representatives.\(^{39}\) Although this Act does not completely eliminate the

\(^{36}\) American Civil Liberties Union, \textit{supra} note 2.  
\(^{37}\) Alexander, \textit{supra} note 6, at 110.  
\(^{38}\) \textit{Id.}  
unjustified and discriminatory disparity in sentencing, it is a step towards remedying the law’s discriminatory impact on African Americans.

**War on Drugs as a Legalized Form of Discrimination on Basis of Race**

Now that we have examined the history and origins of the War on Drugs and the mass incarceration of African Americans due to the War on Drugs, we now turn to examine how the policies and procedures that underlie the War on Drugs functions as a legalized form of discrimination on the basis of race. The War on Drugs functions as a legalized form of discrimination through multi-pronged discriminatory policies and practices implemented and tolerated at every stage of the criminal justice system.\(^{40}\) This part of the paper focuses on detailing how the discriminatory policies of the War on Drugs are implemented at every stage of the criminal justice system. The result of these polices and procedures, taken as a whole, is that the War on Drugs has become a legalized form of discrimination on the basis of race.

**Disproportionate Enforcement and Arrest**

Police and law enforcement officials are charged with the responsibility of waging the War on Drugs in the community by investigating and arresting individuals on drug related charges. Police officers are given vast discretion in whom to stop, search, and seize.

“The central question is how exactly does a formally colorblind criminal justice system achieve such racially discriminatory results? Rather easily, it turns out. The process occurs in two stages. The first step is to grant law enforcement officials extraordinary discretion regarding whom to stop, search, arrest, and charge for drug offenses, thus ensuring that conscious and unconscious racial beliefs and stereotypes will be given free reign. Unbridled discretion inevitably creates huge racial disparities.”\(^{41}\)

\(^{40}\) Steiner, *supra* note 30, at 466.

\(^{41}\) Alexander, *supra* note 6, at 100.
The result of allowing officers to utilize vast discretion is that conscious and unconscious racism are free to play a role in police officer’s decision making. Police discretion is important to understanding why those arrested and sentenced in the War on Drugs tend to be African Americans. In addition, police officers are likely to be more suspicious of African Americans and expend more resources to police African American communities. As a result, more African Americans are stopped, searched, and arrested, even though they commit drug related offenses at a lesser rate than whites.

Evidence suggests that African Americans are stopped and searched by the police more frequently than whites as a result of racism. One study in New Jersey during the 1990s showed that although only 15 percent of the drivers along the New Jersey Turnpike were minorities, 42 percent of all stops and 73 percent of all arrests were of African American drivers. In addition, a study in Maryland found that while African Americans made up 17 percent of the drivers along I-95, they comprised 70 percent of those stopped by police. However, in both studies, whites, not minorities, were more likely to have drugs or other illegal objects in their vehicles. In addition, a study in New York found that African Americans were stopped on the street six times more than whites but that stops of African Americans were actually less likely to result in arrests than stops of whites. These studies suggest that police officers utilize racial profiling to target African Americans for search and seizures although African Americans are not more likely to commit crimes, as evidenced by stops of whites more likely to result in arrest.

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42 Id.
44 DAVID COLE, NO EQUAL JUSTICE 4-6 (2000).
45 Nunn, supra note 5, at 400.
46 Alexander, supra note 6, at 131
47 Id.
48 Alexander, supra note 6, at 133.
The Fourth Amendment of the U.S. Constitution guarantees “the right of the people…against unreasonable searches and seizures.” However, Supreme Court precedent and decisions since the War on Drugs have eroded the protections of the Fourth Amendment and given police officers and law enforcement wide discretion to search and seize individuals. Two cases in particular have greatly expanded police officer’s ability to stop and search African Americans.

In Whren v. United States, the Supreme Court held that an officer’s subjective motivations in stopping an individual are irrelevant and that for purposes of determining the legitimacy of a stop, only an objective analysis of the totality of the circumstances is necessary. Whren allows pretextual stops as long as the officer can offer an objective reason for the arrest, regardless if the officer’s real motivations were racist. Police officers and other law enforcement personnel are adept at offering reasons other than race for a stop. This case is especially troubling because police officers and law enforcement officials are not immune from stereotypes and prejudices against African Americans and other minorities. They are also exposed to the media where the typical drug user is pictured as an African American. Allowing pretext stops in Whren creates a high risk that law enforcement and police officers will exercise this discretion in a discriminatory manner. The Supreme Court, in cases like Whren, has had the opportunity to protect the rights of minorities and implement safeguards designed to prevent discriminatory stops and seizures, but the Supreme Court has refused and made it easier for law enforcement to stop and seize in a discriminatory manner.

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49 U.S. CONST. amend. IV.
50 Sandy, supra note 8, at 667-668.
52 Alexander, supra note 6, at 106.
In another case, *Illinois v. Wardlow*, the Supreme Court held that a black man’s flight from a car created the requisite reasonable suspicion for his detention and search.\(^{53}\) The rule created in the case equates flight from law enforcement with reasonable suspicion. This case is especially problematic considering the fact that there is evidence that police officers target and police minority neighborhoods more heavily than white neighborhoods and disproportionately stop and search African Americans.\(^{54}\)

The court has left an important exception to the rule that a police officer must have reasonable suspicion to stop an individual and probable cause to search – consent searches. If an individual consents to a search, the officer need not have probable cause to search. The problem with this rule in the context of the War on Drugs and African Americans is that officers are not required to tell an individual that they have a right to refuse to consent to the search.\(^{55}\) Most people will comply with a police officer’s request because they do not know they have a right to refuse or out of fear for the consequences of non-compliance. This is especially problematic because given that African Americans are disproportionately stopped, searched, and arrested in the War on Drugs, they have a legitimate fear of law enforcement.\(^{56}\)

The problems with consent searches in the context of the War on Drugs are evident in another Supreme Court case, *Ohio v. Robinette*.\(^{57}\) Robinette was pulled over for speeding and issued a warning. After issuing the warning, the police officer ordered Robinette out of his car, asked him if he was carrying any drugs, and then asked him to consent to a search. Robinette


\(^{54}\) Nunn, *supra* note 5, at 401.


\(^{56}\) Id.

consented and the officer found marijuana and a pill. The Ohio Supreme Court was concerned with officers uses of pretextual stops to obtain consent to search for drugs in the War on Drugs and held that police officers must tell a driver he or she is free to leave before they ask for consent to search. When the case reached the Supreme Court, the court struck down the rule adopted by Ohio’s Supreme Court stating it was unrealistic to require police officers to inform a driver he or she is free to leave. This case coupled with Whren, which allows pretextual stops, eviscerates any meaningful Fourth Amendment protections for individuals and vastly expands police power in the War on Drugs.

Police officers and supporters of vast police discretion and little court oversight of police activities argue that such discretion is necessary to stop crime and apprehend drug users and dealers. This argument is not persuasive. Given that African Americans are no more likely to use drugs than any other racial group, the fact that there is a disproportionate number of African Americans arrested on drug charges shows that police officers are not arresting many of those who violate drug laws. Therefore, police officers are using this vast discretion to racially profile drug offenders and arrest the offenders that fit in with this stereotype.

Disproportionate Sentencing and Incarceration

Another way the War on Drugs serves to discriminate against African Americans is through disproportionately longer sentences to incarceration. In addition, prosecutorial discretion can also give effect to racial bias. Once an individual is arrested and charged, a prosecutor determines whether to offer the individual a plea bargain or to proceed to trial on the charges.

58 Id.
59 Id.
60 Id.
Like law enforcement, prosecutors are given broad discretion to determine what type of plea to offer, if any, and how to try cases. The broad discretion given to prosecutors allows for both conscious and unconscious racial stereotypes and bias to influence how a prosecutor uses his or her discretion. The effect is that African Americans swept into the War on Drugs receive disproportionately long sentences, are less likely to benefit from plea bargains, and are subject to incarceration more often than whites. In addition, prosecutors use their discretion in selecting juries by striking African Americans and minorities from juries, which has a discriminatory effect on African American defendants. The result of these disparities in the sentencing process coupled with disparities in enforcement and arrest in the War on Drugs leads to the mass incarceration of African Americans.

Critics argue that allowing prosecutors to exercise broad discretion is necessary to ensure the success of the criminal justice system and to take dangerous drug offenders off the street. However, this argument does not address the real problem with prosecutorial discretion. The problem is not in giving prosecutors discretion, although one way to deal with the discrimination present when prosecutors use their discretion is to eliminate broad discretionary choices. The real problem is that courts, through their decisions, have made it nearly impossible to bring a claim alleging that racial bias influenced a prosecutor’s use of broad discretion and even more difficult to prove such a claim. If prosecutors are in fact merely attempting to take dangerous drug offenders off the streets and make our communities safe, as critics contend, there should be no problem with allowing courts to review exercise of prosecutorial discretion. The real reason critics argue for broad prosecutorial discretion is that if we stopped the practice of allowing racial

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61 Davis, supra note 34, at 1671.
62 Steiner, supra note 30, at 466.
bias to influence prosecutorial decision-making, our prison population would likely begin to look different. We would then be forced to evaluate the racial stereotypes and attitudes that underlie our choices to adopt a policy of mass incarceration of African Americans.

Various studies that have examined disproportionate sentences have found those disparities attributable to discrimination. A 1984 study found that African Americans, on average, received longer sentences than whites and were also less likely to be offered favorable plea bargains by a prosecutor. In addition, in another study in 1985, the study examined incarceration in six cities and found that African Americans were more likely to be sentenced to incarceration than whites and the disproportionate rates of incarceration were due to racial discrimination.

The Federal Sentencing Guidelines have also contributed to an increase in the number of African Americans sentenced to prison as a result of the War on Drugs. The guidelines, enacted in 1986 and made tougher in 1988, provide minimum sentences for various drug offenses and deprive judges of discretion to determine sentences. Although the guidelines are no longer mandatory, many Judges continue to give great deference to the guidelines. Given that African Americans are already more likely to be sentenced to prison for a longer amount of time than whites, the guidelines have had an especially devastating effect on African Americans.

In addition to discrimination in sentencing, the broad discretion given to prosecutors also allows racial prejudices and bias to take effect. “The legal rules governing prosecutions, like

65 Susan Welch et al., Convicting and Sentencing: Differences Among Black, Hispanic and White Males in Six Localities, 2 Justice QTR. 67 (1985).
67 Nunn, supra note 5, at 400.
those that govern sentencing decisions, maximize rather than minimize racial bias in the drug war. The Supreme Court has gone to great lengths to ensure that prosecutors are free to exercise their discretion in any manner they choose.\textsuperscript{68} Prosecutors have an extraordinary amount of discretion. Prosecutors can decide when to pursue a case, when and what type of plea bargain to offer, whether to transfer a drug case to the federal system, and whether to move to dismiss a case. Since all of these decisions are discretionary and not reviewable by a court, it is easy to see how racial bias can be given effect in a prosecutor’s decision. Studies have confirmed this to be the case. In one study conducted by the \textit{San Jose Mercury News}, the study examined 700,000 criminal cases and found that whites charged with the same crimes as African Americans and other minorities received more favorable plea bargains.\textsuperscript{69} The risk that prosecutors’ decisions will give effect to racial bias is even more likely in the context of the War on Drugs where images of African Americans and other minorities dominate the media and stereotypes about African American and drug use have informed our policy choices.

The Supreme Court has made it nearly impossible for defendants to bring a claim alleging racial bias influenced a prosecutor’s discretionary decision making. One leading case, \textit{Armstrong v. United States}, demonstrates the difficulty defendants have in seeking to prove that a prosecutor’s racial bias influenced the prosecutor’s use of his or her discretion.\textsuperscript{70} Armstrong, suspecting that whites were being funneled into the state system where crack sentences were less severe, filed a motion, seeking discovery of the prosecutor’s files in order to support his claim of selective prosecution. The Supreme Court required Armstrong to produce evidence of white defendants who should have been charged in federal court in order to proceed on his claim of

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\textsuperscript{68} Alexander, \textit{supra} note 6, at 112.
\textsuperscript{69} Alexander, \textit{supra} note 6, at 115.
\textsuperscript{70} \textit{Armstrong v. United States}, 364 U.S. 40 (1960).
\end{flushleft}
selective prosecution. The court held that unless evidence of a prosecutor’s intentional bias can be shown, no inquiry into the causes behind apparent racial disparities in areas of prosecutorial discretion would be allowed.\footnote{Id.} The requirement on a defendant to produce information showing a prosecutor’s intentional bias before discovery will be granted in effect immunizes prosecutors from claims of racially biased decision-making. Without any meaningful check on broad prosecutorial discretion, prosecutors are free to continue to exercise their discretion in ways that gives effect to racial bias and stereotypes.

In addition to the discretion discussed above, prosecutors are also given broad discretion to strike potential jurors and often strike jurors on the basis of race. If a case proceeds to trial, prosecutors are given broad discretion to strike potential jurors from the jury pool. This broad discretion is often used to strike jurors on the basis of race, further prejudicing an African American defendant. In \textit{Batson v. Kentucky}, the Supreme Court held that prosecutors could not strike potential jurors from a case due to the juror’s race.\footnote{\textit{Batson v. Kentucky}, 476 U.S. 79 (1986).} However, \textit{Batson} has not ended the practice of striking jurors on the basis of race. Prosecutor merely must devise a race neutral reason for striking a juror.\footnote{Id.} A prosecutor could simply claim an individual was too young, too old, or wearing some specific article of clothing. Devising a race neutral reason for striking a juror is a very easy task. Prosecutors can even use reasons such as poverty, lack of education, unemployment, and living in the same neighborhood of the defendant as race neutral reasons to strike a juror, although these reasons are all suggestive of race.\footnote{Alexander, \textit{supra} note 6, at 119.}

In one study that analyzed published decisions involving \textit{Batson} challenges after the \textit{Batson} decision, the study found that prosecutors rarely failed to find an acceptable race neutral reason.
explanation to strike an African American juror. In *Purkett v. Elem*, the Supreme Court confirmed that prosecutors can offer any reason for striking a prospective juror and it will be deemed to be race-neutral, regardless of how ridiculous the reason. The court held that when a pattern of race-based strikes is identified, the prosecutor does not have to provide an explanation “that is persuasive or even plausible.” The effect of this case is that all-white juries can continue to sentence African American and other minorities to incarceration based on racial bias and stereotypes. The problem of all-white juries acting out of racial bias is especially problematic in the context of drug cases because of the rampant stereotypes about African Americans as drug users.

Challenging Discriminatory Practices in Criminal Justice System

A discriminatory criminal justice system to carry out the War on Drugs is ensured continued existence by making it nearly impossible to succeed on a claim by a defendant that the criminal justice operates in a discriminatory fashion. Defendants must show that racial disparities apparent in the criminal justice system are the product of intentional racial discrimination. Given the colorblind policies of the criminal justice system, proof of intentional discrimination is nearly impossible to find.

*Mccleskey v. Kemp* makes it nearly impossible for individuals to bring a claim alleging discrimination in the criminal justice system. In *Mccleskey*, the court held that racial bias in sentencing cannot be challenged under the Fourteenth Amendment unless the plaintiff can make a

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77 *Id.* at 768.
showing of discriminatory intent. McCleskey was a black man who had been sentenced to death after he killed a white police officer. McCleskey alleged that Georgia’s death penalty violated the Fourteenth and Eight Amendment because of racial bias that was evidenced through a study submitted as proof of McCleskey’s claim. The study found that prosecutors in the state sought the death penalty in seventy percent of cases when the defendant was black and the victim white, while they only sought the death penalty in nineteen percent of cases when the defendant was white and the victim black. As a result, defendants charged with killing white victims received the death penalty eleven time more often then defendants charged with killing black victims. The statistical evidence presented in this case was the strongest to date that had been presented to a court to show disparities in the criminal justice system. Even faced with such strong statistical evidence, the court held that even if racial bias can be shown through statistical evidence, it is not enough to make out a claim. The court held that unless McCleskey could show that in his case, in particular, the prosecutor sought the death penalty due to racial bias or the jury acted due to racial bias, McCleskey could not prove his claim.

Although this case was on its face a challenge to Georgia’s death penalty, it became clear that the case was really about, “whether – and to what extent – the Supreme Court would tolerate racial bias in the criminal justice as a whole.” In fact, the majority decision goes as far to state that discretion plays an important role in the criminal justice system and that discrimination is the result of discretion. The decision makes clear that is nearly impossible to utilize the courts to challenge the discriminatory practices in the criminal justice system, absent explicit statements of intent to discriminate, which are highly unlikely in the colorblind criminal justice system.

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79 Id.
80 McCleskey, 481 U.S. 279.
81 Alexander, supra note 6, at 107.
82 McCleskey, 481 U.S. 279.
Post-Release Effects of the War on Drugs Based on Race

There are many long-term consequences to being convicted of a crime and sentenced to incarceration. One of the direct results of the harsh minimum sentences and convictions of the War on Drugs is a large portion of African Americans being denied the vote through felon disenfranchisement laws. The War on Drugs discriminatory policies and procedures place a disparate number of African Americans in prison and then state felon disenfranchisement laws step in to bar felons from voting to elect officials to change the discriminatory policies apparent in the War on Drugs.

Felon Disenfranchisement Laws

Forty-eight states and the District of Columbia have enacted felon disenfranchisement laws that prohibit individuals convicted of a felony offense from voting while they are incarcerated. Some states felon disenfranchisement laws also bar felons from voting for a period of years after they are released from prison while in other states felons never regain the right to vote. Although felons in other states may be technically able to regain the right to vote after either being released from prison or after they are released from parole, the process for re-gaining voting rights is so complicated in many states that felons are in effect disenfranchised for life.

Disbarring felons from voting has a devastating effect on African Americans and minorities seeking to elect representatives of their choosing. Throughout the country, 13 percent

84 *Id.*
of all African Americans have lost their right to vote through felon disenfranchisement laws.\textsuperscript{85} In Florida and Alabama, about 33 percent of African Americans living in the state have been made ineligible to vote through these laws.\textsuperscript{86}

In addition, there is evidence that felon disenfranchisement laws dilute the strength of the African American vote. Further, felon disenfranchisement laws have likely changed the outcome of numerous elections, including the 2000 Bush versus Gore presidential election. It is likely that if the vast number of former felons were allowed to vote in Florida in the 2000 Presidential election, Gore would have been President.\textsuperscript{87} In addition, “research indicates that a large number of close elections would have come out differently if felons had been allowed to vote, including at least seven senatorial races between 1980 and 2000.”\textsuperscript{88} In effect, with the doors of the courtroom to challenge discriminatory procedures in the criminal justice system closed, felon disenfranchisement laws then bar convicted felons from voting for representatives to challenge the discriminatory bias present in the criminal justice system. With the discriminatory policies of police and prosecutors, discrimination in sentencing and incarceration, and the stripping of felons’ right to elect representatives to challenge these policies, the legalized form of discrimination apparent in the War on Drugs is complete.

\textbf{Reforming the Policies of the War on Drugs}

Reforming the discriminatory policies and procedures that underlie the War on Drugs will not be easy or swift. Racially discriminatory policies and procedures in every level of the criminal

\textsuperscript{85} Sandy, \textit{supra} at note 8, at 672.
\textsuperscript{86} \textit{Id.}
\textsuperscript{88} Alexander, \textit{supra} note 6, at 156.
justice system come together to create the mass incarceration of African Americans that is directly traceable to the War on Drugs. In addition, the Supreme Court has been less than zealous in protecting the rights of African Americans in the War on Drugs and has been unwilling to entertain claims of racial discrimination in the criminal justice system absent explicit statements of intent to discriminate, which are nonexistent. Given the penetration of discrimination in every part of the criminal justice system and the unwillingness of the court to act, where should reform begin?

Although social justice attorneys often first look to the court to advocate for wide-scale social change, given the Supreme Court’s willingness to tolerate practices and policies in the War on Drugs that greatly contribute to discrimination against African Americans, utilizing the court alone to change the policies of the War on Drugs will likely be ineffective. Given the pervasive discrimination present at every level of the War on Drugs coupled with the huge numbers of African Americans imprisoned at as a result of the War on Drugs, the “system will not be overthrown by isolated victories in legislatures or courtrooms.”89 Remedying the discrimination present in the War on Drugs will require a large-scale social movement that seeks to attack each level of discrimination and ultimately seeks to end the double standards that define the War on Drugs.90

We also must recognize that the racial discrimination present in the War on Drugs reflects the racial bias and stereotypes in society against African Americans and other minorities. Any attempt at reforming the discriminatory War on Drugs must also take aim at addressing underlying racial bias in our country.91 The War on Drugs exploited racial biases present in the

89 Alexander, supra note 6, at 218.
91 Sandy, supra note 8, at 691.
country and inextricably intertwined the concepts of drugs and race. The image of the typical
drug user in America is not a white college student or a white businessman but rather an African
American from the ghetto. Therefore, the first step toward remedying the discrimination inherent
in the War on Drugs must be a realistic assessment of the racial bias and discrimination inherent
in the War on Drugs and the criminal justice system at large. The public, the courts, and our
elected officials need to understand the extent of the problem of discrimination inherent in the
War on Drugs and the historical associations between drugs and race.92

Achieving this understanding will not be easy given that most Americans are in denial that
the discrimination described in this paper exists.93 However, widespread recognition of the
discrimination inherent in the War on Drugs is arguably the most important component necessary
for the success of a widespread social movement seeking change. The War on Drugs needs to be viewed as a legalized form of discrimination akin to the legalized discrimination present during the Civil Rights Movement. Only once we are able to change the public consensus will we be able to begin the work of dismantling the double policies of the War on Drugs and end this legalized form of discrimination.

**Conclusion**

The discriminatory practices present in the enactment of the drug laws, investigation and arrest by police, charging, and sentencing interacts to form a legal system of discrimination in the War on Drugs. The Supreme Court has effectively made it nearly impossible to bring and succeed on claims of racial bias in every stage of the criminal justice system, thus ensuring that the illegal discrimination that characterizes the criminal justice system will continue. Felon

93 Alexander, *supra* note 6, at 291.
disenfranchisement laws then foreclose the ability of incarcerated African Americans to vote for representatives who may be able to challenge the discriminatory practices that underlie the War on Drugs.

Reforming the policies that underlie the War on Drugs will not be an easy task. However, it is a task that we must undertake. It is clear that the War on Drugs is really a war on race, a legalized form of discrimination in our country. Given the vast amount of evidence that demonstrates the striking racial disparities in the War on Drugs, we cannot afford to submit to the status quo. The legitimacy of our criminal justice system demands that we end the War on Drugs.