

State Efforts to Reduce Racial Disparities in Criminal Justice: Empirical Analysis and Recommendations for Action

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ABSTRACT

A number of states have begun high-level processes to analyze and reduce racial and ethnic disparities in the criminal justice system. This article provides a preliminary empirical evaluation of these efforts, focusing on both the governance and substantive content of the anti-disparities processes. Results indicate that these efforts are not governed in a systematic and transparent manner, and tend to ignore or neglect the most glaring causes of disparity and the most promising measures to reduce them. This article discusses how anti-disparities processes and concerned citizens can stimulate more vigorous and effective strategies to minimize racial disparities.

TABLE OF CONTENTS

INTRODUCTION.....	494
I. REPEATING HISTORY	501
A. <i>A Shameful Pattern</i>	501
B. <i>A Disparate War</i>	502
II. EMPIRICAL RESULTS.....	512
A. <i>Governance</i>	513
B. <i>Substantive Content</i>	515
C. <i>Case Studies</i>	518
1. Wisconsin	519
2. Washington	520
3. Ohio	523
4. California	523
III. RECOMMENDATIONS FOR ACTION	524
A. <i>Scope</i>	524
B. <i>Institutional Sponsor</i>	525
C. <i>Governance</i>	525

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D. <i>Speed</i>	526
E. <i>Public Politics and Activism</i>	527
F. <i>Universal Responsibility and Urgency</i>	528
CONCLUSION	529

Will this just be another Committee who listens to us and does nothing?

—South Dakota Equal Justice Commission¹

[T]he racial bias in the justice system lies primarily in institutional policies and practices, rather than individual racism. The result, however, is still the same. And once we know the result, as we now do, a *failure to act* becomes an elevated and egregious form of bias.

—Minnesota Council on Crime and Justice²

INTRODUCTION

This article presents the findings of the first phase of an empirical research project investigating various state-level efforts to reduce racial disparities.³ A majority of states have created high-level committees to determine the prevalence of, and ultimately reduce, racial disparities in their criminal justice systems.⁴ Nearly always initiated by the state supreme court, these processes have all

1. S.D. EQUAL JUSTICE COMM'N, S.D. SUPREME COURT, 2006 FINAL REPORT AND RECOMMENDATIONS 1 (2006), *available at* <http://www.sdjudicial.com/uploads/downloads/SDEJCFinalReport2006jan.pdf>.

2. MINN. COUNCIL ON CRIME & JUSTICE, REDUCING RACIAL DISPARITY WHILE ENHANCING PUBLIC SAFETY: KEY FINDINGS AND RECOMMENDATIONS 14-15 (2003), *available at* <http://www.crimeandjustice.org/researchReports/Reducing%20Racial%20Disparity%20While%20Enhancing%20Public%20Safety.pdf>.

3. The first phase of this research project is based chiefly upon analysis of the state reports. Secondary support comes from one interview and limited correspondence with individuals involved in the anti-disparities processes. The second phase will involve a larger number of interviews intended to gather data about accomplishments that may not have been included in the published reports. Phase two will also take advantage of any quantitative data indicating whether disparities have dropped in any states.

4. Elizabeth Neeley, *From Investigation to Implementation: Factors for Successful Commissions on the Elimination of Racial and Ethnic Bias*, 44 CT. REV. 156, 156 n.1 (2008) (listing the states that have published reports on racial and ethnic bias in the court system); *Links to Task Forces, Commissions, and Related Organizations*, NAT'L CONSORTIUM ON RACIAL & ETHNIC FAIRNESS IN THE COURTS, <http://www.consortiumonline.net/links.html> (last visited Jan. 15, 2012) (listing links to task forces for racial fairness, gender fairness, and other topics); *Racial Fairness State Links*, NAT'L CTR. FOR STATE COURTS, <http://www.ncsc.org/topics/access-and-fairness/racial-fairness/state-links.aspx?cat=Racial%20Fairness%20Task%20Forces%20and%20Reports> (last visited Jan. 15, 2012) (listing thirty-two states and the District of Columbia as having a commission related to racial fairness in the courts or the criminal justice system).

published at least one report analyzing criminal justice disparities and issuing recommendations for actions to measure and reduce them. The impact of these processes has not been the subject of any previous research, aside from one article drawing lessons from Nebraska's experience.⁵ Since quantitative data on the effects of the reforms initiated by these commissions is not yet available, this phase of the project is based primarily on an analysis of the reports that have been published.⁶ In analyzing this material, this article focuses on two key issues determining whether the anti-disparities processes are likely to have a significant impact on disparities: first, the governance of the processes, and second, their substantive content.

Governance refers to the organization of the processes. For example, do these processes make recommendations and regularly publish implementation reports detailing their accomplishments? If a process is disorganized, lacks transparency, or fails to follow through on its recommendations or promises, it is unlikely to succeed in its aims. This article demonstrates that while the governance of the anti-disparities processes varies widely, in most cases it is sorely deficient.

In terms of substantive content, these reports discuss a wide range of sources of disparity, from the need for interpreter services to the small number of minority judges.⁷ While such issues are of doubtless importance, this article focuses on the big-picture question: to what extent have state-level efforts to reduce criminal justice disparities addressed the main sources of racial and ethnic disparities? This is a critical question, because if these processes fail to address the main sources, they are unlikely to reduce disparities substantially. This article's findings indicate that this is unfortunately the case: most of the anti-disparities processes do not indicate a willingness to address the main sources of disparities.

What are the main sources of racial disparities in the criminal justice system? For the sake of simplicity, these sources can be classified into two categories: disparities resulting from different rates of offending among racial groups, and disparities that occur even though rates of commission are the same among racial groups. When disparities exist that are not explained by differential rates of offending or any other rational policy justification, most would agree such

5. See Neeley, *supra* note 4. In addition, two practical guides to creating a commission on racial fairness in the courts are EDNA WELLS HANDY ET AL., NAT'L CONSORTIUM OF TASK FORCES & COMM'NS ON RACIAL & ETHNIC BIAS IN THE COURTS, ESTABLISHING AND OPERATING A TASK FORCE OR COMMISSION ON RACIAL AND ETHNIC BIAS IN THE COURTS (Marilyn McCoy Roberts ed., 1995), and DENNIS SCHRANTZ & JERRY MCELROY, REDUCING RACIAL DISPARITY IN THE CRIMINAL JUSTICE SYSTEM (Jenni Gainsborough & Marc Mauer eds., 2000).

6. See *supra* note 3 and accompanying text.

7. See NEB. MINORITY & JUSTICE TASK FORCE, NEB. SUPREME COURT, FINAL REPORT 10, 99 (2003), available at http://ppc.unl.edu/userfiles/file/Documents/projects/MinorityandJusticeTaskForce/mjtf_final_report.pdf.

disparities are unjustified and should be eradicated. The most dramatic disparities of this type—in which rates of offending are the same among racial groups, yet minorities are arrested and convicted at many times the rate of whites—are found with drug offenses, which are also the single largest contributor to overall racial disparities in the criminal justice system.⁸ While disparities occur at every stage of the criminal justice process, arrest rates are the most significant driver of drug-related disparities.⁹ Thus, racial disparities in drug arrests are the single most important contributor to unjustified racial disparities in the criminal justice system.¹⁰ If efforts to identify and reduce disparities fail to address disparities in

8. JUSTICE KENNEDY COMM'N, AM. BAR ASS'N, REPORTS WITH RECOMMENDATIONS TO THE ABA HOUSE OF DELEGATES 55 (2004), *available at* http://www.americanbar.org/content/dam/aba/publishing/criminal_justice_section_newsletter/crimjust_kennedy_JusticeKennedyCommissionReportsFinal.authcheckdam.pdf (“No single policy has done more to contribute to the current racial disparity in the criminal justice system than the War on Drugs.”); RYAN S. KING, THE SENTENCING PROJECT, DISPARITY BY GEOGRAPHY: THE WAR ON DRUGS IN AMERICA’S CITIES 2 (2008), *available at* http://www.sentencingproject.org/doc/publications/dp_drugarrestreport.pdf (“The extreme variation in city-level drug arrests suggests that policy and practice decisions, and not overall rates of drug use, are responsible for much of this disparity.”); MARC MAUER, THE SENTENCING PROJECT, RACE TO INCARCERATE 143 (1999); Michael Tonry & Matthew Melewski, *Malign Effects of Drug and Crime Control Policies on Black Americans*, 37 CRIME & JUST. 1, 14 (2008) (“Police can arrest street-level inner-city drug dealers almost at will, meaning that arrests are more a measure of police than of criminal activity. Disparities in arrests for drug offenses are the result of police policy choices.”).

9. HUMAN RIGHTS WATCH, TARGETING BLACKS: DRUG LAW ENFORCEMENT AND RACE IN THE UNITED STATES 41 (2008) (“The disproportionate rates at which blacks are sent to prison for drug offenses compared to whites largely originate in racially disproportionate rates of arrest for drug offenses.”). The Minnesota Council on Crime and Justice, which has conducted numerous quantitative and qualitative studies on racial disparities, explained as follows:

The racial disparity in the justice system originates predominantly at the point of first contact with law enforcement. Depending on the level and type of crime, disparity may increase, remain roughly the same, or in some cases decrease as the case moves through the justice system; however, this change is typically not significant when compared to the disparity that occurs at arrest.

MINN. COUNCIL ON CRIME & JUSTICE, *supra* note 2, at 4. Even if prosecution and sentencing practices contribute to a significant portion of drug-related disparities, the “preponderance” of these disparities is caused by the disparities in drug arrests. HUMAN RIGHTS WATCH, *supra*, at 41 n.58; Tonry & Melewski, *supra* note 8, at 30-31.

10. Tonry and Melewski identify disparities in drug arrests, along with mandatory minimum sentences and other sentencing policies mandating long sentences for drugs and certain other offenses, as the two biggest causes of racial disparities. Tonry & Melewski, *supra* note 8, at 30-31. Since the mandatory minimum sentences would be less consequential without the large disparities in drug arrests, it is only logical to conclude that disparities in drug arrests are the single most important cause of unjustified racial disparities. This is not to say that other disparities are not important or are justified. The point is that

drug arrests, they have overlooked the elephant in the room. As this article demonstrates, this is exactly what most anti-disparities processes have done.

There is another elephant in the room as well: the lack of needed services in impoverished minority communities. When disparities in arrest, conviction, or incarceration reflect actual rates of commission by different groups, people may think of such disparities as less problematic. For instance, if members of groups, such as African Americans and Hispanics—which on average, have far lower socioeconomic status than whites—commit more of certain types of crimes and are imprisoned at higher rates, then many might consider this an unfortunate consequence of deprivation, but not something that policymakers can correct.¹¹ There are problems with such a view. For one thing, even if rates of offending and convictions are relatively close for a particular crime, whatever gap remains may well be a result of bias.¹² Moreover, evidence demonstrates that blacks receive harsher punishments than whites convicted of the same crime.¹³ Thus, even if rates of offending fully explain higher conviction rates, bias at the sentencing stage can still produce unjustified racial disparities. Most importantly, citizens should not simply accept disparities resulting from differential rates of offending since these rates are themselves caused by the lack of needed investment in poor communities.

Minority communities are in many cases extremely impoverished, but they have been virtually abandoned by policymakers. If high-quality public schools, mental-health services, substance-abuse programs, and job-training and placement services were widely available to minorities—as they are to a much greater extent for whites¹⁴—minority crime rates would certainly decrease, and thus help reduce

drug disparities are the least explained by differential rates of use or any other legitimate policy justification, and thus are the most clearly unjustified of all the sources of disparity.

11. It goes without saying, of course, that any differential offense rates among racial or ethnic groups should always be understood to result from differences in social circumstances, and not the supposed inherent tendencies of any groups. It is also important to point out that, even though there are some differences among groups in offense rates, overall incarceration rates do not necessarily correspond to these differences or to overall trends in crime. For example, studies have shown that poor, minority men were, on average, more law-abiding in 2000 than twenty years earlier, but were still much more likely to be in prison because of the increased use of incarceration as a punishment, the increased length of incarceration sentences, and the increased prosecution of drug crimes. *Id.*

12. *See id.* at 20-23 (discussing research showing the conscious and unconscious effects that racial biases have on racial disparities).

13. *See* David B. Mustard, *Racial, Ethnic, and Gender Disparities in Sentencing: Evidence from the U.S. Federal Courts*, 44 J.L. & ECON. 285, 312 (2001) (finding, in a study of 77,236 federal offenders that controlled for numerous criminological and other variables, that blacks received significantly longer prison sentences than whites, and were more likely to be sentenced to prison rather than probation).

14. Scott W. Allard, *Place, Race, and Access to the Safety Net*, in *THE COLORS OF POVERTY* 232, 252 (Ann Chih Lin & David R. Harris eds., 2008) (“[A] poor person in a

racial disparities.¹⁵ Likewise, if the government were to finally commit itself to eliminating racial discrimination in the labor market¹⁶ and take decisive steps towards increasing high school graduation rates—such as giving families payments for children who remain in school, a practice used with much success in numerous countries¹⁷—these actions would also decrease crime in poor neighborhoods.¹⁸

predominantly black or Hispanic neighborhood will have access to roughly half as many social services [including job training, substance abuse treatment, and mental health treatment, among others] as a poor person living in a predominantly white neighborhood.”); Margarita Alegría et al., *Disparity in Depression Treatment Among Racial and Ethnic Minority Populations in the United States*, 59 PSYCHIATRIC SERVS. 1264, 1268-71 (2008) (showing that African Americans suffering from depression are significantly less likely to have access to, or to actually receive, high-quality treatment); Sylvia Atdjian & William A. Vega, *Disparities in Mental Health Treatment in U.S. Racial and Ethnic Minority Groups: Implications for Psychiatrists*, 56 PSYCHIATRIC SERVS. 1600, 1600 (2005) (“Disparities in health status and treatment outcome among members of U.S. racial and ethnic minority groups are well documented. Recent reports from the Institute of Medicine, the U.S. Department of Health and Human Services, the Surgeon General, and the President’s New Freedom Commission on Mental Health all urge immediate action to overcome these disparities.”); Benjamin Lê Cook & Margarita Alegría, *Racial-Ethnic Disparities in Substance Abuse Treatment: The Role of Criminal History and Socioeconomic Status*, 62 PSYCHIATRIC SERVS. 1273, 1274-75, 1279-80 (2011) (demonstrating that African Americans are more likely than whites to have court-mandated drug treatment, and noting the need for African Americans to have more access to substance-abuse treatment outside the criminal justice context).

15. See William Julius Wilson, *A New Agenda for America’s Ghetto Poor*, in ENDING POVERTY IN AMERICA 92-97 (John Edwards et al. eds., 2007) (suggesting similar policies to help reduce disparities).

16. Well-designed quasi-experimental studies have consistently demonstrated that employers discriminate against black jobseekers, and some studies have found that blacks with no criminal record fare just as poorly or even worse than whites with criminal records. See Devah Pager et al., *Discrimination in a Low-Wage Labor Market: A Field Experiment*, 74 AM. SOC. REV. 777, 795 (2009); Devah Pager, *The Mark of a Criminal Record*, 108 AM. J. SOC. 937, 958 (2003).

17. Tina Rosenberg, *To Beat Back Poverty, Pay the Poor*, N.Y. TIMES OPINIONATOR (Jan. 3, 2011, 8:15 PM), <http://opinionator.blogs.nytimes.com/2011/01/03/to-beat-back-poverty-pay-the-poor/>.

18. See Richard H. McAdams, *Economic Costs of Inequality*, 2010 U. CHI. LEGAL F. 23, 27 (reviewing extensive econometric evidence suggesting that inequality and poverty causes crime); see also WILLIAM JULIUS WILSON, WHEN WORK DISAPPEARS, at xii (1996) (“Many of today’s problems in the inner-city ghetto neighborhoods—crime, family dissolution, welfare, low levels of social organization, and so on—are fundamentally a consequence of the disappearance of work.”). It is clear enough that someone with a full-time job paying a reasonable wage is less likely to commit crimes than someone without work, if for no other reason than the fact that the employed have less free time. Evidence consistently documents the unemployment-crime connection. E.g., DON STEMEN, CTR. ON SENTENCING & CORR., VERA INST. OF JUSTICE, RECONSIDERING INCARCERATION 12 (2007) (discussing several studies showing a strong relationship between unemployment rates and

Given the well-documented connection between unemployment and crime, and the finding that nearly sixty percent of black men who had not completed high school had spent time in prison by their early thirties, it is urgent that policymakers adopt such policies.¹⁹ Since the federal government has excluded blacks from major welfare and wealth-redistribution programs in the past,²⁰ likely contributing to current poverty levels, it seems appropriate to target spending in minority communities to reduce poverty and prevent crime, rather than focusing solely on punishing offenders. The one positive trend in this regard is that spending on diversion programs offering alternatives to incarceration or arrest²¹ and programs helping offenders reintegrate within society has increased across the country as part of a wave of criminal justice reform over the last decade.²² Yet such programs still

property crime).

19. See Becky Pettit & Bruce Western, *Mass Imprisonment and the Life Course: Race and Class Inequality in U.S. Incarceration*, 69 AM. SOC. REV. 151, 161, 164 (2004); *supra* note 18 and accompanying text.

20. Southern opposition to the Social Security Act of 1935 resulted in the exclusion of African Americans from the Act's core programs. JILL QUADAGNO, *THE COLOR OF WELFARE: HOW RACISM UNDERMINED THE WAR ON POVERTY* 21 (1994); JILL QUADAGNO, *THE TRANSFORMATION OF OLD AGE SECURITY* 115-16 (1988).

21. "Alternatives to arrest" refers to informal or formal policies in which law enforcement take some action other than arrest in response to low-level offenses such as drug possession, public drunkenness, or driving with a suspended license. See generally ROBERT C. BORUCHOWITZ, AM. CONSTITUTION SOC'Y, *DIVERTING AND RECLASSIFYING MISDEMEANORS COULD SAVE \$1 BILLION PER YEAR* 2, 11 (2010), available at http://www.acslaw.org/sites/default/files/Boruchowitz_-_Misdemeanors.pdf (discussing various alternatives to arrest and prosecution for minor crimes); Michael S. Scott, *Progress in American Policing? Reviewing the National Reviews*, 34 LAW & SOC. INQUIRY 171, 175-76 (2009) (reviewing the relationship between various policing philosophies and alternatives to arrest, and noting that alternatives to arrest can include "issuing an informal warning, referring the matter to another agency for resolution, temporarily relocating the offender or complainant from the scene of the incident . . . or doing nothing").

22. Jesse J. Norris, *The Earned Release Revolution: Early Assessments and State-Level Strategies*, 95 MARQ. L. REV. (forthcoming 2012) (manuscript at 10-11) (on file with author) (describing an increase in early releases in reaction to budgetary constraints); Cecelia Klingele, *Changing the Sentence Without Hiding the Truth: Judicial Sentence Modification as a Promising Method of Early Release*, 52 WM. & MARY L. REV. 465, 485-86 (2010) (noting how states are beginning to recognize that "less is more when it comes to incarceration"); Michael M. O'Hear, *Beyond Rehabilitation: A New Theory of Indeterminate Sentencing*, 48 AM. CRIM. L. REV. 1247, 1248 (2011) (documenting and discussing the growth of early release over the last decade); Michael M. O'Hear, *The Early-Release Renaissance: Reflections and a Legislative Update*, MARQ. U. L. SCH. FAC. BLOG (Feb. 25, 2011), <http://law.marquette.edu/facultyblog/2011/02/25/the-early-release-renaissance-reflections-and-a-legislative-update/> (discussing increases in early release programs).

need to be greatly expanded to reduce rates of incarceration and recidivism, which remain unacceptably high.²³

This article characterizes the lack of needed services as the second, smaller, elephant in the room, and focuses less on this issue, not because the case for more services is weak, but because it is a more indirect cause of disparities and less amenable to immediate societal consensus. That is, nearly everyone would agree that if minorities' higher arrest rates for drug offenses are not explained by higher rates of use or any other legitimate policy consideration, these disparities should be eliminated without delay. The need for greater investment in poor communities, on the other hand, is a complex policy question that, despite its urgency, could be addressed in a number of different ways. Even so, if state-level anti-disparities processes are earnestly committed to reducing disparities, they must address this issue. Unfortunately, this article shows that most of these processes are, in fact, neglecting the need for more services.²⁴

In Part I, this article places current efforts to reduce racial disparities in historical context by noting a disturbing pattern that has repeated itself in American history in which criminal justice officials ignore, or even participate in, discriminatory criminal justice practices for decades before the practices cease. In particular, Part I shows that this pattern has persisted with the War on Drugs, which has continued for decades despite clear indications that its disparities are unjustified and harmful. Part II presents an analysis of the anti-disparities processes and concludes that most processes are governed deficiently and ignore the two most

23. In 2010, the rate of incarceration in the United States decreased for the first time in decades. Dee J. Hall, *State's Big Prison Drop Called "Historic,"* Wis. St. J. (Jan. 13, 2011, 3:00 AM), http://host.madison.com/wsj/news/local/crime_and_courts/article_a351792c-1e97-11e0-ba47-001cc4c002e0.html (discussing the drop in the prison population in Wisconsin and the country as a whole). However, the United States still has by far the world's highest incarceration rate—many times the rate of any other democratic Western country—and this is clearly unnecessary. Jim Webb, *Why We Must Fix Our Prisons*, PARADE (Mar. 29, 2009), <http://www.parade.com/news/2009/03/why-we-must-fix-our-prisons.html> (“With so many of our citizens in prison compared with the rest of the world, there are only two possibilities: Either we are home to the most evil people on earth or we are doing something different—and vastly counterproductive. Obviously, the answer is the latter.”). America's higher rates of incarceration are not caused by differences in crime rates, but by government policies. See MAUER, *supra* note 8. Recidivism is extremely high largely because of the difficulty that felons have finding full-time employment. See Shawn Bushway et al., *Introduction to BARRIERS TO REENTRY?: THE LABOR MARKET FOR RELEASED PRISONERS IN POST-INDUSTRIAL AMERICA 1* (Shawn Bushway et al. eds., 2007); Francis T. Cullen et al., *Prisons Do Not Reduce Recidivism: The High Cost of Ignoring Science*, 91 PRISON J. (SUPPLEMENT) 48S, 55S, 59S (2011) (discussing studies showing high recidivism rates and demonstrating that, while there is no evidence that prisons reduce recidivism, there is some evidence that prisons have a criminogenic effect).

24. See discussion *infra* Part II.B.

important sources of disparity: drug arrests and the lack of needed services and programs in minority communities. Part III describes the lessons that both anti-disparities processes and individuals should learn from this analysis, so that efforts to reduce disparities can finally succeed.

I. REPEATING HISTORY

Before evaluating the results of anti-disparities efforts, it is important to place them in historical context. This section briefly describes the long-term historical pattern, repeated several times over the past 150 years, in which racial discrimination within the criminal justice system is widely ignored or condoned by government officials. Unfortunately, as this section shows, the drug war—and, in particular, the racially skewed pattern of drug arrests—is a clear example of this same pattern occurring in the present time. Attempts to justify these dramatic disparities are to no avail, demonstrating they are unjustified and unnecessary, yet the disparities continue at full force.

A. *A Shameful Pattern*

The history of racial discrimination in criminal justice has repeatedly followed a similar pattern. Criminal justice officials, or other actors, begin a massively discriminatory and oppressive practice against minorities. For decades the practice goes on and by and large, those with power and influence in the criminal justice system—such as attorneys, sheriffs, judges, and politicians—either approve of the practice or do nothing to stop it.

A prime example is the convict lease system of the late nineteenth century, in which thousands of recently freed African Americans were arrested—often for unconstitutional reasons, such as the “crime” of not being employed at a plantation²⁵—and sent to forced labor camps with working conditions that were, without exaggeration, worse than slavery.²⁶ Many were literally worked to death:

25. EDWARD ROYCE, *THE ORIGINS OF SOUTHERN SHARECROPPING* 64-65 (1993) (describing how vagrancy laws functioned after emancipation to coerce African Americans into remaining in the plantation labor market).

26. MARK COLVIN, *PENITENTIARIES, REFORMATORIES AND CHAIN GANGS* 243-49 (1997) (explaining that African Americans were arrested for vagrancy and similar crimes, then sent to work on chain gangs through the convict lease system, where they were brutally exploited, subjected to horrendous conditions, and even tortured, resulting in a death rate that exceeded fifty percent in some cases); DAVID M. OSHINSKY, *WORSE THAN SLAVERY: PARCHMAN FARM AND THE ORDEAL OF JIM CROW JUSTICE* 35 (1996) (arguing that the convict lease system was worse than slavery in many respects). The economic interests and white supremacist philosophy behind the convict lease system enabled it to expand to a massive scale, dramatically increasing the nonwhite prison population. See JEFF MANZA &

between thirty-six and fifty-three percent of convicts died per year in some camps.²⁷ Although investigations repeatedly revealed these horrors, the practices persisted for decades, killing thousands.²⁸

The same pattern can be seen with lynching,²⁹ Jim Crow laws,³⁰ and the Jim Crow era death penalty, which in some states was used exclusively against blacks for certain crimes.³¹ Unfortunately, this pattern of official complicity in or indifference to widespread discriminatory practices is being repeated in the current War on Drugs, the single biggest cause of unjustified racial disparities.³²

B. *A Disparate War*

As Chief Judge Robert Pratt of the Southern District of Iowa asks, “How did it happen that we built a system that incarcerates our fellow citizens for inordinately long periods of time, wastes huge amounts of taxpayer dollars, ruins lives, and does

CHRISTOPHER UGGEN, *LOCKED OUT: FELON DISENFRANCHISEMENT AND AMERICAN DEMOCRACY* 57 (2006) (noting Alabama as an example where, between 1850 and 1870, the number of nonwhites in prison rose from two percent of the total prison population to seventy-four percent of the total prison population). The fact that this system was a significant driver behind the birth of vast racial disparities in incarceration adds additional urgency to the task of reducing the disparities.

27. COLVIN, *supra* note 26, at 246-47.

28. *Id.* at 247.

29. Between 1882 and 1968, white mobs—mostly in the South—lynched 3446 blacks. WALTER HAZEN, *AMERICAN BLACK HISTORY* 40 (2004). It was not until 1946 that a single white person was convicted in federal court for lynching, and the penalty was relatively minor (a year in prison and a \$1000 fine). LAURA WEXLER, *FIRE IN A CANEBREAK: THE LAST MASS LYNCHING IN AMERICA* 154 (2003); *see also* Paul Finkelman, *Introduction to JAMES HARMON CHADBOURN, LYNCHING AND THE LAW*, at xi (The Lawbook Exch., Ltd. 2008) (1933) (“For more than half a century most of the elite leaders of the South had either defended lynching or ignored the problem.”). United States senators from Southern states filibustered anti-lynching bills throughout the 1920s and 1930s. *See* CHADBOURN, *supra*, at 118-19.

30. Jim Crow was a complex set of legal rules—lasting from shortly after the Civil War until the 1960s—designed to keep blacks in an inferior social position. *See* MICHAEL J. KLARMAN, *FROM JIM CROW TO CIVIL RIGHTS* (2004). Jim Crow laws encountered little opposition from whites, and the U.S. Supreme Court even approved of “separate-but-equal” arrangements in *Plessy v. Ferguson*, 163 U.S. 537, 551-52 (1896). It was not until the 1950s and 1960s, the era of the civil rights movement, that Supreme Court decisions and federal legislation brought Jim Crow to an end. *See* KLARMAN, *supra*.

31. *See* DIANE MILLER SOMMERVILLE, *RAPE AND RACE IN THE NINETEENTH-CENTURY SOUTH* 159 (2004) (“Armed with a broad spectrum of penalties for sexual assault, white-dominated courts could mete out prison sentences to white rapists while reserving the death penalty for blacks.”).

32. *See supra* note 8 and accompanying text.

not accomplish the stated purpose, i.e. to end the illegal consumption of drugs?”³³ The answer, unfortunately, has much to do with race and racism. Anti-drug legislation and enforcement has long focused on minorities, even though studies have consistently shown that minorities are no more likely than whites to use or sell drugs.³⁴ Even in the late nineteenth and early twentieth centuries, before the modern War on Drugs, surges in drug law enforcement arose from racist fears of foreigners or minorities.³⁵

Historical research has documented that the modern drug war began as part of the “Southern strategy” used by Richard Nixon, among others, to win votes by appealing to voters’ racial anxieties and prejudices with tough-on-crime policies.³⁶ Close Nixon advisor H.R. Haldeman wrote that President Nixon “‘emphasized that you have to face the fact that the whole problem is really the blacks. The key is to devise a system that recognizes this while not appearing to.’”³⁷

When President Reagan officially declared the War on Drugs in 1982, drug use was in fact declining.³⁸ Years later, when crack use began to spread rapidly in some communities, Reagan hired staff to feed crack-related stories to the media, hoping to build public support for the drug war.³⁹ This media strategy was wildly successful: “Almost overnight, the media was saturated with images of black ‘crack whores,’ ‘crack dealers,’ and ‘crack babies.’”⁴⁰ Crack’s racialized publicity sparked

33. Robert W. Pratt, *Senseless Sentencing: A Federal Judge Speaks Out*, NOVEMBER COALITION (Jan. 10, 1999), <http://www.november.org/dissentingopinions/Pratt.html>.

34. See MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 7 (2010) (noting “that people of all colors use and sell illegal drugs at remarkably similar rates,” yet the prisons are “over-flowing with black and brown drug offenders”); CORAMAE RICHEY MANN, *UNEQUAL JUSTICE: A QUESTION OF COLOR* 58-61 (1993) (noting that due to prevalent racist myths, minorities have often been the focus of public discourse on drugs and police enforcement of drug laws, with Chinese Americans associated with opium, African Americans with cocaine, and Mexican Americans with marijuana).

35. Opium use was tolerated among whites, but opium smoking—associated with Chinese immigrants—was the target of energetic enforcement and legislation. Michael Woodiwiss, Op-Ed., *Reform, Racism and Rackets: Alcohol and Drug Prohibition in the United States*, in *THE CONTROL OF DRUGS AND DRUG USERS* 13-14 (Ross Coomber ed., 1998). The impetus for criminalizing marijuana arose from racist fears of Mexican immigrants. George Soros, *Why I Support Legal Marijuana*, WALL ST. J. (Oct. 26, 2006), <http://online.wsj.com/article/SB10001424052702303467004575574450703567656.html>.

36. See ALEXANDER, *supra* note 34, at 43-47.

37. *Id.* at 43-44.

38. *Id.* at 5, 7.

39. *Id.* at 5.

40. *Id.*

sharp increases in funding for drug enforcement, and influenced harsh sentencing policies that dramatically increased racial disparities.⁴¹

Today, nearly eighty percent of those convicted for federal crack offenses are black,⁴² even though studies show that the majority of crack users are not black.⁴³ Such statistics have been available since at least the mid-1990s; in fact, the U.S. Sentencing Commission noted in 1995 that a majority of crack users were white.⁴⁴ The government's response to this information, however, was to recommend conducting yet another study.⁴⁵ The crack/powder cocaine disparity was recently reduced to 18:1, but it is unclear if this is a positive sign since it amounts to explicit congressional and presidential approval of a vast sentencing disparity unsupported by any real evidence.⁴⁶

In practice, if not in law, racial disparities are also very high for other drugs. For example, in some California cities, blacks are twelve times more likely than whites to be arrested for marijuana, even though whites in California are actually more likely than blacks to use the drug.⁴⁷

41. *Id.*; see also Katherine Beckett et al., *Drug Use, Drug Possession Arrests, and the Question of Race: Lessons from Seattle*, 52 SOC. PROBS. 419, 421 (2005) ("Many studies of media representations of crack cocaine also suggest that these images have been highly racialized.").

42. U.S. SENTENCING COMM'N, 2010 ANNUAL REPORT 35 (2010), available at http://www.uscc.gov/Data_and_Statistics/Annual_Reports_and_Sourcebooks/2010/2010_Annual_Report_Chap5.pdf.

43. Using data from a 2006 national survey, Human Rights Watch calculated that blacks constitute only twenty-one percent of those who have ever used crack. HUMAN RIGHTS WATCH, *supra* note 9, at 42.

44. U.S. SENTENCING COMM'N, SPECIAL REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY 34 (1995), available at http://www.uscc.gov/Legislative_and_Public_Affairs/Congressional_Testimony_and_Reports/Drug_Topics/199502_RtC_Cocaine_Sentencing_Policy/chap1-4.pdf.

45. *Id.* at 4; see also OHIO COMM'N ON RACIAL FAIRNESS, SUPREME COURT OF OHIO, THE REPORT OF THE OHIO COMM'N ON RACIAL FAIRNESS 42-43 (1999), available at <http://www.sconet.state.oh.us/publications/fairness/fairness.pdf> (discussing the contents of U.S. SENTENCING COMM'N, *supra* note 44).

46. See Michael Tonry, *Less Imprisonment Is No Doubt a Good Thing: More Policing Is Not*, 10 CRIMINOLOGY & PUB. POL'Y 137, 139-40 (2011). Professor Tonry argues that this reduction does not go far enough:

[N]o one claims that the federal 100-to-1 law for crack and powder cocaine sentencing (since August 2010, 18-to-1) deters sales of crack cocaine. It has been widely recognized for 20 years that it is unjust, a primary cause of racial disparities in federal prisons, and based on drastic distinctions between two substances that are pharmacologically indistinguishable.

Id.

47. HARRY G. LEVINE ET AL., MARIJUANA ARREST RESEARCH PROJECT, ARRESTING BLACKS FOR MARIJUANA IN CALIFORNIA 13 (2010), available at <http://www.drugpolicy.org/>

Arrest is the single most important site of disparity in the criminal justice system, and at every step, the disparities tend to get worse, resulting in enormous disparities at the sentencing level.⁴⁸ Sentencing data from 2003 in Washington and California shows that blacks were ten times more likely than whites, given their proportion in the population, to be sent to prison for drugs.⁴⁹ These disparities were even worse than those found in most southern states, although they did not approach the two worst states, Wisconsin and Illinois.⁵⁰ There, blacks were, respectively, forty-two and twenty-three times more likely than whites to be sentenced to prison for drug offenses,⁵¹ despite the fact that rates of use for both groups are the same.⁵²

Individuals have attempted to explain away these disparities, but these attempts consistently fail. First, some presume that the presence of outdoor drug markets in minority communities, which disrupt neighborhoods and are easy to bust, account for racial disparities in drug arrests.⁵³ Yet one study, led by sociologist Katherine Beckett, indicates that similar outdoor drug markets composed of whites get little or no police attention.⁵⁴ Beckett and her coauthors witnessed whites engaging in hundreds of outdoor drug transactions in a Seattle neighborhood without any police intervention.⁵⁵ Moreover, outdoor markets cannot explain all the disparity. Blacks are also overrepresented in indoor arrests,⁵⁶ and racial profiling in traffic stops may also be a major source of disparities in arrest rates.⁵⁷ Finally, from a policy

sites/default/files/ArrestingBlacks.pdf. A recent Gallup poll showed that fifty percent of Americans, a record high, now support completely legalizing marijuana. *Record-High 50% of Americans Favor Legalizing Marijuana Use*, GALLUP (Oct. 17, 2011), <http://www.gallup.com/poll/150149/Record-High-Americans-Favor-Legalizing-Marijuana.aspx>. Even though public opinion has shifted decisively away from punitive approaches to marijuana, enforcement against blacks, including prison terms, remains a ubiquitous feature of American criminal justice.

48. See Marc Mauer, *Addressing Racial Disparities in Incarceration*, 91 PRISON J. (SUPPLEMENT) 87S, 91S-95S (2011) (reviewing evidence of racial bias at various decision points in the criminal justice process).

49. HUMAN RIGHTS WATCH, *supra* note 9, at 23 tbl.4.

50. *Id.*

51. *Id.*

52. See *infra* note 57 and accompanying text.

53. See Tonry & Melewski, *supra* note 8, at 27, 29.

54. Beckett et al., *supra* note 41, at 436; Katherine Beckett et al., *Race, Drugs, and Policing: Understanding Disparities in Drug Delivery Arrests*, 44 CRIMINOLOGY 105, 122 (2006).

55. Beckett et al., *supra* note 41, at 436.

56. *Id.* at 435 (noting that blacks accounted for 38.5% of those arrested indoors, which is far in excess of the proportion of blacks in the Seattle population).

57. See generally AM. CIVIL LIBERTIES UNION & THE RIGHTS WORKING GROUP, *THE PERSISTENCE OF RACIAL AND ETHNIC PROFILING IN THE UNITED STATES* (2009), available at

perspective, there is scant evidence that arresting street dealers eliminates these outdoor markets.⁵⁸ There are alternative, more effective ways to shut these markets down, which do not involve arresting large numbers of users and small-time dealers.⁵⁹

Second, some may argue that disparities are justified because increased drug enforcement reduces violence associated with the inner city drug trade.⁶⁰ Yet this argument is easily refuted. Using Seattle as an example again, the police often focus enforcement efforts on crack, while admitting there is no significant violence associated with crack in the city.⁶¹ In fact, individuals arrested in Seattle for heroin (and these were mainly whites), were over eleven times more likely to have a weapon than African Americans arrested for crack.⁶² Furthermore, there is no evidence that arresting large numbers of drug users and dealers decreases violence. In fact, there is considerable evidence it increases violence.⁶³

http://www.aclu.org/pdfs/humanrights/cerd_finalreport.pdf (showing a disparity in traffic stops and searches throughout the United States).

58. A recent review of the literature on strategies to combat outdoor drug markets makes twenty-one recommendations for policymakers. ALEX HAROCOPOS & MIKE HOUGH, CTR. FOR PROBLEM-ORIENTED POLICING, GUIDE NO. 31, DRUG DEALING IN OPEN-AIR MARKETS 22-30 (updated 2011), http://www.cops.usdoj.gov/files/RIC/Publications/061120377_Drug-Dealing-in-Open-Mkts-508.pdf. Only three of these recommendations relate to arresting users or dealers, and these strategies are referred to as “controversial,” “difficult to sustain,” and “unlikely” to “significantly disrupt” outdoor markets. *Id.* at 22-25. Such strategies “may even exacerbate the situation.” *Id.* at 23. The authors also note: “Simply arresting market participants will have little impact in reducing the size of the market or the amount of drugs consumed. This is especially true of low-level markets where if one dealer is arrested, there are, more than likely, several others to take their [sic] place.” *Id.* at 8. More broadly, the general consensus is that hefty penalties, such as mass arrests of drug sellers, do not induce general deterrence. Tonry, *supra* note 46, at 144-45.

59. Tonry, *supra* note 46, at 137-38, 148; see also David Kennedy, *Drugs, Race and Common Ground: Reflections on the High Point Intervention*, NAT’L INST. JUST. J., Mar. 2009, at 12 (discussing the well-known High Point model for reducing drug markets without large numbers of arrests).

60. Beckett et al., *supra* note 41, at 433.

61. Tal Klement & Elizabeth Siggins, *A Window of Opportunity: Addressing the Complexities of the Relationship Between Drug Enforcement and Racial Disparity in Seattle*, 1 SEATTLE J. FOR SOC. JUST. 165, 209-10 (2002).

62. Beckett et al., *supra* note 41, at 427 tbl.2, 433.

63. See INT’L CTR. FOR SCIENCE IN DRUG POLICY, EFFECT OF DRUG-LAW ENFORCEMENT ON DRUG-RELATED VIOLENCE (2010), available at <http://www.icsdp.org/docs/ICSdp-1%20-%20FINAL.pdf> (reviewing numerous studies showing that increased drug enforcement causes violence to rise, and that arresting drug dealers creates more volatility because of the influx of new dealers who fill the market void).

Third, some attribute disparities to differences in the types of drugs used by different racial and ethnic groups.⁶⁴ Most crack users, however, are white, while the vast majority of those convicted are black.⁶⁵ Regardless, there is no legitimate policy justification for the police emphasis on crack users.⁶⁶ Crack arrests, for example, are not concentrated in places with the highest non-drug crime rates⁶⁷ or the most citizen complaints and, unlike heroin, crack is not associated with the spread of infectious disease.⁶⁸ As Beckett has shown, the most plausible explanation for the Seattle disparities is that the police are operating unconsciously under a racialized conception of the drug problem.⁶⁹

Largely as a result of similar law enforcement practices nationwide, in which police arrest blacks for drugs at several times the rates of whites without a rational policy justification, over one-third of the country's black men have been convicted of felonies.⁷⁰ The United States has the world's highest incarceration rate—with 743 out of 100,000 individuals incarcerated—but this is mainly due to the absurdly high black incarceration rate.⁷¹ For example, the white incarceration rate (approximately 400 per 100,000 individuals) is higher than the overall incarceration rates of all but two countries in the world (Cuba and Russia).⁷² The black

64. See FRITZ RAUSCHENBERG & DAVID DIROLL, OHIO SENTENCING COMM'N, DISPARITY AND UNIFORMITY IN CRIMINAL SENTENCING 2 (1993). *But see* OHIO COMM'N ON RACIAL FAIRNESS, *supra* note 45, at 45-46 (critiquing RAUSCHENBERG & DIROLL, *supra*, for failing to support the assertion that the types of drugs used by different groups explain racial and ethnic disparities in drug sentencing).

65. See U.S. SENTENCING COMM'N, *supra* note 42.

66. Beckett et al., *supra* note 41, at 430-34.

67. If crack arrests were concentrated where non-drug crime rates were highest, this might support a rational policy justification for the disproportionate police focus on crack. That is, police might assume that crack use drives many non-drug crimes.

68. *Id.*

69. *Id.* at 436. Psychological studies have shown that when Americans are told to imagine a drug user, ninety-five percent think of an African American, despite the fact that rates of use are virtually the same across racial and ethnic groups. *Id.*

70. Christopher Uggen et al., *Citizenship, Democracy, and the Civic Reintegration of Criminal Offenders*, 605 ANNALS AM. ACAD. POL. & SOC. SCI. 281, 288 (2006).

71. LAUREN E. GLAZE, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SER. NO. NCJ 2131681, CORRECTIONAL POPULATIONS IN THE UNITED STATES, 2009 app. at 7 tbl.2 (2010), <http://bjs.ojp.usdoj.gov/content/pub/pdf/cpus09.pdf>.

72. These estimates of the overall black and white incarceration rates were produced by averaging the incarceration rates for men and women. They are approximate numbers because women slightly outnumber men in the U.S. population. PAGE M. HARRISON & ALLEN J. BECK, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SER. NO. NCJ 213133, PRISON AND JAIL INMATES AT MIDYEAR 2005, at 10 tbl.13 (2006), <http://bjs.ojp.usdoj.gov/content/pub/pdf/pjim05.pdf>; Christopher Hartney, *US Rates of Incarceration: A Global Perspective*, NAT'L COUNCIL CRIME & DELINQ. 2 (Nov. 2006), http://www.nccd-crc.org/nccd/pubs/2006nov_factsheet_incarceration.pdf (indicating that only Russia and

incarceration rate, however—approximately 2500 per 100,000 individuals—is several times higher than the overall rate in any country in the world—seventeen times higher than the rate in the United Kingdom, for example.⁷³ This is mass incarceration at a level unprecedented in world history, and it is devastating to individuals and communities.⁷⁴ Ex-convicts experience lifelong discrimination, often losing their right to vote, their chance of ever getting a normal job, and the ability to benefit from public housing or obtain student loans. The situation is so dire that law professor Michelle Alexander, in a very well-argued monograph, describes the mass incarceration of black men as “the new Jim Crow” because it renders large numbers of black men second-class citizens for life based on discriminatory practices.⁷⁵

What is the proper response to the vast disparities in drug enforcement? Lawsuits alleging that these disparities are unconstitutional are extremely unlikely to succeed. In *McClesky v. Kemp*, the U.S. Supreme Court held that disparate statistics alone are insufficient to support an alleged equal protection violation; there must be evidence that the individual defendant was prosecuted or sentenced with racist motives.⁷⁶ It is thus effectively impossible to challenge disparities through litigation, unless police, prosecutors, or judges publicly admit to racism—something that virtually never occurs.⁷⁷

Both policy and ethical considerations demand that our anti-disparities strategy should be the opposite of *McClesky*. In the face of such huge, unjustified disparities, all citizens—and, in particular, attorneys and others involved in the criminal justice system—should insist that the police immediately decrease the rate

Cuba have incarceration rates above 400 per 100,000 individuals); *State and County Quick Facts: USA*, U.S. CENSUS BUREAU, <http://quickfacts.census.gov/qfd/states/00000.html> (last updated Jan. 17, 2012) (showing that 50.8% of the overall U.S. population is female).

73. HARRISON & BECK, *supra* note 72; Hartney, *supra* note 72. The incarceration rate in the United Kingdom is 145 per 100,000 individuals. Hartney, *supra* note 72. These numbers would be even higher if women were excluded. For example, the black male incarceration rate (including both state and federal prisoners) is 4682 per 100,000. HARRISON & BECK, *supra* note 72.

74. Even at the height of Stalin’s repression, the Soviet Union’s overall incarceration rate did not approach the rate at which the United States incarcerates African Americans. Hartney, *supra* note 72, at 3. In fact, in 1950 the Soviet Union incarcerated an estimated 823 per 100,000 individuals overall, which is still sixty-four percent less than the current black incarceration rate in the United States. *Id.*

75. See ALEXANDER, *supra* note 34, at 192-95, 213.

76. 481 U.S. 279, 292-93 (1987).

77. Even if prosecutors privately admitted to discriminatory motivations, procedural rules often prevent defense counsel from accessing this information. ALEXANDER, *supra* note 34, at 108. For this reason, Professor Alexander writes that the *McClesky* Court “knew full well that the standard could not be met absent an admission that a prosecutor or judge acted because of racial bias.” *Id.*

at which they arrest minorities for drug offenses. If the police wish to maintain the status quo, the burden should be on them to provide quality evidence that disparate arrests rates are rationally justified.⁷⁸ The police may claim that disparities in drug enforcement result merely from the neutral application of rational public policies. Yet given the devastating impact that mass incarceration has on minority individuals and communities, the public should not accept these assurances in the absence of hard evidence from independent evaluations that such large disparities in drug arrests are necessary.⁷⁹

Prosecutors and judges should refuse to accept these assurances as well. As previous scholars have advocated, prosecutors should take a proactive role in counteracting disparities that originate at the arrest stage.⁸⁰ In particular, this could involve increasing the rate at which prosecutors decline to prosecute drug offenses when there is a wide disparity and no evidence that it derives from differential rates of offending or other legitimate policy considerations.⁸¹ For example, in reaction to evidence of racial disparities, Milwaukee prosecutors declined to prosecute a larger

78. See Angela J. Davis, *Racial Fairness in the Criminal Justice System: The Role of the Prosecutor*, 39 COLUM. HUM. RTS. L. REV. 202, 221 (2008) (“The absence of credible evidence of disproportionate criminality [justifying disparate arrest rates] should create a rebuttable presumption of racial bias in the arrest process.”).

79. See TODD R. CLEAR, *IMPRISONING COMMUNITIES: HOW MASS INCARCERATION MAKES DISADVANTAGED NEIGHBORHOODS WORSE* 111-17 (2007).

80. E.g., Josh Bowers, *Legal Guilt, Normative Innocence, and the Equitable Decision Not to Prosecute*, 110 COLUM. L. REV. 1655, 1700 (2010) (“Once police have made arrests, it falls to prosecutors to pick up the discretionary slack and determine equitably in which cases to decline prosecution. And prosecutors have significant authority to decline charges for equitable reasons . . . but their professional position leaves them overcautious.” (footnotes omitted)); Angela J. Davis, *Prosecution and Race: The Power and Privilege of Discretion*, 67 FORDHAM L. REV. 13, 31 (1998) (“Prosecutors should bear the brunt of the remedial responsibility to eliminate racism in the criminal process, even though inappropriate or illegal considerations of race may occur at the arrest stage.”); Davis, *supra* note 78, at 203 (“Unwarranted racial disparities cannot be eliminated without the active participation of prosecutors.”).

81. Davis, *supra* note 78, at 31, 65 (“If a prosecutor is aware of the inappropriate or illegal consideration of race at the arrest stage of the process, she may legitimately decide to exercise her discretion to decline prosecution. . . . By declining to prosecute cases where they suspect police misconduct, prosecutors may deter discriminatory law enforcement. Such action would compel police to develop policies to ferret out discriminatory practices and promote the fair and equitable enforcement of the law.”); Marc L. Miller & Ronald F. Wright, *The Black Box*, 94 IOWA L. REV. 125, 156, 165 (2008) (“Once the police complete their work, prosecutors could contribute to the imbalance themselves—or counteract the effects of police work. As they sort through the files that the police deliver to them, prosecutors must select which cases to decline to prosecute At every point along the way, prosecutors could shift the racial mix of the defendants. . . . When prosecutors operate in a system with deep racial imbalances already at work, the prosecutor might need to push back against problems that originate outside the office.”)

proportion of low-level drug crimes, partially ameliorating the disparity.⁸² New Orleans prosecutors have also decreased disparities by using their discretion not to prosecute certain cases.⁸³ Besides changing their charging practices, prosecutors can conduct racial impact studies, and work collaboratively with police to reduce disparities in arrests.⁸⁴

Judges, too, should find ways in which to appropriately respond to the dramatic disparities in drug arrests. One potential way for judges to reduce the impact of these disparities is to generally favor treatment and supervision, rather than incarceration, when sentencing drug offenders.⁸⁵ Arguably, this should even apply to minority offenders with multiple prior convictions. Even if a minority offender has several previous drug convictions, this does not necessarily mean that he or she deserves incarceration. Given the police practices in this country, we can say with virtual certainty that if that person were white, and had engaged in exactly the same behaviors, he or she would not have those convictions—at least not all of them.⁸⁶ Because of the disproportionate focus of police on minority drug users,

82. *Racial Disparities in the Criminal Justice System: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 111th Cong. 8 (2009) (statement of Wayne S. McKenzie, Dir., Prosecution & Racial Justice Program, Vera Inst. of Justice), available at <http://judiciary.house.gov/hearings/pdf/McKenzie091029.pdf> (noting that Milwaukee requires its misdemeanor prosecutors to submit drug paraphernalia charges to a more experienced prosecutor for review and approval prior to prosecution; noting further that “[t]his policy has resulted not only in remedying the disparity, but the overall declination rate of such cases rose significantly”); see also Miller & Wright, *supra* note 81, at 164-65 (discussing the Milwaukee case study). It should be noted that in Milwaukee’s case the source of the disparities was prosecution practices themselves.

83. Miller & Wright, *supra* note 81, at 158 (“In nine of the twenty high-volume crimes [including drug possession] . . . [New Orleans] prosecutors *reduced* the racial imbalance in the pool that they received from the police.”).

84. *Id.* at 166 (“The chief prosecutor takes a leadership role in the community on all matters related to crime control. In this policy leadership role, the prosecutor might use the data about sources of racial disparities to convince others to take action. . . . [A] prosecutor might raise questions about the allocation of police resources in a city. The prosecutor is the one actor with the best information (visible through well-designed data systems) to diagnose possible racial trouble spots.”); see also Davis, *supra* note 78, at 219-22 (advocating for the use of racial impact studies of prosecution practices).

85. This would be legally problematic only in those states where mandatory minimum sentencing statutes do not give judges a choice between sentencing offenders to incarceration or supervision. Of course, judges should still exercise their discretion to sentence some drug offenders to prison when the facts indicate they are likely to endanger public safety.

86. That is, if the defendant were white, he would be less likely to have ever been arrested. Bernard E. Harcourt, *Risk as a Proxy for Race*, 11 CRIMINOLOGY & PUB. POL’Y (forthcoming 2012) (manuscript at 4-8), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1677654 (arguing that giving weight to previous convictions will disadvantage blacks, due to high arrest rates); Davis, *supra* note 78, at 209 (“A white defendant with no

previous convictions are more of a measure of police activity than criminal activity.⁸⁷ The result of uneven drug enforcement is the mass incarceration of run-of-the-mill drug users who pose no identifiable threat to society. As one study demonstrated, nearly sixty percent of drug offenders in state prisons had no history of violence or substantial drug selling.⁸⁸

The answer is not to simply begin arresting large numbers of white drug users and dealers. Not only would that fail to relieve African Americans of their overincarceration, it is not feasible—fiscally or politically—to arrest whites at the same rates as blacks. What must happen, then, is to almost completely stop using incarceration as a way to fight drugs. As the recent Illinois Commission points out, mass incarceration is mainly caused by the overuse of prison for nonviolent drug offenders, and the longstanding emphasis on drug enforcement rather than the prevention and treatment of drug use.⁸⁹ To be sure, illegal drugs (much like the legal drugs alcohol and tobacco) can be extremely harmful and justify strong policy measures. Yet there is considerable evidence that treatment is more cost effective and more effective overall in reducing recidivism, in comparison to incarceration.⁹⁰ This fact has already prompted some states to begin shifting resources away from incarceration and towards treatment, but the transition needs to happen more quickly and completely to ensure disparities are eliminated.⁹¹

criminal arrest or conviction record may have engaged in criminal behavior. If he lives in a community that resolves certain criminal offenses (drug use, assault, etc.) without police intervention, he may be a recidivist without a record. Likewise, a black defendant who lives in a designated ‘high crime’ area may have been detained and arrested on numerous occasions even if he has not engaged in criminal behavior. Thus, the existence or nonexistence of an arrest or conviction record may not reflect criminality.”)

87. See *supra* note 8 and accompanying text.

88. MARC MAUER & RYAN S. KING, THE SENTENCING PROJECT, A 25-YEAR QUAGMIRE: THE WAR ON DRUGS AND ITS IMPACT ON AMERICAN SOCIETY 13 (2007), available at http://www.sentencingproject.org/doc/publications/dp_25yearquagmire.pdf.

89. See ILL. DISPROPORTIONATE JUSTICE IMPACT STUDY COMM’N, FINAL REPORT 2 (2010), available at http://www.centerforhealthandjustice.org/DJIS_FullReport_FINAL.pdf (“Extensive reviews of national and state research reveal that mass incarceration has been driven largely by drug control policies that emphasize enforcement over substance abuse prevention and treatment strategies, and that overuse prison as punishment for drug-law violations.”).

90. JUSTICE POLICY INST., SUBSTANCE ABUSE TREATMENT AND PUBLIC SAFETY 2 (2008), available at http://www.justicepolicy.org/images/upload/08_01_REP_DrugTx_AC-PS.pdf (noting that “[e]very dollar spent on drug treatment in the community is estimated to return \$18.52 in benefits to society,” making it more cost-effective than prison).

91. Encouragingly, the Justice Reinvestment project of the Council of State Governments Justice Center prompted several states to pass legislation decreasing incarceration and investing the savings in services where offenders are concentrated. *Justice Reinvestment*, COUNCIL OF STATE GOV’TS JUSTICE CTR. 3, http://justicereinvestment.org/files/JR_overview_2010_rev.pdf (last visited Jan. 15, 2012).

II. EMPIRICAL RESULTS

Using national databases of anti-disparities reports, I identified twenty-seven states (along with the District of Columbia) that published reports⁹² on racial disparities, nearly always led by the jurisdiction's highest court.⁹³ This section will

92. See *supra* note 4 and accompanying text.

93. ALASKA ADVISORY COMM. ON FAIRNESS & ACCESS, ALASKA SUPREME COURT, REPORT OF THE ALASKA SUPREME COURT ADVISORY COMMITTEE ON FAIRNESS AND ACCESS (1997), available at <http://www.ajc.state.ak.us/Reports/fairness.pdf>; ARIZ. COMM'N ON MINORITIES IN THE JUDICIARY, ARIZ. SUPREME COURT, STRATEGIC PLAN 2006-2008, at 6 (2006), available at http://www.supreme.state.az.us/courtserv/ComMinorities/COM_Strategic_Plan_2006-2008.pdf; CAL. ADVISORY COMM. ON RACIAL & ETHNIC BIAS IN THE COURTS, JUDICIAL COUNCIL OF CAL., FINAL REPORT OF THE CALIFORNIA JUDICIAL COUNCIL ADVISORY COMMITTEE ON RACIAL AND ETHNIC BIAS IN THE COURTS (1997), available at <http://www.courts.ca.gov/documents/rebias.pdf>; COLO. MULTICULTURAL COMM'N, COLO. SUPREME COURT, FINAL REPORT TO THE CHIEF JUSTICE (1998), available at <http://cospl.coalliance.org/fez/eserv/co:3674/sc122c431998internet.pdf>; DEL. COURTS: FAIRNESS FOR ALL TASK FORCE, DEL. SUPREME COURT, REPORT (2009), available at <http://courts.delaware.gov/docs/FAIRNESSFINALREPORT.pdf>; D.C. STANDING COMM. ON FAIRNESS & ACCESS TO THE D.C. COURTS, D.C. COURTS, THE FIRST ANNUAL REPORT (1997), available at <http://www.dccourts.gov/dccourts/docs/FirstAnnualReport.pdf>; FLA. STANDING COMM. ON FAIRNESS & DIVERSITY, FLA. SUPREME COURT, FINAL REPORT: PERCEPTIONS OF FAIRNESS AND DIVERSITY IN THE FLORIDA COURTS (2008), available at http://www.flcourts.org/gen_public/family/diversity/bin/FairnessDiversityReport.pdf; GA. COMM'N ON RACIAL & ETHNIC BIAS IN THE COURT SYS., GA. SUPREME COURT, LET JUSTICE BE DONE: EQUALLY, FAIRLY, AND IMPARTIALLY (1995), available at <http://www.georgiacourts.gov/files/Let%20Justice%20Be%20Done%20part1.pdf>, and <http://www.georgiacourts.gov/files/Let%20Justice%20Be%20Done%20part2.pdf>; IND. COMM'N ON RACE & GENDER FAIRNESS, IND. SUPREME COURT, EXECUTIVE REPORT AND RECOMMENDATIONS (2002), available at <http://www.in.gov/judiciary/fairness/files/fair-pubs-fair-final-report.pdf>; MD. COMM'N ON RACIAL & ETHNIC FAIRNESS IN THE JUDICIAL PROCESS, COURT OF APPEALS OF MD., REPORT OF THE COMMISSION ON RACIAL AND ETHNIC FAIRNESS IN THE JUDICIAL PROCESS (2004), available at <http://www.courts.state.md.us/publications/raciaethnicfairness04.pdf>; MINN. TASK FORCE ON RACIAL BIAS IN THE JUDICIAL SYS., MINN. SUPREME COURT, FINAL REPORT (1993), available at http://www.mncourts.gov/documents/0/Public/Court_Information_Office/Race_Bias_Report_Complete.pdf; NEB. MINORITY & JUSTICE TASK FORCE, *supra* note 7; N.J. COMM. ON MINORITY CONCERNS, N.J. SUPREME COURT, 2009-2011 BIENNIAL REPORT (2011), available at <http://www.judiciary.state.nj.us/reports2011/SCCMC.pdf>; OHIO COMM'N ON RACIAL FAIRNESS, *supra* note 45; OR. TASK FORCE ON RACIAL/ETHNIC ISSUES IN THE JUDICIAL SYS., OR. SUPREME COURT, REPORT OF THE OREGON SUPREME COURT TASK FORCE ON RACIAL/ETHNIC ISSUES IN THE JUDICIAL SYSTEM (1994), available at http://courts.oregon.gov/OJD/docs/OSCA/cpsd/courtimprovement/access/rac_eth_TFR.pdf; PA. COMM. ON RACIAL & GENDER BIAS IN THE JUSTICE SYS., SUPREME COURT OF PA., FINAL REPORT OF THE PENNSYLVANIA SUPREME COURT COMMITTEE ON RACIAL AND GENDER BIAS IN THE JUSTICE SYSTEM (2003), available at <http://www.courts.state.pa.us/NR/rdonlyres/EC162941-F233-4FC6-9247-54BFE3D2840D/0/FinalReport.pdf>; S.D. EQUAL JUSTICE COMM'N, *supra* note 1; TENN. COMM'N ON RACIAL & ETHNIC FAIRNESS, TENN. SUPREME COURT, FINAL REPORT OF

first address the governance of the anti-disparities processes, and then the substantive content of their reports.

A. Governance

Overall, the governance of anti-disparities processes suffers from serious deficits of consistency, transparency, and organization. Four states published reports, yet have not made any of them available on the Internet, and another state also has major reports that are unavailable online.⁹⁴ This transparency deficit makes it difficult or impossible to hold relevant actors responsible for their roles in perpetuating disparities or for failing to follow recommendations to reduce them. Twelve of the twenty-seven states and the District of Columbia published a report, but neglected to publish any subsequent reports such as implementation reports or action plans.⁹⁵ Besides lacking in transparency, this likely indicates a lack of

THE TENNESSEE SUPREME COURT COMMISSION ON RACIAL AND ETHNIC FAIRNESS (1997), available at http://www.tsc.state.tn.us/sites/default/files/docs/report_from_commission_on_racial_ethnic_fairness.pdf; UTAH TASK FORCE ON RACIAL & ETHNIC FAIRNESS IN THE LEGAL SYS., UTAH SUPREME COURT, RACIAL AND ETHNIC FAIRNESS: REPORT ON THE STATE OF THE CRIMINAL AND JUVENILE JUSTICE SYSTEM (2000), available at <http://www.utcourts.gov/specproj/retaskforce/Reportfinal.pdf>; WASH. STATE MINORITY & JUSTICE COMM'N, WASH. STATE SUPREME COURT, 2010 ANNUAL REPORT (2011), available at <http://www.courts.wa.gov/committee/pdf/2010MJCAnnualReport.pdf>; see also *Links to Task Forces, Commissions, and Related Organizations*, *supra* note 4.

In Wisconsin, however, the governor commissioned the report. WIS. COMM'N ON REDUCING RACIAL DISPARITIES IN THE WIS. JUSTICE SYS., FINAL REPORT 27 (2008), available at <ftp://doafpt04.doa.state.wi.us/doadocs/web.pdf>. Michigan's task force issued its report under the authority of the state bar association. MICH. TASK FORCE ON RACIAL/ETHNIC & GENDER ISSUES IN THE COURTS & THE LEGAL PROFESSION, STATE BAR OF MICH., THE IMPACT OF RACIAL/ETHNIC BIAS ON THE CRIMINAL JUSTICE PROCESS 1-2 (1998), available at <http://www.michbar.org/programs/REGissues.cfm>. In Connecticut and Illinois, the task force creating the report was brought into being by a state statute. CONN. COMM'N ON RACIAL & ETHNIC DISPARITY IN THE CRIMINAL JUSTICE SYS., REPORT ON ACTIVITIES 2006-2010, at 5 (2011), available at http://www.ct.gov/redcjs/lib/redcjs/Racial_disparity_report.pdf; ILL. DISPROPORTIONATE JUSTICE IMPACT STUDY COMM'N, *supra* note 89, at iii. Washington has two processes, one initiated by the state supreme court and one by an independent group of citizens and organizations. See *Minority and Justice Commission*, WASH. COURTS, http://www.courts.wa.gov/committee/?fa=committee.home&committee_id=84 (last visited Jan. 15, 2012); *Race and Criminal Justice*, SEATTLE UNIV. SCH. OF LAW, <http://www.law.seattleu.edu/x8777.xml> (last visited Jan. 15, 2012).

94. Idaho, Louisiana, New Mexico, and Nevada have all published reports on criminal justice racial disparities, but those reports are only available in print. See *Racial Fairness State Links*, *supra* note 4 (providing the names and reference numbers of each report). Michigan has published some relevant reports online, while neglecting to make its earlier reports available. See *infra* note 98.

95. These include Alaska, Colorado, the District of Columbia, Georgia, Idaho,

action. That said, it is possible that some of those states took significant steps to combat disparities in their respective criminal justice systems, yet merely neglected to report on these actions. The next phase of this research project will collect data through correspondence and interviews with participants at the state level to determine whether these states have implemented measures to reduce disparities despite their lack of documentation.

Ten states published initial reports, including recommendations, and later published some kind of implementation report indicating their progress.⁹⁶

Indiana, Louisiana, Nevada, New Mexico, Ohio, South Dakota, and Wisconsin. *See* sources cited *supra* note 93.

96. These include Arizona, Connecticut, Florida, Michigan, Nebraska, New Jersey, Oregon, Pennsylvania, Tennessee, and Utah. ARIZ. COMM'N ON MINORITIES IN THE JUDICIARY, *supra* note 93; ARIZ. COMM'N ON MINORITIES IN THE JUDICIAL DEP'T, ARIZ. SUPREME COURT, PROGRESS REPORT (1996), *available at* <http://www.azcourts.gov/Portals/74/COM/Reports/prgrss04.pdf>; CONN. COMM'N ON RACIAL & ETHNIC DISPARITY IN THE CRIMINAL JUSTICE SYS., *supra* note 93; CONN. COMM'N ON RACIAL & ETHNIC DISPARITY IN THE CRIMINAL JUSTICE SYS., ANNUAL REPORT AND RECOMMENDATIONS 2001-2002 (2002), *available at* <http://www.ct.gov/redcjs/lib/redcjs/reports/2002fullreport.pdf>; FLA. RACIAL & ETHNIC BIAS COMM'N, FLA. SUPREME COURT, "WHERE THE INJURED FLY FOR JUSTICE": REFORMING PRACTICES WHICH IMPEDE THE DISPENSATION OF JUSTICE TO MINORITIES IN FLORIDA (1990), *available at* http://www.flcourts.org/gen_public/family/diversity/bin/bias-study-part1.pdf; FLA. RACIAL & ETHNIC BIAS COMM'N, FLA. SUPREME COURT, "WHERE THE INJURED FLY FOR JUSTICE": A TEN-YEAR RETROSPECT ON THE REPORT AND RECOMMENDATIONS OF THE FLORIDA SUPREME COURT RACIAL AND ETHNIC BIAS STUDY COMMISSION (2000), *available at* http://www.flcourts.org/gen_public/family/diversity/bin/bias_study2.pdf; MICH. TASK FORCE ON RACIAL/ETHNIC & GENDER ISSUES IN THE COURTS & THE LEGAL PROFESSION, *supra* note 93 (discussing 1989 reports not available online); NEB. MINORITY & JUSTICE TASK FORCE, *supra* note 7; NEB. MINORITY JUSTICE COMM., NEB. SUPREME COURT, PROGRESS REPORT 2010 (2011), *available at* http://nebar.com/associations/8143/files/MJIC_ProgressReport2010_Final.pdf; N.J. COMM. ON MINORITY CONCERNS, N.J. SUPREME COURT, 2002-2004 REPORT (2004), *available at* <http://www.judiciary.state.nj.us/reports2004/minorityconcerns.pdf>; N.J. COMM. ON MINORITY CONCERNS, *supra* note 93; OR. TASK FORCE ON RACIAL/ETHNIC ISSUES IN THE JUDICIAL SYS., *supra* note 93; OR. TASK FORCE ON RACIAL/ETHNIC ISSUES IN THE JUDICIAL SYS., OR. SUPREME COURT, PROGRESS REPORT OF THE OREGON SUPREME COURT IMPLEMENTATION COMMITTEE: A COMMITMENT TO FAIRNESS (1996), *available at* http://courts.oregon.gov/OJD/docs/OSCA/cpsd/courtimprovement/access/IC/Implementation_Report.pdf; PA. COMM. ON RACIAL & GENDER BIAS IN THE JUSTICE SYS., *supra* note 93; PA. INTERBRANCH COMM'N FOR GENDER, RACIAL, & ETHNIC FAIRNESS, SUPREME COURT OF PA., 2008/2009 ANNUAL REPORT (2009), *available at* http://www.courts.state.pa.us/NR/rdonlyres/6DA14E1B-EDAE-4848-891B-FB96E1E6B10B/0/Interbranch_AR0809.pdf; TENN. COMM'N ON RACIAL & ETHNIC FAIRNESS, *supra* note 93; TENN. COMM. TO IMPLEMENT THE RECOMMENDATIONS OF THE RACIAL & ETHNIC FAIRNESS COMM'N & THE GENDER FAIRNESS COMM'N, TENN. SUPREME COURT, IMPLEMENTING FAIRNESS: THE REPORT OF THE COMMITTEE TO IMPLEMENT THE RECOMMENDATIONS OF THE RACIAL AND ETHNIC FAIRNESS COMMISSION AND THE GENDER FAIRNESS COMMISSION (2000), *available at* http://www.tsc.state.tn.us/sites/default/files/docs/report_of_committee_to_

However, almost none of these were thorough or comprehensive. Pennsylvania, for example, publishes updates each year, but they amount to little more than glossy brochures touting a few initiatives, rather than reports systematically indicating to what extent each recommendation has been implemented.⁹⁷ Michigan's implementation report was oddly unsystematic, discussing the progress of just a tiny fraction of recommendations from previous reports—and these previous reports are not even available online.⁹⁸ Several states published one implementation report, but, years later, there are no additional reports indicating the plan's progress.⁹⁹ Only Nebraska, Oregon, and Washington regularly publish high-quality implementation reports.

B. *Substantive Content*

Disappointingly, a large number of the processes—at least eight of the twenty-four analyzed—are focused solely on the court system, completely ignoring the main sources of disparity.¹⁰⁰ In some cases, it is quite remarkable that the reports managed to avoid these issues, since the reports were obviously well researched, spanning hundreds of pages with numerous chapters.¹⁰¹ A source involved in one state's process indicated that participants from processes in other states had recommended limiting the scope to issues within the courts' direct jurisdiction.¹⁰²

implement_race_ethnic_gender_fairness.pdf; UTAH TASK FORCE ON RACIAL & ETHNIC FAIRNESS IN THE LEGAL SYS., *supra* note 93; UTAH COMM'N ON RACIAL & ETHNIC FAIRNESS IN THE CRIMINAL & JUVENILE JUSTICE SYS., UTAH SUPREME COURT, COMMISSION IMPLEMENTATION REPORT (2004), *available at* <http://www.utcourts.gov/specproj/retaskforce/AnnualReportFinal2004.pdf>.

97. *See Reports*, UNIFIED JUDICIAL SYS. OF PA., <http://www.courts.state.pa.us/Reports/#Interbranch> (last visited Jan. 15, 2012) (providing links to reports by the Pennsylvania Interbranch Commission for Gender, Racial, and Ethnic Fairness).

98. MICH. TASK FORCE ON RACIAL/ETHNIC & GENDER ISSUES IN THE COURTS & THE LEGAL PROFESSION, *supra* note 93, at 254-61. The original reports are not available on the courts' website, and when I asked for copies from an administrator, I was told that no electronic copies existed. E-mail from Anonymous Administrator to author (Sept. 19, 2011) (on file with author).

99. These include Florida, Michigan, Ohio, Tennessee, and Utah. *See* sources cited *supra* note 93.

100. These include Arizona, Colorado, the District of Columbia, Georgia, Maryland, New Jersey, Oregon, and Pennsylvania. *See* sources cited *supra* note 93.

101. For example, the final report put out by Pennsylvania's Committee on Racial and Gender Bias in the Justice System is 554 pages long. *See* PA. COMM. ON RACIAL & GENDER BIAS IN THE JUSTICE SYS., *supra* note 93.

102. The rationales for this advice were (1) a belief that the judiciary should get its own house in order before critiquing other branches of government; (2) a desire to focus on what changes the courts can accomplish themselves; and (3) a fear that including law enforcement in the scope of the anti-disparities process would consume the entire effort. E-

Of course, states choosing to ignore the contributions of law enforcement, prosecution, and social services to disparities are correct that these sectors are not under the direct jurisdiction of the court system. Yet reports respond to this fact in strikingly different ways. Maryland's report responds with public relations concerns: it recommends explaining to the public that the police and prosecutors are not "primarily controlled" by the court system.¹⁰³ This is reminiscent of the classic, "it's not our problem" response, emblematic of the narrow-mindedness and compartmentalization of the most dysfunctional bureaucracies.

Other reports, however, take a more constructive approach. The Final Report of the South Dakota Equal Justice Commission, commissioned by the South Dakota Supreme Court and published in 2006, noted that "[a]lthough the decisions to bring people before the courts are initiated by law enforcement and by prosecutors, the courts need to be ever vigilant not to tolerate or allow racial profiling to go unchecked under the rule of law."¹⁰⁴ As the South Dakota Commission recognizes, the courts have the duty to supervise agencies such as police departments outside of their direct jurisdiction because they have the responsibility to prevent widespread bias from corrupting the rule of law.

Similarly, the Tennessee Supreme Court's Commission on Racial and Ethnic Fairness said the following in its 1997 report: "The Commission urges judicial leaders, including judges, clerks, district attorneys, public defenders and others, to use what influence they have to address bias at any stage in the process, including behavior by law enforcement officials, bail bonding personnel, and retained or appointed counsel."¹⁰⁵ This passage urges judges, prosecutors, and others to become personally involved in efforts to stop the racially biased practices of any criminal justice actors, including police. This supports my argument in Part I.B that prosecutors and judges have an ethical duty to fight unjustified disparities caused by police by altering the way they charge and sentence defendants and working publicly to end disparity-producing policies.¹⁰⁶

Nine of the processes at least mention the uneven enforcement of drug laws.¹⁰⁷ Processes initiated by organizations other than state supreme courts seem to be the most likely to give this issue the prominence it deserves.¹⁰⁸ However, some of the

mail from Anonymous Participant to author (Sept. 21, 2011) (on file with author).

103. See MD. COMM'N ON RACIAL & ETHNIC FAIRNESS IN THE JUDICIAL PROCESS, *supra* note 93, at 42.

104. S.D. EQUAL JUSTICE COMM'N, *supra* note 1, at 9.

105. TENN. COMM'N ON RACIAL & ETHNIC FAIRNESS, *supra* note 93, at 81-82.

106. See *supra* notes 80-84 and accompanying text.

107. These include California, Florida, Illinois, Indiana, Minnesota, Nebraska, Ohio, Washington, and Wisconsin. See sources cited *supra* note 93.

108. Illinois, Washington, and Wisconsin all have projects of this kind. See *Race and Criminal Justice*, *supra* note 93. With regard to Washington, this refers to the more recent

nine states discuss the problem, but then proceed to ignore the issue completely in subsequent reports, as if one of the main sources of disparities—arguably the most glaring human rights violation in the industrialized world—simply does not exist.¹⁰⁹ Unfortunately, the states with the most transparent processes—Nebraska, Oregon, and Washington—were among the states whose implementation reports deal exclusively with disparities within the court system.¹¹⁰

It is possible that the individuals involved in these processes have no choice but to ignore this issue because they have been instructed to limit their scope. Even so, the point is that this is not a plausible way to substantially reduce disparities in the criminal justice system. If these high-level committees will not analyze the whole system, who will? It would be fortunate if police associations or some other law enforcement group would create comprehensive reports examining police practices that cause disparities and calling for their reform, but realistically this is unlikely to occur.¹¹¹

The legislature (or even local governments) could address these issues at any time, but the courts have the responsibility to address issues of fundamental fairness in the criminal justice system. If the court system undertakes the task of analyzing racial disparities, it is negligent and disingenuous to ignore disparities arising from the source of all criminal cases: the police. For courts to say that they are not responsible for vast disparities in conviction rates and imprisonment resulting from racially biased arrest patterns is like a habitual fencer (a buyer of stolen goods) saying that it is not her fault that the goods were stolen, and denying that she should have done anything about the fact they were stolen. Obviously, as soon as the fencer knows the goods are stolen, she has the responsibility to stop selling the goods and turn in the thieves. It should be just as obvious that the courts have a duty to take decisive action when they have good reason to believe—as they have

Task Force on Race and the Criminal Justice System, rather than the Washington State Minority and Justice Commission, which was initiated by the state supreme court.

109. For example, the Nebraska report includes strong language about law enforcement contributions to disparities, and calls for another “commission or task force” to “investigate the disproportionately high minority arrest figures among Nebraska’s law enforcement agencies.” NEB. MINORITY & JUSTICE TASK FORCE, *supra* note 7, at 78. However, there is no indication that Nebraska ever formed such an entity.

110. OR. TASK FORCE ON RACIAL/ETHNIC ISSUES IN THE JUDICIAL SYS., *supra* note 93; NEB. MINORITY & JUSTICE TASK FORCE, *supra* note 7; WASH. STATE MINORITY & JUSTICE COMM’N, *supra* note 93.

111. As discussed below in Part II.C, in Washington a number of actors in the legal system and academia came together to create an anti-disparities process that includes a substantial focus on police practices. *See Race and Criminal Justice*, *supra* note 93. Yet in nearly all states, the supreme-court-initiated process is the only one that exists, and the participants should not count on another process arising that will address the issues they are neglecting.

for years—that the cases the police present to them result from racially biased, unjustified practices.

Even though few state processes are devoting significant attention to disparities in drug enforcement, it is important to note that some of these states have indicated a willingness to confront police and prosecution practices, including some processes initiated by state supreme courts.¹¹² This teaches us that even if a process is court initiated, it can still call for change in other branches of government. Limitations in scope are self-imposed and arbitrary, even if they seem completely natural to the people involved.

As for the need for more programs and services, the results are mixed. On one hand, thirteen states at least mention the need to increase funding for diversion programs, drug courts, alternatives to incarceration, or reentry programs.¹¹³ The Connecticut process even has a working group devoted entirely to these issues.¹¹⁴ On the other hand, only two states, Wisconsin and Illinois, mention the need for social services outside of the criminal justice system, despite the crime-reducing potential of greater investments in this area.¹¹⁵ Moreover, even if many states call for more funding for criminal-justice related programs that might decrease disparities, most of their reports are focused overwhelmingly on issues within the court system.

C. Case Studies

For the purpose of illustration, and of drawing some general lessons useful for other state processes, the following section briefly outlines the governance and content of four states' anti-disparities processes. The discussions of Wisconsin and

112. See, e.g., S.D. EQUAL JUSTICE COMM'N, *supra* note 1, at 2.

113. These include Alaska, Arizona, Connecticut, Florida, Georgia, Illinois, Nebraska, New Jersey, Ohio, Pennsylvania, South Dakota, Utah, and Washington. See sources cited *supra* note 93. For a brief explanation of some of these programs, see Norris, *supra* note 22 (manuscript at 67-72).

114. CONN. COMM'N ON RACIAL & ETHNIC DISPARITY IN THE CRIMINAL JUSTICE SYS., *supra* note 93 ("The Pre-Arrest, Prevention Diversionary and Community-Based Programs Working Group[s] mission is to act as an oversight working group to promote alternatives to arrest through prevention and community-based programs in the state of Connecticut as it relates to criminal justice.").

115. WIS. COMM'N ON REDUCING RACIAL DISPARITIES IN THE WIS. JUSTICE SYS., *supra* note 93, at 6; ILL. DISPROPORTIONATE JUSTICE IMPACT STUDY COMM'N, *supra* note 89. The Wisconsin report recommends that mental health services be made more widely available to those not under the supervision of the criminal justice system. WIS. COMM'N ON REDUCING RACIAL DISPARITIES IN THE WIS. JUSTICE SYS., *supra* note 89, at 6. The Illinois report suggests that greater investment should be made in drug treatment and prevention generally, instead of focusing on the enforcement of drug-related criminal statutes. See *supra* note 89 and accompanying text.

Washington are more detailed because of the long history of their processes, while the experiences of Ohio and California are summarized more briefly.

1. Wisconsin

In 1999, Wisconsin Governor Tommy Thompson convened a commission on racial profiling.¹¹⁶ The resulting report included recommendations on measuring and reducing racial profiling, which twelve years later, have yet to be implemented.¹¹⁷ In fact, a 2007 article by a major black magazine listed Wisconsin as the “worst place to be black,” largely due to the state’s extremely high imprisonment disparities.¹¹⁸ Shocked by the report, then Governor Jim Doyle quickly created a commission to study racial disparities in the criminal justice system.¹¹⁹ A year later, the Commission issued a detailed report calling for, among other things, more data collection, alternatives to incarceration, leadership from judges and prosecutors, and implementing the recommendations of the 1999 profiling report.¹²⁰ Dane County—where Madison is located—later published its own report and recommendations.¹²¹ However, there is no indication that any of the major recommendations in either report have been implemented. The Wisconsin legislature did pass a racial profiling bill, but the new republican legislature and governor repealed it in 2011.¹²² An official speaking off-the-record

116. WIS. COMM’N ON REDUCING RACIAL DISPARITIES IN THE WIS. JUSTICE SYS., *supra* note 93, at 7. In 1991, the Wisconsin Equal Justice Task Force (an entity created by the Wisconsin Supreme Court) issued a final report that dealt solely with gender issues. WIS. EQUAL JUSTICE TASK FORCE, WIS. SUPREME COURT, FINAL REPORT (1991), *available at* <http://wisconsin-divorce.net/files/TC.pdf>.

117. WIS. COMM’N ON REDUCING RACIAL DISPARITIES IN THE WIS. JUSTICE SYS., *supra* note 93, at 7.

118. Based on the ratio of blacks’ and whites’ incarceration rates, the worst states were listed as Wisconsin, Iowa, Texas, Oklahoma, Arizona, Delaware, Nevada, Oregon, California, and Colorado. Bruce Dixon, *Ten Worst Places to Be Black*, BLACK COMMENTATOR (July 14, 2005), http://www.blackcommentator.com/146/146_cover_dixon_ten_worst.html. Interestingly, five of the ten states were western states. *Id.*

119. *Id.*

120. WIS. COMM’N ON REDUCING RACIAL DISPARITIES IN THE WIS. JUSTICE SYS., *supra* note 93.

121. DANE CNTY. TASK FORCE ON RACIAL DISPARITIES IN THE CRIMINAL JUSTICE SYS., FINAL REPORT (2009), *available at* http://danedocs.countyofdane.com/webdocs/pdf/oeo/final_report.pdf.

122. *Gov. Walker Nixes Racial Profiling Data Effort*, NEWS8000.COM (June 22, 2011, 4:09 PM), <http://www.news8000.com/news/Gov-Walker-nixes-racial-profiling-data-effort/-/326/133196/-/7hg5ddz/-/index.html>.

indicated that the main step taken so far to implement the state-level report was anti-racist trainings for police departments.¹²³

While this is a positive step, many challenges remain. In 2009, African Americans in Madison were still seven times more likely than whites to be arrested for drugs.¹²⁴ Madison's Chief of Police, Nobel Wray, an African American, co-chaired the governor's disparities commission, but the drug war in Madison is still being fought disproportionately against minorities.¹²⁵ Racial disparities in Wisconsin have increased dramatically since the first report in 1991, as they have nationwide, despite similar well-meaning reports elsewhere.¹²⁶

2. Washington

In 1980, the revelation that Washington State had the nation's worst racial disparities in incarceration "sparked a firestorm of concern."¹²⁷ Yet it was not until 1986 that policymakers published a major report on the issue.¹²⁸ In reaction to the 1986 report, the Washington State Supreme Court created what is now known as the Washington State Minority and Justice Commission,¹²⁹ which published another report in 1990.¹³⁰ The 1990 report found that a perception of bias was widespread among minorities, but concluded more research was necessary to determine the effects of race at different points in the criminal justice process.¹³¹ Since 1990, the Minority and Justice Commission has published eleven reports,¹³²

123. E-mail from Anonymous Official to author (Sept. 11, 2011) (on file with author).

124. MADISON POLICE DEP'T, 2009 ANNUAL REPORT 25 (2009), available at <http://www.cityofmadison.com/police/documents/2009AnnualReportMPD.pdf>.

125. WIS. COMM'N ON REDUCING RACIAL DISPARITIES IN THE WIS. JUSTICE SYS., *supra* note 93.

126. See Pamela Oliver, *Wisconsin: Total Prison Admissions*, U. WIS., <http://www.ssc.wisc.edu/~oliver/RACIAL/Graphics/WisconsinTotal.htm> (last updated Dec. 25, 2004).

127. Task Force on Race & the Criminal Justice Sys., *Preliminary Report on Race and Washington's Criminal Justice System*, 47 GONZ. L. REV. 251, 254 (2012) (discussing the findings of Scott Christianson, *Corrections Law Developments: Racial Discrimination and Prison Confinement—a Follow-Up*, 16 CRIM. L. BULL. 616, 617 (1980)).

128. GEORGE S. BRIDGES & ROBERT D. CRUTCHFIELD, INST. FOR PUB. POLICY & MGMT., UNIV. OF WASH., RACIAL AND ETHNIC DISPARITIES IN IMPRISONMENT (1986).

129. *Minority and Justice Commission*, *supra* note 93.

130. CHARLES Z. SMITH, WASH. STATE MINORITY & JUSTICE TASK FORCE, WASH. STATE SUPREME COURT, FINAL REPORT (1990), available at <http://www.courts.wa.gov/committee/pdf/TaskForce.pdf>.

131. *Id.* at xxiii.

132. WASH. STATE MINORITY & JUSTICE COMM'N, *supra* note 93; WASH. STATE MINORITY & JUSTICE COMM'N, WASH. STATE SUPREME COURT, 2009 ANNUAL REPORT (2010), available at <http://www.courts.wa.gov/committee/pdf/2009MJCAnnualReport.pdf>; WASH. STATE MINORITY & JUSTICE COMM'N, WASH. STATE SUPREME COURT, 2007-2008

and several empirical studies on various issues ranging from minority judges to drug charging and sentencing practices.¹³³ It has published a newsletter from one

REPORT (2009), *available at* <http://www.courts.wa.gov/committee/pdf/2007-2008Report.pdf>; WASH. STATE MINORITY & JUSTICE COMM'N, WASH. STATE SUPREME COURT, ANNUAL REPORT 2006 (2006), *available at* <http://www.courts.wa.gov/committee/pdf/2006AnnualReport.pdf>; WASH. STATE MINORITY & JUSTICE COMM'N, WASH. STATE SUPREME COURT, ANNUAL REPORT 2005 (2005), *available at* <http://www.courts.wa.gov/committee/pdf/annualReport2005.pdf>; WASH. STATE MINORITY & JUSTICE COMM'N, WASH. STATE SUPREME COURT, BIENNIAL REPORT 2003-2004 (2004) *available at* <http://www.courts.wa.gov/committee/pdf/MJCBiennial2003-04.pdf>; WASH. STATE MINORITY & JUSTICE COMM'N, WASH. STATE SUPREME COURT, 2002 ANNUAL REPORT (2002), *available at* <http://www.courts.wa.gov/committee/pdf/2002%20Annual%20Report.pdf>; WASH. STATE MINORITY & JUSTICE COMM'N, WASH. STATE SUPREME COURT, ANNUAL REPORT 2001 (2001), *available at* <http://www.courts.wa.gov/committee/pdf/MJCAAnnual2001.pdf>; WASH. STATE MINORITY & JUSTICE COMM'N, WASH. STATE SUPREME COURT, 1998 REPORT (1998), *available at* <http://www.courts.wa.gov/committee/pdf/annualReport1998.pdf>; WASH. STATE MINORITY & JUSTICE COMM'N, WASH. STATE SUPREME COURT, 1995-1996 REPORT (1996), *available at* <http://www.courts.wa.gov/committee/pdf/annualReport1995-1996.pdf>; WASH. STATE MINORITY & JUSTICE COMM'N, WASH. STATE SUPREME COURT, 1994 ANNUAL REPORT (1994), *available at* <http://www.courts.wa.gov/committee/pdf/annualReport1994.pdf>; *see also Minority and Justice Commission Publications Available*, WASH. COURTS, http://www.courts.wa.gov/committee/?fa=committee.display&item_id=129&committee_id=84 (last visited Jan. 15, 2012).

133. KATHERINE A. BECKETT ET AL., WASH. STATE MINORITY & JUSTICE COMM'N, WASH. STATE SUPREME COURT, THE ASSESSMENT AND CONSEQUENCES OF LEGAL FINANCIAL OBLIGATIONS IN WASHINGTON STATE (2008), *available at* http://www.courts.wa.gov/committee/pdf/2008LFO_report.pdf; GEORGE S. BRIDGES, WASH. STATE MINORITY & JUSTICE COMM'N, WASH. STATE SUPREME COURT, A STUDY ON RACIAL AND ETHNIC DISPARITIES IN SUPERIOR COURT BAIL AND PRE-TRIAL DETENTION PRACTICES IN WASHINGTON (1997), *available at* http://www.courts.wa.gov/committee/pdf/1997_ResearchStudy.pdf; ROBERT D. CRUTCHFIELD ET AL., WASH. STATE MINORITY & JUSTICE COMM'N, WASH. STATE SUPREME COURT, RACIAL AND ETHNIC DISPARITIES IN THE PROSECUTION OF FELONY CASES IN KING COUNTY (1995), *available at* <http://www.courts.wa.gov/committee/pdf/November%201995%20Report.pdf>; ROBERT D. CRUTCHFIELD ET AL., WASH. STATE MINORITY & JUSTICE COMM'N, WASH. STATE SUPREME COURT, RACIAL/ETHNIC DISPARITIES AND EXCEPTIONAL SENTENCES IN WASHINGTON STATE (1993), *available at* <http://www.courts.wa.gov/committee/pdf/1993SeptRacia%20EthnicDisparitiesReport.pdf>; RODNEY L. ENGEN ET AL., WASH. STATE MINORITY & JUSTICE COMM'N, WASH. STATE SUPREME COURT, THE IMPACT OF RACE AND ETHNICITY ON CHARGING AND SENTENCING PROCESSES FOR DRUG OFFENDERS IN THREE COUNTIES OF WASHINGTON STATE (1999), *available at* <http://www.courts.wa.gov/committee/pdf/FinalReport.pdf>; WASH. STATE MINORITY & JUSTICE COMM'N, WASH. STATE SUPREME COURT, WASHINGTON STATE RACIAL AND ETHNIC MINORITY JUDGES (2009), *available at* <http://www.courts.wa.gov/committee/pdf/MinorityJudges.pdf>; WASH. STATE MINORITY & JUSTICE COMM'N, WASH. STATE SUPREME COURT, RACIAL AND ETHNIC DISPARITIES IN SENTENCING OUTCOMES FOR DRUG OFFENDERS IN WASHINGTON STATE (1999), *available at* http://www.courts.wa.gov/committee/pdf/1996-1999_ResearchStudy.pdf; *see also Minority and Justice Commission Publications Available*, *supra* note 132.

to three times a year since 1999, and has made meeting minutes available online since 1998.¹³⁴ Comparatively, this is a rather high and commendable level of transparency for a state-level anti-disparities process. However, like Nebraska and Oregon—the other two states that regularly publish high-quality implementation reports—the content of the Commission’s work relates almost exclusively to disparities within the court system. The only exception has been the Commission’s involvement in sponsoring a study of drug-charging and sentencing patterns in three counties.¹³⁵ Even so, it is unclear whether this research project had an effect on actual criminal justice practices since subsequent reports have not discussed its impact.

In 2010, comments attributed to two sitting Washington State Supreme Court justices, to the effect that racial disparities in imprisonment are due solely to higher crime rates among African Americans, prompted the creation of an independent research group called the Task Force on Race and the Criminal Justice System.¹³⁶ Unlike any other anti-disparities process, the Task Force is an independent organization initiated by a group of concerned citizens, rather than a government organization. Yet the process is not without high-level participants: the Task Force is co-chaired by a sitting state supreme court justice, and participating organizations include the Minority and Justice Commission, the Washington State Bar Association, several minority bar associations, the state’s three law schools, the Seattle City Attorney’s Office, and various other associations.¹³⁷

The Task Force’s preliminary report, originally released in 2011, focuses to large extent on racial discrimination in law enforcement and prosecution.¹³⁸ The report contains several brief but convincing and well-presented sections on racial disparities in juvenile justice, the assessment of fines, pretrial release decisions, drug arrests, drug-related asset forfeiture, traffic stops, and citations for driving with a suspended license.¹³⁹ Citing Professor Beckett’s research, the section on drug arrests notes that “a rigorous, data-driven 2008 analysis of drug use, delivery, and law enforcement patterns in Seattle indicates that this racial disparity in arrest rates does not reflect the reality of the local drug economy. Nor is it a function of public health, public safety, or civilian complaints.”¹⁴⁰ The report insists, “a less harmful approach to drug law enforcement is necessary,” including a “more equitable enforcement of drug laws” and a focus on “diversion programs” rather than

134. *Minority and Justice Commission Publications Available*, *supra* note 132.

135. ENGEN ET AL., *supra* note 133.

136. Task Force on Race & the Criminal Justice Sys., *supra* note 127, at 253.

137. *Id.* at 251 nn.*-**.

138. *Id.* at 266-98 Part III.

139. *Id.* at Part III.B.1-9, pgs. 266-89.

140. *Id.* at 278-79.

traditional enforcement.¹⁴¹ Of all the anti-disparity reports analyzed in this article, Washington's Task Force may have the strongest emphasis on disparities in drug arrests.¹⁴²

3. Ohio

The 1999 report of the Ohio Commission on Racial Fairness is critical, incisive, and bold, taking a strong stand against disparities in drug enforcement.¹⁴³ It sharply critiques a previous report for explaining away drug-related disparities with unsupported assertions.¹⁴⁴ The report also contains well-thought-out recommendations for more data collection, a comprehensive study of disparities, and alternatives to arrest and incarceration.¹⁴⁵ Despite such a vigorous start, it is unclear what has happened since. It took three years (until 2002) for another document to be released—an action plan, which made clear that almost none of the recommendations of the previous report had been implemented.¹⁴⁶ Since 2002, there have been no follow-up reports. An official explained that no further updates were forthcoming, since the entity creating the reports had ceased to exist, but claimed that many of the recommendations, such as those regarding interpreter services and training for court staff, had been implemented.¹⁴⁷

4. California

Like Ohio's 1999 report, California's 1997 report is an impressive document.¹⁴⁸ It recognizes the importance of police practices and has a unique section about how media influences disparities.¹⁴⁹ The report calls for a comprehensive study of criminal justice disparities, but unfortunately, such a study

141. *Id.* at 280.

142. Illinois's report also emphasizes this issue rather visibly. ILL. DISPROPORTIONATE JUSTICE IMPACT STUDY COMM'N, *supra* note 89, at 1. In fact, the legislation leading to the commission was prompted by stark disparities in drug arrests. *Id.*

143. OHIO COMM'N ON RACIAL FAIRNESS, *supra* note 45, at 42-44.

144. *Id.* at 45-48.

145. *Id.* at 53-55, 81-83.

146. The only recommendations that the report indicates had been accomplished were the creation of an implementation task force and the inclusion of racial and ethnic identification on the Ohio Supreme Court's attorney registration form. *See* OHIO RACIAL FAIRNESS IMPLEMENTATION TASK FORCE, SUPREME COURT OF OHIO, ACTION PLAN 3 (2002), available at <http://www.sconet.state.oh.us/Publications/fairness/Action-Plan-dev.pdf>.

147. E-mail from Anonymous Official to author (Oct. 19, 2011) (on file with author).

148. CAL. ADVISORY COMM. ON RACIAL & ETHNIC BIAS IN THE COURTS, *supra* note 93.

149. *Id.* at 177, 204.

was never done.¹⁵⁰ Nor have there been implementation reports, though various other reports on issues such as gender inequality and sexual orientation in the courts have been published.¹⁵¹ Disparities within California's criminal justice system remain extremely high.¹⁵²

III. RECOMMENDATIONS FOR ACTION

What can these results teach us about how state-level anti-disparities processes can more effectively combat racial disparities? The first four recommendations for action involve the nature of the anti-disparities processes, while the final two relate to the participation of attorneys and other citizens. To summarize, anti-disparities processes should be (1) comprehensive in scope; (2) sponsored, at least in part, by institutional actors outside of the court system; (3) governed in a transparent, participatory, and systematic fashion; and (4) committed to accomplishing their major objective at a rapid pace. Attorneys, criminal justice professionals, and concerned citizens should (5) stimulate criminal justice reform by personal initiative and public activism, rather than expecting high-level processes to effectively combat disparities alone; and (6) recognize their ethical responsibility to act with the utmost urgency to eliminate all racial and ethnic disparities given the country's long history of malign neglect.

A. *Scope*

First, anti-disparities processes should comprehensively analyze the causes and possible solutions to racial disparities—including issues involving police, prosecutors, and social services—regardless of whether the process is sponsored by the courts or by another branch of government.¹⁵³ Because of the courts'

150. *Id.* at 189.

151. CAL. ADVISORY COMM. ON ACCESS & FAIRNESS, JUDICIAL COUNCIL OF CAL., SEXUAL ORIENTATION FAIRNESS IN THE CALIFORNIA COURTS (2001), http://www.courts.ca.gov/documents/sexualorient_report.pdf; CAL. ADVISORY COMM. ON ACCESS & FAIRNESS, JUDICIAL COUNCIL OF CAL., GENDER AND JUSTICE: IMPLEMENTING GENDER FAIRNESS IN THE COURTS (Bobbie L. Welling & Susan Mather eds., 1996), *available at* http://www.courts.ca.gov/documents/imp_rept.pdf; CAL. ADVISORY COMM. ON GENDER BIAS IN THE COURTS, JUDICIAL COUNCIL OF CAL., ACHIEVING EQUAL JUSTICE FOR WOMEN AND MEN IN THE CALIFORNIA COURTS (Gay Danforth & Bobbie L. Welling eds., 1996), *available at* <http://www.courts.ca.gov/documents/f-report.pdf>; *see also Access & Fairness Reports & Publications*, CAL. COURTS, <http://www.courts.ca.gov/7769.htm> (last visited Jan. 15, 2012).

152. *See* HUMAN RIGHTS WATCH, *supra* note 9, at 22 fig.4 (showing that blacks in California are over ten times more likely than whites to be imprisoned for drug offenses).

153. *See* Davis, *supra* note 78, at 223-24 (advocating for comprehensive racial justice task forces analyzing and combating disparities at every stage of the criminal justice process).

responsibility for ensuring the fundamental fairness of all legal processes, it is both illogical and irresponsible for courts to ignore some of the largest sources of disparities, and the most promising methods of reducing them.

B. *Institutional Sponsor*

Second, although the processes initiated by state supreme courts should be expected to research and issue recommendations about all aspects of the criminal justice system, anti-disparities processes created by legislatures (as in Illinois), the governor (as in Wisconsin), or independent groupings of citizens and organizations (as in Washington) may ultimately be more effective in diagnosing disparities and advocating for their reduction. This is both because they will not have the excuse court-initiated processes have—that is, that they lack jurisdiction over police, prosecutors, and social services—and because they will not have to reverse course from a longstanding court-centric approach. In Washington, the supreme-court-initiated Minority and Justice Commission deals mainly with disparities and diversity in the courts, while the Task Force created by interested citizens has a much more comprehensive strategy.¹⁵⁴ The coexistence of two processes need not create tension or cause other difficulties; in fact, the Commission participated in the preparation of the Task Force's first major publication.¹⁵⁵ Moreover, organizations like the Task Force, created despite the existence of a court-focused anti-disparities process, may lead to a fruitful division of labor, in which the court-focused process continues as before, while the new process tackles police, prosecution, and services issues in a focused and determined manner.

C. *Governance*

Third, every anti-disparities process should commit to regular, systematic implementation reports indicating its accomplishments and future plans. If the processes are not publishing reports, implementing recommendations, or accomplishing anything of significance, those responsible ought to be publicly held accountable, whether by prominent individuals or citizen organizations. As part of the task of reporting on implementation, states should commission independent evaluation studies measuring whether any policy changes resulting from the process have succeeded in reducing disparities. This is particularly important because despite the numerous actions carried out in various states, evaluation studies showing that they have reduced disparities are not available.

154. See discussion *supra* Part II.C.2.

155. Task Force on Race & the Criminal Justice Sys., *supra* note 127, at 251 n**.

Ideally, there should be a system somewhat like what the European Union refers to as “the open method of coordination.”¹⁵⁶ Under such a system, each state would be required to annually publish disparities statistics regarding each aspect of the criminal justice system, and outline their completed and planned actions to measure and reduce disparities in annual implementation reports and action plans. In addition, a national organization created for this purpose could publish a yearly report card indicating which states succeeded in reducing disparities, and which states have the highest levels of disparities in each stage of the criminal justice process. This regular system of organized, transparent reporting could stimulate a healthy competition among states, and give ammunition to concerned citizens or groups dissatisfied with their state’s progress—including those participating in the anti-disparities process. In addition, although the participatory aspect of governance is not a major focus of this article, it is important to ensure that a wide range of stakeholders—from various parts of the criminal justice system, as well as civil society groups in the state—are allowed to have input into the content and governance of the processes.¹⁵⁷

D. *Speed*

Fourth, once a state has an anti-disparities process in place, all parties should ensure the process moves forward swiftly, accomplishing major changes such as legislation or significant internal policy shifts as soon as possible. In many states, the anti-disparities processes have proceeded at a snail’s pace, with years going by between reports, which themselves contain hardly anything new or unexpected, leading to few if any substantial initiatives to reduce disparities. In light of the fact that elections can derail anti-disparities processes—as happened in Wisconsin¹⁵⁸—processes should move quickly when they have the chance. For example, states should pass legislation requiring all police, prosecutors, and courts to gather and make publicly available high-quality race and ethnicity data, and interested parties

156. See generally CHANGING EUROPEAN EMPLOYMENT AND WELFARE REGIMES: THE INFLUENCE OF THE OPEN METHOD OF COORDINATION ON NATIONAL REFORMS (Martin Heidenreich & Jonathan Zeitlin eds., 2009).

157. For example, Wisconsin’s process included a number of prominent community leaders from the African American community. These participants were concerned about racial discrimination in the criminal justice system, but they also placed importance on the need to decrease crime by investing in more community and social services in minorities’ communities. Interview with Anonymous Source in Madison, Wis. (Aug. 13, 2011) (interview notes on file with author). This may have resulted in the emphasis on community services in the 2008 report. Moreover, the Washington State process has involved a wide swath of individuals and institutions, such as law schools, research institutes, and minority bar associations. See *supra* notes 136-137 and accompanying text.

158. See *supra* note 122 and accompanying text.

should take the initiative to hold them accountable immediately for practices leading to unjustified disparities.

E. *Public Politics and Activism*

Fifth, while attorneys, criminal justice officials, and other concerned citizens should pressure these state processes to be as transparent, strong, and productive as possible, they should realize that only much larger efforts involving broad-based alliances of civil society groups can accomplish the decisive policy shifts needed to minimize disparities. Given the fact that people are generally defensive in reaction to criticism and resistant to change—a problem likely magnified when bureaucracies are involved—a mere series of reports and meetings is unlikely to be enough to pressure the relevant parties to change. Ultimately, new legislation, significant new funding, and significant policy changes on the part of numerous government agencies from the state to local level will be necessary to eliminate or minimize disparities. A number of tactics—for example, lobbying, media campaigns, protests, new organizations or alliances between them, or electing new officeholders—may be necessary to achieve these changes. Everyone should have high expectations for high-level anti-disparities processes, but it is unrealistic to expect these efforts to succeed in the absence of public pressure from citizens.¹⁵⁹ To ensure that all sectors appropriately address their contributions to disparities, we should ensure that they are all pressured or compelled to change through three types of accountability: top-down accountability, in which the legislative, executive, or judicial branches induce lower-level actors to change; horizontal accountability, in which agencies or other parts of government pressure one another to change; and bottom-up accountability, in which individual citizens or civil society groups pressure government entities to change.¹⁶⁰

159. Interestingly, Arizona's anti-disparities process launched a program called the Building Blocks Initiative, which has an "an emphasis on building constituencies to advocate for change" in the disproportionate involvement of minority youth in the juvenile justice system. Angeline Spain, *Arizona's Building Blocks Initiative*, NAT'L EVALUATION & TECHNICAL ASSISTANCE CENTER (May 2004), http://www.neglected-delinquent.org/nd/resources/spotlight/spotlight_az3.asp; see ARIZ. COMM'N ON MINORITIES IN THE JUDICIARY, *supra* note 93, at 6. This initiative is an example of a semi-official program that contains a prominent organizing and activism component. Yet in many other cases, activism generated by more independent organizations may be more important for stimulating policy changes.

160. See Jesse J. Norris, *Rethinking Accountability in New Governance: Lessons from European Anti-Poverty Processes* (Aug. 30, 2011) (unpublished manuscript) (on file with author).

F. Universal Responsibility and Urgency

Finally, all actors involved in the criminal justice system—and all citizens aware of this problem—must recognize their responsibility to eradicate unjustified disparities from every aspect of the system. Those with the ability to directly reduce disparities, such as police officers, prosecutors, judges, and probation/parole officers, must take personal initiative to document and reduce disparities, even in the absence of direct orders or pressure from authorities. Even if their colleagues or supervisors disfavor such actions, these individuals have the ethical duty to act against unjustified disparities in whatever ways they can. More broadly, everyone should join and actively participate in organized, public campaigns for criminal justice reforms, to maximize the chance that these reforms will succeed.¹⁶¹

Over the last 150 years, our forerunners in the American criminal justice system have stood idly by in the face of horrible injustices, and we must not repeat their mistakes.¹⁶² Today, the situation should be far different. This is a time of unprecedented criminal justice reform, in which jurisdictions across the country are expanding early release policies, repealing mandatory minimum sentences, and taking other measures to reduce incarceration.¹⁶³ Even right-wing figures like Newt Gingrich and Pat Robertson have called for lowering the prison population and reforming drug laws.¹⁶⁴ Now is not a time to be cautious about advocating for change. Yet unfortunately, for the past three decades, criminal justice officials have

161. The content of these campaigns could vary greatly depending on the strategic choices and interests of actors in each state. A large number of criminal-justice-related activist or policy organizations already exist, from Families Against Mandatory Minimums to the Sentencing Project, many of which support policies that, if enacted, would reduce disparities. In *The New Jim Crow*, Professor Alexander devotes a chapter to discussing the need for a new movement to end racial disparities. ALEXANDER, *supra* note 34, at 209-48. Arguing for activism rather than litigation as the main strategy for ending “the new Jim Crow,” she observes that “[t]hroughout most of our nation’s history—from the days of the abolitionist movement through the Civil Rights Movement—racial justice advocacy has generally revolved around grassroots organizing and the strategic mobilization of public opinion.” *Id.* at 213. She writes in favor of a “movement to dismantle the system of mass incarceration,” which openly talks about race rather than engaging in “colorblind advocacy.” *Id.* at 212, 224.

162. See discussion *supra* Part I.A.

163. See *supra* notes 21-22 and accompanying text.

164. Newt Gingrich, in league with Grover Norquist and other prominent conservatives, has launched a “right on crime” movement meant to reduce the prison population. See RIGHT ON CRIME, <http://www.rightoncrime.com> (last visited Jan. 13, 2012). Evangelical leader Pat Robertson recently called for the legalization of marijuana. Sandhya Somashekhar, *Robertson Pleases Pot-Legalization Groups*, WASH. POST, Dec. 24, 2010, at A02, available at <http://www.washingtonpost.com/wp-dyn/content/article/2010/12/23/AR2010122305376.html>.

been repeating history and ignoring the unjustified disparities of the War on Drugs, and policymakers have failed to make the necessary investments in poor communities. High-level commissions should not let this continue, and neither should we.

As the Minnesota Council on Crime and Justice said, “once we know the result” of the justice system’s racial or ethnic bias, “*failure to act* becomes an elevated and egregious form of bias.”¹⁶⁵ There comes a point at which failing to redress bias is itself a form of bias, and we have long passed that point. To allow the system to continue as before is to endorse and participate in practices that have caused a staggering amount of unnecessary suffering for countless individuals and communities. As the Council points out, the fact that institutional racism, and not personal racism, is the primary source of the system’s bias does not affect our ethical duty to act against this injustice.

CONCLUSION

Over the last two decades, the majority of states have created high-level processes to examine and reduce racial disparities in the criminal justice system. Given the widespread and dramatic nature of these disparities, and the convincing evidence that they are unjustified, citizens should expect these processes to comprehensively document and vigorously combat all types of disparities, and particularly the most important sources of these disparities. This article has demonstrated that, unfortunately, these processes have failed to do so. Only about one-third of the twenty-four anti-disparities processes analyzed even mention the largest source of unjustified disparities—the disproportionate enforcement of drug laws in minority communities—and none have resulted in actions that could substantially reduce such disparities. Less than half of the processes mention the need for criminal justice reforms such as alternatives to incarceration, and only two states discuss the lack of needed services in poor communities (such as mental health, substance abuse, and job training services) that encourage vast racial disparities in criminal justice. The governance of the reports is also lacking: only three states regularly publish comprehensive implementation reports, and many states published major reports with no follow-up publications whatsoever.

As outlined in Part III, these results indicate the need for anti-disparities processes to be comprehensive, rather than focusing on disparities within the court system alone; to operate swiftly and vigorously, instead of the slow-moving and half-hearted efforts in many states; and to ensure that the governance of the processes is participatory, transparent, and systematic, and includes regular implementation reports. This article recommends that states consider the creation

165. See *supra* note 2 and accompanying text.

of comprehensive anti-disparities processes not run by the court system, and calls upon attorneys and other citizens to become involved in organized public advocacy for criminal justice reforms, rather than counting on isolated, elite-led processes to somehow extinguish disparities. The shameful history of American criminal justice, which has repeatedly featured the main actors in the criminal justice system ignoring massively discriminatory practices for decades, should motivate all attorneys and criminal justice professionals to demand decisive and aggressive efforts to document and eliminate racial and ethnic disparities in the criminal justice system.