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BENIGN NEGLECT* OF RACISM IN THE CRIMINAL JUSTICE SYSTEM

*Angela J. Davis***

MALIGN NEGLECT: RACE, CRIME, AND PUNISHMENT IN AMERICA. By *Michael Tonry*. New York: Oxford University Press. 1995. Pp. xii, 233. \$25.

In October 1995, two black male teenagers were shopping in a clothing store in Prince George's County, Maryland. A white security guard, who was also an off-duty police officer, approached one of the teens and questioned him about the shirt that he was wearing. The youth explained that he had bought the shirt in that same store the previous week. Even though a black cashier in the store tried to convince the guard that she remembered the teen buying the shirt the previous week, the guard demanded to see the receipt. After the youth told the officer that the receipt was at home, the guard insisted that the boy remove the shirt, leave it in the store, and go home to retrieve the receipt. The humiliated teen removed his shirt in the store, went home without a shirt, and found the receipt. The shirt was eventually returned to him.¹

Just two months later, in December 1995, members of the same Prince George's County Police Department observed three adults sitting in a car smoking crack cocaine. The scene would not have been particularly unusual but for the presence of an infant in the car. However, the response of the police officers proved even more shocking than the presence of the baby. The officers went over to the car, escorted the adults and the child to a local substation, talked with them, and allowed them to go home. No arrest was

* "Benign neglect" was a policy proposed to President Richard M. Nixon in 1970 by then Assistant Secretary of Labor Daniel Patrick Moynihan, suggesting that the federal government did not need to subsidize civil rights because of the educational gains that African Americans had made at that time. See Charles Sumner Stone, Jr., *Thucydides' Law of History, or from Kerner, 1968 to Hacker, 1992*, 71 N.C. L. REV. 1711, 1719 (1993).

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1. See Courtland Milloy, *Teen Stripped of More than Just a Shirt*, WASH. POST, Nov. 15, 1995, at D1, D5.

made, and no charges were filed. The officers were white and so were the crack smokers.²

On January 8, 1996, a young black nursing student was driving her car on Interstate 95 in South Carolina when a white South Carolina State Trooper pulled her over. The trooper approached her car with his gun drawn, yanked the door open, dragged her out, and threw her onto the ground face down, while constantly cursing and screaming at her. He eventually handcuffed her and placed her under arrest. Her crime? Driving fifteen miles per hour above the speed limit.³

Each incident, in its own way, illustrates race discrimination in the criminal justice system.⁴ Few people would doubt that the black skin of the teenager in the clothing store played a significant role in the officer's decision to stop and question him.⁵ Although the incident did not result in an arrest, one wonders what would have happened if the innocent youth had declined to obey the security guard's demands.⁶ Would the officer have verbally or physically

2. See Courtland Milloy, *Unequal Justice in P.G.?*, WASH. POST, Feb. 25, 1996, at B1.

3. *State Trooper Fired in Speeding Incident*, L.A. TIMES, Mar. 10, 1996, at A24. A video camera installed on the dashboard of the trooper's car recorded the entire incident. *Id.*

4. For a discussion of race discrimination in the criminal process, see generally CORAMÆ RICHEY MANN, *UNEQUAL JUSTICE: A QUESTION OF COLOR* 129-219 (1993); THOMAS M. UHLMAN, *RACIAL JUSTICE* 13 (1979); David Cole, *The Paradox of Race and Crime: A Comment On Randall Kennedy's "Politics of Distinction,"* 83 GEO. L.J. 2547 (1995); Charles J. Ogletree, *Does Race Matter in Criminal Prosecutions?*, CHAMPION, July 1991, at 6; *Developments in the Law — Race and the Criminal Process*, 101 HARV. L. REV. 1472 (1988) [hereinafter *Developments in the Law*].

5. Police officers frequently consider race in deciding whether to stop or detain a suspect. See *United States v. Weaver*, 966 F.2d 391, 394 n.2 (8th Cir.) (upholding the use of race as a factor in the detention of a black male in the airport), *cert. denied*, 506 U.S. 1040 (1992); *United States v. Richard*, 535 F.2d 246, 248-49 (3d Cir. 1976) (finding the presence of two black males in a predominately white neighborhood insufficient by itself to constitute probable cause but permissible as one of many factors); *United States v. Collins*, 532 F.2d 79, 82 (8th Cir.) (holding that the color of a person's skin may not serve as the sole identifying factor but may assist police in narrowing the scope of an identification procedure), *cert. denied*, 429 U.S. 836 (1976); *State v. Dean*, 543 P.2d 425, 427 (Ariz. 1975) (holding that police may consider race in deciding whether to stop a Mexican in a predominately white middle to upper-middle class neighborhood); *State v. Ruiz*, 504 P.2d 1307, 1307-09 (Ariz. Ct. App. 1973) (deciding that police may stop a person of Mexican descent in an area not frequented by Mexicans); see also Carol S. Steiker, *Second Thoughts About First Principles*, 107 HARV. L. REV. 820, 855 (1994) ("Given the history of racial discrimination in law enforcement, concern about the 'arbitrariness or bias' of the police as decisionmakers is certainly warranted."). See generally Sheri Lynn Johnson, *Race and the Decision To Detain a Suspect*, 93 YALE L.J. 214 (1983) (discussing and criticizing how police officers consider race as a factor in the decision to detain a suspect); Randall S. Susskind, Note, *Race, Reasonable Articulable Suspicion, and Seizure*, 31 AM. CRIM. L. REV. 327 (1994) (criticizing legal standards that allow the use of race as a factor in the decision to stop a suspect); *Developments in the Law — Race and the Criminal Process*, *supra* note 4, at 1494-1520 (discussing racially-biased police conduct).

6. See generally Rachel Karen Laser, Comment, *Unreasonable Suspicion: Relying on Refusals To Support Terry Stops*, 62 U. CHI. L. REV. 1161, 1172-85 (1995) (arguing that a person's refusal to consent to a police request does not provide a reasonable basis for detaining

abused him? Would he have arrested him?⁷ What if the boy had failed to produce the receipt? Would the officer have stopped a similarly clothed white youth?

The second example involved actual criminality, but the police officers exercised their discretion not to arrest the white perpetrators, even though they routinely arrest blacks merely suspected of drug activity.⁸ When a black officer on Prince George County's police force learned of the incident and questioned the responsible officers, a white officer who supervised the incident said that he did not arrest the crack smokers because they were white.⁹ The third example resulted in an arrest for speeding, an offense for which police officers can use the arrest power at their discretion.¹⁰ Even if the officer had stopped a white motorist for speeding, would he have arrested her? Would he have verbally and physically abused her?

These examples also illustrate the impropriety and inaccuracy of relying on arrest statistics as evidence of criminality.¹¹ Because the arrest process involves so much discretion, arrest statistics may both overestimate and underestimate actual criminal behavior. Furthermore, because no uniform method of documenting an officer's decision *not* to arrest exists,¹² we cannot know the extent to which such decisions skew the arrest statistics currently used as evidence of criminality within particular racial groups. Despite these concerns, Professor Michael Tonry¹³ relies on arrest statistics to support his

that person and noting that African Americans and other minorities would be most affected by the consideration of such refusals).

7. Rude, insulting, and brutal behavior on the part of police officers toward minorities may produce a response or protest that quickly leads to an arrest. See MANN, *supra* note 4, at 150.

8. The release of the white suspects occurred during a two-week special operation that resulted in the arrest of 76 adults. All of the black adults caught with crack cocaine were arrested. The only suspects set free were white. See Milloy, *supra* note 2, at B1.

9. The white officer admitted making this statement but claimed to have been joking. *Id.*

10. See Barbara C. Salken, *The General Warrant of the Twentieth Century? A Fourth Amendment Solution to Unchecked Discretion To Arrest for Traffic Offenses*, 62 TEMP. L. REV. 221, 222 (1989).

11. The Uniform Crime Reports (UCR) published by the Federal Bureau of Investigation considers a crime to be "cleared" when at least one person is arrested, charged, and turned over to the court for prosecution. See FEDERAL BUREAU OF INVESTIGATION, U.S. DEPT. OF JUSTICE, UNIFORM CRIME REPORTS: CRIME IN THE UNITED STATES 376 (1994). The UCR reports the age, sex, and race of arrestees by crime category. *Id.*

12. There has been a dramatic increase in the placement of video cameras in police cruisers. Most of these camera-installation programs have been supported or funded by private groups or insurance companies. See Bill Billiter, *Video Gift to Police Honors Drunk Driving Victim*, L.A. TIMES, Mar. 15, 1996, at 2; David G. Grant, *Police To Use Cameras in Arresting Drunken Drivers*, DETROIT NEWS, Jan. 26, 1996, at C5; *Bridgeville Police Department Buys Two Cameras for Police Cars*, PITTSBURGH POST-GAZETTE, Feb. 26, 1996, at W2.

13. Michael Tonry is Sonosky Professor of Law and Public Policy at the University of Minnesota and the author of numerous books and other publications on crime and sentencing.

conclusion that racial bias in the criminal justice system can explain only a relatively small part of the problem of the overrepresentation of black men in the U.S. prison system (p. 3). In his book, *Malign Neglect: Race, Crime, and Punishment in America*, Tonry argues that the disproportionate incarceration of African Americans was caused primarily by the crime policies of the Reagan and Bush administrations. He seeks to "demonstrate why American crime control policies from 1980 onward did so little good at such great cost and how policies in coming years can do more good at less cost and with much less racial disparity" (p. viii). In so doing, he makes only passing reference to the significance of police discretion (p. 56) and no mention at all of the effect of prosecutorial discretion on racial disparities in the criminal justice system.¹⁴

Tonry persuasively argues that the crime policies of the last two decades have contributed to the disproportionate incarceration of African American men. Instead of seeing these policies as one component of the conundrum of race and crime, however, he identifies them as the primary cause of this complex problem. As a result, he trivializes the role that racial bias plays in the overrepresentation of African-American men in the criminal justice system. Although Tonry acknowledges the existence of discrimination in housing, education, and employment (p. 133), he all but absolves police and other criminal justice officials of discrimination against African Americans (p. 50). He makes an exception in the area of drug arrests — but even here he maintains that police targeting of minority neighborhoods is "tactical" rather than intentionally discriminatory (pp. 105-07). Although he bemoans the dearth of literature explaining these police tactics, he does not express similar concerns about the absence of proof in support of his theories about the motives of the "white-shirted-and-suspended officials of the Office of National Drug Control Policy."¹⁵

Tonry's scathing indictment of unnamed crime policy officials in the Bush and Reagan administrations contrasts curiously with his benign treatment and vindication of police and other criminal justice officials. His charge that Reagan and Bush administration officials malignly neglected the effect of the War on Drugs¹⁶ on African Americans suggests that these officials consciously promulgated policies that they knew would result in the incarceration of disproportionate numbers of African Americans. Indeed, one can hardly imagine a harsher criticism of these policies than Tonry's depiction of the War on Drugs as a "calculated effort foreordained to increase [the] percentages" of African American prisoners (p. 82).

14. See *infra* notes 34-44 and accompanying text.

15. P. 104; see *infra* notes 21-23 and accompanying text for discussion of these theories.

16. See *infra* note 29 for discussion of the War on Drugs.

His discussion of the motives of the architects of the War on Drugs¹⁷ comes close to agreeing with the theories promulgated by those who believe that U.S. crime policies and laws make up part of a conspiracy or genocidal plot to eliminate African Americans.¹⁸

Despite his failure to acknowledge the significance of day-to-day racial bias in the criminal process, Tonry's analyses of the discriminatory impact of the crime policies of the Reagan and Bush administrations (pp. 3-47), and particularly of the War on Drugs (pp. 81-123), are important contributions to the literature on race and crime. Tonry also sets forth thoughtful proposals for changing current policies to ameliorate the disproportionately adverse treatment of African Americans in the criminal justice system (pp. 181-209). Had Tonry confined the scope of his book to demonstrating how the crime policies of the 1980s failed and how they affected black Americans, it would have been more focused and effective.

Part I of this review describes Tonry's analysis of the crime policies of the Reagan and Bush administrations. Part II discusses Tonry's indictment of the War on Drugs and criticizes his failure to acknowledge the effects of discriminatory prosecutorial practices and sentencing laws. Part III critiques Tonry's trivialization of the significance of race discrimination in the criminal justice system more generally. Part IV summarizes Tonry's proposals for change and stresses the importance of documenting, examining, and eliminating racial bias in the criminal justice system.

I. MALIGN NEGLECT — THE CRIME POLICIES OF THE REAGAN AND BUSH ERAS

In Chapter One, Tonry presents his thesis that the crime policies of the Reagan and Bush administrations significantly contributed to the disproportionate incarceration of African Americans. These policies consisted of higher penalties, mandatory minimum sentences, expanded use of the death penalty, and increased prison construction (p. 19). Tonry states that administration officials made many claims to justify these policies — and many that were patently untrue (p. 19). He challenges three of them in particular: (1) that an increase in the use of incarceration would result in a decrease in the crime rate (pp. 19-24), (2) that ninety-five percent of prisoners committed violent or dangerous offenses (pp. 24-26), and (3) that building prisons saves money (pp. 26-28).

Although Tonry does not identify the architects of the War on Drugs that he so harshly criticizes, he names and criticizes two offi-

17. See *infra* notes 21-23 and accompanying text.

18. For a discussion of antiblack conspiracy and genocidal theories, see generally Regina Austin, *Beyond Black Demons & White Devils: Antiblack Conspiracy Theorizing & The Black Public Sphere*, 22 FLA. ST. U. L. REV. 1021 (1995).

cial of the Bush administration — Steven Dillingham, the Director of the Justice Department's Bureau of Justice Statistics, and Attorney General William Barr — for promoting prison expansion. Dillingham and Barr claimed that increased imprisonment leads to reduced crime rates and that reduced imprisonment results in increased crime rates (p. 20). Tonry argues that both Dillingham and Barr attempted to support these conclusions by selectively and deceptively presenting data from the Bureau of Justice Statistics and the Federal Bureau of Investigation's (FBI) *Uniform Crime Reports* (p. 22). Tonry skillfully reanalyzes Barr's data and defeats his claims that the reduced use of prisons between 1960 and 1970 led to a substantial increase in the crime rate and that the 112% increase in incarceration between 1980 and 1990 led to a two percent decline in the crime rate. For example, Tonry reveals that between 1985 and 1990, the period during which the U.S. prison population grew faster than at any prior point in history, the overall crime rate rose by twelve percent, and the violent crime rate rose by thirty-two percent. Through an effective use of charts and graphs, Tonry illustrates how Barr focused upon those time periods that supported his claims while ignoring others that did not (pp. 22-24).

Tonry's attack on the second argument made by the Reagan/Bush officials — that ninety-five percent of those in prison committed dangerous or violent offenses — again shows how they manipulated and deceptively presented statistics. Steven Dillingham presented this argument at the 1991 Attorney General's Crime Summit. Tonry explains that Dillingham arrived at this phenomenal statistic by lumping violent offenders and recidivists together despite the fact that many recidivists have committed only nonviolent, minor crimes such as shoplifting, theft, passing bad checks, and selling small amounts of marijuana or other drugs (p. 25). Tonry then analyzes the 1991 data himself and finds that only 46.6% of state prisoners committed violent crimes, and that the remainder committed property crimes, drug crimes, or public order crimes (p. 25). With respect to recidivism, thirty-eight percent had never been incarcerated before (p. 25).

Tonry attacks the third justification for the crime policies — that imprisonment saves money — with less detail. Tonry notes that the Bush administration relied on a series of cost-benefit analyses of prison use conducted by Edwin Zedlewski of the National Institute of Justice, John DiIulio of Princeton University, and Mark A.R. Kleiman and David Cavanagh of Harvard's Kennedy School of Government. In explaining the flaws in these analyses, Tonry fails to note the cost of prison construction and prisoner maintenance¹⁹ as well as the cost-effectiveness of reserving existing prison space

19. See *infra* note 30.

for the most violent offenders, as he does in a later chapter of the book (pp. 205-06).

Tonry sharply criticizes the crime policies of the 1980s for their effect on black Americans. He contends that African Americans are six to seven times more likely to be in jail or prison than whites, despite the fact that the crime rate among blacks has not increased proportionally since 1980 (pp. 28-29). He refers to a number of studies that investigated the percentages of young black men under the control of the criminal justice system in various cities between 1988 and 1991.²⁰ These percentages, which ranged from twenty-three percent nationwide to fifty-six percent in Baltimore, Maryland, effectively illustrate the gross overrepresentation of young black men as criminal defendants, probationers, parolees, and prisoners (pp. 29-30).

One of Tonry's most interesting and compelling arguments is that the proponents of the crime policies of the 1980s should be held morally responsible for the disproportionate incarceration of young black men. This argument marks the beginning of his stinging indictment of the War on Drugs. Tonry grounds his analysis in the criminal law doctrines of *mens rea* and *actus reus*.²¹ He states that purpose and knowledge are equally culpable states of mind, and that a person who intentionally and purposefully kills has the same level of culpability as a person who causes a death with some other purpose in mind but with the knowledge that a death will most certainly occur.²² Employing this *mens rea* framework, Tonry contends that while the architects of the crime reduction policies may not have implemented them with the precise purpose of confining large numbers of black men, they knew that such disproport-

20. For example, the Sentencing Project's 1990 report showed that twenty-three percent of black men between the ages of twenty and twenty-nine were in the criminal justice system. See p. 29. The October 1995 update concluded that this percentage had increased to 32.2% by 1994. See MARC MAUER & TRACY HULING, *YOUNG BLACK AMERICANS AND THE CRIMINAL JUSTICE SYSTEM: FIVE YEARS LATER 1* (1995). Tonry also discusses similar reports that examined the proportions of young black males in the system in New York State (23%), California (33%), Washington, D.C. (42%), and Baltimore, Maryland (56%). See pp. 29-30.

21. *Mens rea* refers to the mental state required for culpability in criminal law: "[A] person is not guilty of an offense unless he acted purposely, knowingly, recklessly or negligently, as the law may require, with respect to each material element of the offense." MODEL PENAL CODE § 2.02(1) (1962). *Actus reus* refers to the overt act required for culpability: "A person is not guilty of an offense unless his liability is based on conduct that includes a voluntary act or the omission to perform an act of which he is physically capable." MODEL PENAL CODE § 2.01(1) (1962).

22. See p. 32. Tonry's criminal law analogy, while powerful, is somewhat overstated. With the exception of the Model Penal Code's definition of murder, purpose and knowledge generally are not equally culpable states of mind. See MODEL PENAL CODE § 2.02(2) (1962); Paul H. Robinson & Jane A. Grall, *Element Analysis in Defining Criminal Liability: The Model Penal Code and Beyond*, 35 STAN. L. REV. 681, 694-99 (1983) (distinguishing purposeful and knowing acts).

tionate confinement would likely result from their actions. Therefore, according to Tonry, they should be held responsible.²³

Tonry reaches a similar conclusion by applying *actus reus* analysis. The criminal law holds a person responsible for an omission only if the person had a duty to act under existing law.²⁴ Dismissing this doctrine as retrograde, he argues that a person should be expected to save or help someone else if she faces no significant risk of harm in so doing. Thus, says Tonry, if crime-policy proponents could have implemented policies that would not have harmed young, black Americans, they should be held morally responsible for this omission.

Tonry anticipates some responses to his argument. For example, proponents of the crime policies argue that they responded appropriately to the public's demands for harsher penalties for criminals. Tonry contends that the politicians themselves prompted this demand when they used the crime issue to secure votes by instilling fear and making promises to be "tough on crime" (p. 34). He also argues that these politicians dishonestly told the public that crime rates were rising when in fact the crime rate for most serious crimes fell from 1980 through 1986.²⁵

Tonry also takes on the claim that poll data confirmed that the public wanted tougher crime policies. He notes that responses to poll questions usually turn on the form rather than the substance of the questions. For instance, when pollsters offer a choice between "lenient" and "tough" policies, the responses are predictable. Tonry also suggests that people's uninformed first reactions often change after they give informed consideration to a problem (p. 35). He notes that public opinion data show that although Americans want to see offenders punished, they also want to see them rehabilitated and would support community-based sentences for many offenders (p. 35).

Tonry responds next to the argument that the crime policies implemented in the 1980s were not immoral because they did not intentionally discriminate against black Americans. He concedes that

23. The Supreme Court rejected a similar argument in *McCleskey v. Kemp*, 481 U.S. 279 (1987). *McCleskey* argued that the State of Georgia violated the Equal Protection Clause of the Fourteenth Amendment when it adopted a capital punishment statute and allowed it to remain in effect despite its discriminatory impact on blacks. The Court held that *McCleskey* would have to prove that the legislature adopted the statute "because of" not merely "in spite of" its adverse effects on blacks. 481 U.S. at 298 (quoting *Personnel Admr. v. Feeney*, 442 U.S. 256, 279 (1979)).

24. Liability for the commission of an offense may not be based on an omission unless: (1) the statute defining the offense expressly provides as such; or (2) the law imposes a duty to perform the omitted act. See MODEL PENAL CODE § 2.01(3) (1962).

25. Tonry cites data from the Bureau of Justice Statistics of the United States Department of Justice to support his argument. See p. 34.

since the Supreme Court's decision in *Washington v. Davis*,²⁶ a plaintiff must prove intent to discriminate in order to establish a constitutional violation.²⁷ He goes on to say, "that a policy is not unconstitutional does not make it right, or even not wrong" (p. 35).

Finally, Tonry deals with the suggestion that black communities want these harsh policies because they are disproportionately victimized by crime.²⁸ He maintains that although residents of crime-stricken neighborhoods understandably request the removal of guns, gangs, and drug markets from their neighborhoods, they also want solutions to the chronic social and economic problems that cause crime in the first place. Applying common sense, he contends that the fact that people in these neighborhoods support policies that result in the incarceration of some of their neighbors does not mean that they would not prefer policies that would make the very need for such incarceration less likely (p. 37).

II. RACE AND THE WAR ON DRUGS

In Chapter Three, Tonry continues and intensifies his indictment of Reagan and Bush administration officials by focusing on the "architects" of the War on Drugs.²⁹ In uncompromising language, he

26. 426 U.S. 229 (1976).

27. For arguments criticizing the current equal protection standard, see Sheri Lynn Johnson, *Unconscious Racism and the Criminal Law*, 73 CORNELL L. REV. 1016 (1988); Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987); Todd Rakoff, *Washington v. Davis and the Objective Theory of Purpose and Mens Rea: The Tortured Argument of Invidious Intent*, 93 YALE L.J. 111 (1983). See also David A. Sklansky, *Cocaine, Race, and Equal Protection*, 47 STAN. L. REV. 1283, 1318-19 (1995) (arguing against a single set of equal protection rules).

28. See Randall Kennedy, *The State, Criminal Law, and Racial Discrimination: A Comment*, 107 HARV. L. REV. 1255, 1255-61 (1994) (arguing that black communities need more, not less, law enforcement because they are disproportionately victimized by crime). But see David Cole, *The Paradox of Race and Crime: A Comment on Randall Kennedy's "Politics of Distinction"*, 83 GEO. L.J. 2547 (1995), for a critique of this view.

29. See p. 83. Some suggest that President Ronald Reagan launched the modern War on Drugs during a speech he delivered at the Department of Justice on October 14, 1982. See, e.g., Leslie Maitland, *President Gives Plan To Combat Drug Network*, N.Y. TIMES, Oct. 15, 1982, at A1. In that speech, Reagan stated that he would do what was necessary to end the drug menace. *Id.* The Justice Department and the Congress cooperated by concentrating their efforts on drug-law enforcement. See ATTORNEY GENERAL'S TASK FORCE ON VIOLENT CRIME, OFFICE OF THE ATTY. GENERAL, FINAL REPORT 28 (1981) (recommending an "unequivocal commitment to combating international and domestic drug traffic"); UNITED STATES CONG., CHARTER OF THE SENATE DRUG ENFORCEMENT CAUCUS (1982) (identifying a group of 28 Senators who wish to "establish drug law enforcement as a Senate priority"); House Select Comm. on Narcotics Abuse and Control, H.R. REP. NO. 418, 97th Cong., 2d Sess., pts. 1-2, at 50 (1982) (urging the President to "declare war on drugs"). Large amounts of federal resources went to the drug-law enforcement effort. See STEVEN WISOTSKY, BEYOND THE WAR ON DRUGS: OVERCOMING A FAILED PUBLIC POLICY 5-6 (1990) (discussing the increasing involvement of the U.S. military, the FBI, and the CIA in drug intervention efforts). In November 1988, President Reagan signed the Anti-Drug Abuse Act of 1988, P.L. 100-690, 102 Stat. 4181, which established the National Drug Control Policy and created a new executive agency with the mandate of stopping illegal drug trafficking and abuse.

exposes the failure of the War and castigates its proponents. He characterizes the disproportionate incarceration of black Americans as "the product of malign neglect of the war's effects on black Americans" (p. 115). He even goes so far as to suggest that the War was an intentional effort to incarcerate African Americans in large numbers (pp. 104, 123).

Tonry contends that the War on Drugs was a total and abysmal failure. In support of this conclusion, he notes that during the War cocaine prices fell while street sales and drug use remained steady (p. 81). In like manner, arrests doubled; police, prosecution, jail, and court costs more than doubled; and prison costs trebled.³⁰ He also carries out a cost-benefit analysis that shows that the War's costs were tremendous and that it accomplished few if any of its goals.

Tonry presents statistics that graphically illustrate the disparate impact of the War on Drugs on African Americans. For example, he reveals that by the late 1980s, the rate of black drug arrests was five times higher than that of whites, for both adults and juveniles (p. 111). He then makes a startling comparison of national data on black and white drug arrests: between 1985 and 1989, white arrests increased by twenty-seven percent while black arrests increased by 115% (p. 113). In Minnesota, drug arrests of whites increased by twenty-two percent while drug arrests of blacks increased by an astounding 500% (p. 113).

Tonry illustrates that these arrest rates bear no relation to drug use percentages (p. 108). He presents statistics that prove that African Americans are no more likely to use drugs than whites but are far more likely to be arrested, prosecuted, and convicted for drug offenses.³¹ He maintains that the architects made no secret of their intention to carry out the War on Drugs in poor, predominantly minority neighborhoods where drug use and trafficking is open and easy to detect (pp. 105-06). He suggests that police made more drug arrests in these communities because they are easier to pene-

William J. Bennett was appointed as the agency's first director. Bennett proposed a strategy that included massive increases in the penalties and punishment levied on drug offenders, including first-time drug users. See THE WHITE HOUSE, NATIONAL DRUG CONTROL STRATEGY (1989); Diane M. Canova, *The National Drug Control Strategy: A Synopsis*, in *HANDBOOK OF DRUG CONTROL IN THE UNITED STATES* 339-48 (James A. Inciardi ed., 1990).

30. Tonry reports that drug offenders comprised 25 percent of the federal prison population in 1980 and 58 percent in 1992. See pp. 81-82. The annual cost of maintaining one prisoner runs between \$20,000 and \$30,000 while the cost of building a new prison ranges from \$50,000 to \$200,000 per prisoner. See p. 82.

31. The most recent household surveys of the National Institute on Drug Abuse (NIDA) revealed that in 1992 and 1993, African Americans composed only 13% of monthly drug users. See MAUER & HULING, *supra* note 20, at 12. However, African Americans composed 35% of drug possession arrests, 55% of drug possession convictions, and 74% of drug possession imprisonments. See *id.*

trate, but bemoans the dearth of available literature in support of this analysis.³² Tonry's examination of juvenile drug arrests by race provides further evidence that the War was implemented in a grossly discriminatory manner. Citing the criminologist Alfred Blumstein, Tonry notes that white juvenile drug arrests rose from the late 1960s to the early 1980s but then dropped after the early 1980s just as black juvenile drug arrests began to increase sharply (p. 111).

Tonry also agrees with Blumstein's assertion that drug law enforcement declined in the 1970s when drug use was seen as a middle-class white phenomenon but then increased again in the late 1980s when it was seen as a low-income minority phenomenon (p. 112). Using graphs and data on drug use over the near-twenty-year period from 1975 to 1991, Tonry illustrates that drug use was actually in steep decline at the time the Drug War began in the late 1980s (p. 91). He then cites David Musto, a leading historian of American drug policies, for the propositions that American tolerance of drug and alcohol use follows a cyclical pattern, and that harsh, draconian drug policies usually appear during the decline phase of drug use, when societal tolerance is low (p. 92). He quotes Musto's thesis, which states that during this decline phase, drug use becomes associated with "the lower ranks of society, and often with racial and ethnic groups that are feared or despised by the middle class."³³ Tonry contends that this precise phenomenon occurred with regard to crack cocaine during the 1980s.

As mentioned previously, Tonry's harshest indictment of the War on Drugs is his contention that it was "a calculated effort fore-ordained to increase" the percentages of blacks in prison (p. 82). His analysis of how and why the architects of the War targeted black Americans is chilling. Not only did the architects of the War on Drugs specifically target black Americans, but they did so for the benefit of primarily white, nondisadvantaged Americans (p. 95). Citing Emile Durkheim's theory of how laws influence behavior, Tonry maintains that the criminal laws define the outer limits of acceptable behavior and have dramaturgical properties that help shape the values and beliefs of the larger society (p. 95). In other words, the public apprehension and punishment of wrongdoers help socialize others. According to Tonry, "[m]ost people abstain from crime and drug use not because of the immediate threat of penalties but because they are socialized to believe the behaviors are wrong;

32. For one report providing authority for Tonry's claim, see UNITED STATES SENTENCING COMMISSION, SPECIAL REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY 70 (1995) (noting that police have more difficulty targeting dealers who sell to affluent users in upper-class neighborhoods).

33. P. 94 (quoting DAVID F. MUSTO, *THE AMERICAN DISEASE: ORIGINS OF NARCOTICS CONTROL* (1973)).

they are not the kind of people who are tempted (or tempted enough) to do such things" (p. 95). Thus, Tonry suggests that the Reagan officials purposefully began the War on Drugs at a time when drug use was declining in order to take advantage of the low social tolerance of drug use and to reinforce their moral message (p. 96). He concludes that this effort to reinforce the existing norms of white people destroyed the lives of many young black and Hispanic men (p. 97). Tonry maintains that the architects of the War knew that drug use was declining among whites but not among blacks and Hispanics and that blacks and Hispanics would be the primary casualties of the War (p. 104).

Tonry certainly makes interesting arguments, but he provides no evidence to support his strong, almost criminal, accusations against the anonymous architects of the War on Drugs. Furthermore, his conclusions tend to conflict. For example, after he refers to the War on Drugs as a "calculated effort foreordained" to increase the black prison population (p. 82), he later concludes that the most charitable interpretation of the disproportionate increase in the African-American prison population is that it was "a foreseen but not an intended consequence" (p. 115), and the least charitable interpretation is that it was "the product of malign neglect of the war's effects on black Americans" (p. 115). Although the term "malign neglect" suggests behavior that is unintentional yet evil because of its harmful consequences, it does not describe the purposeful, intentional behavior he alleges earlier.

Tonry's analysis also fails to address two of the most significant phenomena that impacted the War on Drugs: discriminatory prosecutorial practices and sentencing laws. Prosecutors have unbridled discretion in deciding whether to charge a suspect, what charge or charges to bring,³⁴ and whether to offer a plea bargain.³⁵ Both charging and plea bargaining decisions have a tremendous effect on the outcome of a case. For example, the decision to charge a defendant with possession of cocaine rather than possession with intent to distribute cocaine could mean the difference between a

34. See *Town of Newton v. Rumery*, 480 U.S. 386, 396 (1987) (holding that prosecutors should be granted broad discretion since it is they, and not the courts, who must evaluate the strength of the case, the allocation of resources, and enforcement priorities); *United States v. Palmer*, 3 F.3d 300, 305 (9th Cir. 1993), *cert. denied*, 114 S. Ct. 1120 (1994) ("[S]eparation of powers concerns prohibit us from reviewing a prosecutor's charging decisions absent a prima facie showing that it rested on an impermissible basis . . ."); *United States v. Chagra*, 669 F.2d 241, 247 (5th Cir.) (noting that the Constitution grants the authority for faithful execution of laws to the executive branch), *cert. denied*, 459 U.S. 846 (1982); see also *United States v. Brock*, 782 F.2d 1442, 1444 (7th Cir. 1986) (asserting that the prosecutorial decision to delay prosecution is a priority decision that should not be subject to judicial review).

35. See *United States v. Moody*, 778 F.2d 1380, 1385-86 (9th Cir. 1985), *amended*, 791 F.2d 707 (9th Cir. 1986) ("There is no constitutional right to a plea bargain, and the decision . . . to offer a plea bargain is a matter of prosecutorial discretion.").

probationary sentence and a lengthy prison term.³⁶ By the same token, a prosecutor may offer a plea bargain that will help a defendant to avoid imprisonment.³⁷ Tonry makes no mention of these decisions or the extent to which race may play a role in them.

Most drug offenses may be prosecuted in either state or federal court.³⁸ Federal prosecutors have played a significant role in the War on Drugs by exercising their discretion to prosecute drug cases in federal court.³⁹ Federal law enforcement agents — under control of a United States Attorney's office — often work with state and local police,⁴⁰ but they make the final decisions themselves.⁴¹ The decision to prosecute in federal court, like the charging and plea bargaining decisions, can mean the difference between probation and a lengthy prison term. The penalties for drug possession, possession with intent to distribute drugs, and distribution of drugs tend to be far harsher in federal court than in state courts.⁴² Although recent cases have alleged discrimination in the exercise of the prosecutorial discretion to bring cases in federal court, the standards for merely getting discovery and an evidentiary hearing are

36. In the federal system, a crack possession charge of four to five grams can result in a sentence of one to two years. See 21 U.S.C.A. § 844 (West Supp. 1996). In contrast, a distribution charge based on a similar amount of crack can result in a sentence ranging from eleven years to life in prison, depending on the defendant's criminal history. See UNITED STATES SENTENCING GUIDELINES [hereinafter USSG] § 5 (1995). In the District of Columbia Superior Court, a crack possession charge can result in a sentence of 180 days, a \$1000 fine, or both. D.C. CODE ANN. § 33-541(d) (1981). However, a conviction for possession with intent to distribute cocaine can result in a sentence of up to thirty years, a \$500,000 fine, or both. See D.C. CODE ANN. § 33-541(a)(2)(A) (1981).

37. See *supra* note 35.

38. See 21 U.S.C. § 801 (1988) (Controlled Substance Act of 1970 § 101, which established broad federal jurisdiction over drug crimes); see also Sandra Guerra, *The Myth of Dual Sovereignty: Multijurisdictional Drug Law Enforcement and Double Jeopardy*, 73 N.C. L. REV. 1159, 1165-66 (1995) (examining federal and state jurisdiction in drug cases).

39. The implementation of the Federal Sentencing Guidelines has greatly increased the power of federal prosecutors. Because the guidelines mandate a particular sentence when certain objective factors apply in a particular case, judges exercise little or no discretion in imposing sentences in federal court. Thus, the charging and plea bargaining decisions of prosecutors often predetermine the outcome of a case. See generally William J. Powell & Michael T. Cimino, *Prosecutorial Discretion Under the Federal Sentencing Guidelines*, 97 W. VA. L. REV. 373 (1995); Jeffrey Standen, *Plea Bargaining in the Shadow of the Guidelines*, 81 CAL. L. REV. 1471 (1993); Elizabeth A. Parsons, Note, *Shifting the Balance of Power: Prosecutorial Discretion Under the Federal Sentencing Guidelines*, 29 VAL. U. L. REV. 417 (1994); Steve Y. Koh, Note, *Reestablishing the Federal Judge's Role in Sentencing*, 101 YALE L.J. 1109 (1992).

40. See Guerra, *supra* note 38, at 1182.

41. See *id.* at 1183.

42. See, e.g., CAL. HEALTH AND SAFETY CODE §§ 11351-11351.5 (West 1991) (Distribution of cocaine results in two- to five-year sentence.); MASS. ANN. LAWS ch. 94c, § 32 (Law. Co-op. 1995) (Distribution of cocaine results in up to a ten-year sentence.); NEV. REV. STAT. § 453.337 (1995) (Distribution of cocaine results in one- to fifteen-year sentence.). The Federal Sentencing Guidelines, by contrast, mandate a sentence of 235 months to life in prison for possession with intent to distribute five grams of crack cocaine. USSG Ch. 5, Pt. A (1996).

set quite high.⁴³ Furthermore, criminal defendants bringing these challenges must prove intentional discrimination by the individual prosecutor, an extremely difficult burden to meet.⁴⁴

The disparity between the federal sentencing laws for powder versus crack cocaine also has a tremendously discriminatory effect on African Americans. The penalties for possession and distribution of five grams of crack cocaine are the same as the penalties for possession and distribution of 500 grams of powder cocaine.⁴⁵ The majority of individuals convicted of all crack cocaine offenses are African American.⁴⁶ By contrast, the majority of those convicted of powder cocaine possession and a significant percentage of those prosecuted for powder cocaine trafficking are white.⁴⁷ The effect of this disparity on the incarceration rate of African Americans in federal prisons has been phenomenal;⁴⁸ yet, Tonry does not mention this in his analysis of the War on Drugs. He does make passing reference to it in his chapter on solutions (pp. 188-89) but incorrectly states that "crack tends to be used and sold by blacks and powder by whites" (p. 188). The 1991 National Household Survey on Drug Abuse conducted by the National Institute on Drug Abuse revealed that of those reporting crack use at least once in that year,

43. Nine black defendants charged with crack cocaine trafficking and firearms offenses in federal court in Los Angeles filed a motion to dismiss the indictment for selective prosecution based on race. They claimed that the U.S. Attorney prosecuted virtually all African Americans charged with crack offenses in federal court and all white crack defendants in state court. Federal courts penalize crack trafficking much more harshly than state courts. See *supra* note 42. The defendants filed a discovery motion to obtain information in support of their selective prosecution claim. The information requested included the criteria for deciding whether to bring charges in federal court and the number and racial identity of all defendants charged with crack offenses in both federal and state court. The District Court granted the motion. The Court of Appeals for the Ninth Circuit affirmed the District Court after a rehearing en banc, holding that a "colorable basis" for selective prosecution entitles a defendant to discovery. See *United States v. Armstrong*, 48 F.3d 1508 (9th Cir. 1995), cert. granted, 116 S. Ct. 377 (U.S. Oct. 30, 1995) (No. 95-157). The Supreme Court granted certiorari to decide the narrow issue of the applicable standard for discovery in selective prosecution claims based on race. On May 13, 1996, the Supreme Court reversed the Ninth Circuit decision, holding that, in order to establish entitlement to discovery in selective prosecution cases based on race, a defendant must produce credible evidence that similarly situated defendants of other races could have been prosecuted, but were not. The Court held that defendants in *Armstrong* did not meet this threshold. *United States v. Armstrong*, 116 S. Ct. 1480 (1996). For a more thorough discussion of selective prosecution claims, see *infra* text accompanying notes 73-84.

44. See *infra* text accompanying notes 79-84.

45. See USSG § 2D1.1 (c)(8) (1996).

46. In 1993, 88.3% of federal prisoners convicted of crack trafficking were black and 84.5% of federal prisoners convicted of crack possession were black. See UNITED STATES SENTENCING COMM., *supra* note 32, at 156.

47. In 1993, 32% of federal prisoners convicted of powder cocaine trafficking were white and 58% of federal prisoners convicted of powder cocaine possession were white. *Id.*

48. A Bureau of Justice Statistics study conducted by Douglas McDonald and Kenneth Carlson suggested that between 1986 and 1990 both the rate and length of imprisonment for federal offenders increased for blacks as compared to whites, primarily because of the disparate federal cocaine laws. *Id.* at 162.

fifty-two percent were white, thirty-eight percent were black, and ten percent were Hispanic.⁴⁹

III. RACIAL DISPROPORTION IN THE CRIMINAL JUSTICE SYSTEM

Tonry falters most when he attempts to support his conclusion that racial bias in the criminal justice system plays a minor role in the disproportionate incarceration of African Americans. Tonry asserts that, although African Americans are present in disproportionate numbers at every stage of the criminal process, their numbers have remained stable at the arrest stage since the 1980s. He maintains that most of the racial disparity in sentencing results from the offending and criminal records of African Americans rather than from racial bias or discrimination in the criminal justice system (p. 49). Finally, he argues that drug law enforcement stands alone as the one notable exception to this rule.⁵⁰

Tonry concedes that some racial bias exists in the criminal justice system, but concludes that "the apparent influence of the offender's race on official decisions concerning individual defendants is slight" (p. 50). Tonry bases this conclusion on his review of the social science literature and statistical studies that compare black and white arrest rates and victim surveys with imprisonment rates.⁵¹

Tonry's conclusions are undermined by several major flaws in his analysis. First, he fails even to acknowledge the literature that suggests the existence of racial bias at various stages of the criminal process, including the arrest, prosecution, trial, and sentencing phases.⁵² Second, he appears to define racial bias in terms of open, intentional biased acts without recognizing the possibility or significance of unconscious racism⁵³ on the part of criminal justice officials. Third, he fails to see the racial bias in his own analyses.

49. *See id.* at 33-39.

50. "Blacks are arrested and confined in numbers grossly out of line with their use or sale of drugs." P. 49. Even though Tonry admits here that there is discrimination in the processing of drug offenses, he places the primary responsibility for that discrimination with the architects of the War on Drugs, not on police and other criminal justice officials. *See infra* section III.A.

51. *See infra* section III.B.

52. *See supra* notes 31 & 46-50 and *infra* text accompanying notes 86-88.

53. Professor Charles Lawrence defines unconscious racism as the ideas, attitudes, and beliefs developed in American historical and cultural heritage that cause Americans unconsciously to attach significance to an individual's race and that induce negative feelings and opinions about nonwhites. He argues that although America's historical experience has made racism an integral part of our culture, because racism is rejected as immoral, most people exclude it from their conscious minds. *See Lawrence, supra* note 27, at 322-23; *see also Johnson, supra* note 27 (discussing unconscious racism in criminal law and procedure).

A. *The Existence of Racial Bias in the Criminal Justice System*

Tonry does acknowledge the existence of racism and discrimination in American society. In fact, he identifies such discrimination and racism as the primary reason for the socio-economic disadvantages that lead to black criminality (pp. 128-34). Tonry also concedes that racism exists in the criminal process,⁵⁴ but he trivializes the discriminatory impact of the policies and discretionary practices of criminal justice officials. There is, in fact, ample evidence that racism plays a role at every stage of the criminal process.⁵⁵ This section will address the two stages — arrest and prosecution — during which some of the most determinative decisions in the criminal process are made. The effect of race and racism on these stages of the process is significant, because many of these determinative decisions are totally within the discretion of police and prosecutors.⁵⁶

1. *Law Enforcement*

With the exception of drug-law enforcement,⁵⁷ Tonry concludes that biased police practices are “not a serious problem” (p. 71). He bases this conclusion on his belief that “few or no reliable, systematic data are available that demonstrate systematic discrimination” (p. 71). He also draws support from a number of other authors.⁵⁸ For example, he cites William Wilbanks for the proposition that “the evidence supporting claims of systematic discrimination against blacks by the police ‘is sparse, inconsistent, and contradictory to the discrimination thesis.’”⁵⁹

54. See p. 49. When Tonry refers to bias in the criminal justice system, he appears to refer to the actions of official criminal justice officials such as police, prosecutors, judges, and other court officials rather than to the actions of citizens who become involved in the criminal justice system, such as grand jurors, petit jurors, victims, and witnesses. See pp. 49-50.

55. See *supra* note 4.

56. Although judges also exercise discretion at every stage of the process, their discretion at the sentencing phase has been greatly diminished by the Federal Sentencing Guidelines and by the increased adoption of mandatory minimum sentencing laws on both the federal and state levels. For a discussion of the effect of the Sentencing Guidelines on judicial discretion, see Charles J. Ogletree, Jr., *The Death of Discretion? Reflections on the Federal Sentencing Guidelines*, 101 HARV. L. REV. 1938 (1988); Hon. Bruce M. Selya & John C. Massaro, *The Illustrative Role of Substantial Assistance Departures in Combatting Ultra-Uniformity*, 35 B.C. L. REV. 799 (1994); Koh, *supra* note 39; Philip Oliss, Comment, *Mandatory Minimum Sentencing: Discretion, the Safety Valve, and the Sentencing Guidelines*, 63 U. CIN. L. REV. 1851 (1995); Parsons, *supra* note 39.

57. See *supra* text accompanying notes 30-33.

58. See p. 71 (citing WILLIAM WILBANKS, *THE MYTH OF A RACIST CRIMINAL JUSTICE SYSTEM* (1987); MANN, *supra* note 4; RACE AND CRIMINAL JUSTICE (Michael J. Lynch & E. Britt Patterson eds., 1991); James J. Fyfe, *Race and Extreme Police-Citizen Violence*, in RACE, CRIME, AND CRIMINAL JUSTICE (R.L. McNeely & Carl E. Pope eds., 1981)).

59. See p. 71 (quoting WILBANKS, *supra* note 58, at 139.)

Tonry actually acknowledges that police treat African Americans differently, but does not seem to appreciate the significance of this discriminatory treatment. He argues that "the fact that police and others too often for no reason other than skin color or style of dress are suspicious of blacks does not, according to the best available evidence, mean that blacks as defendants and convicted offenders are treated fundamentally differently than whites" (p. 51). It is not clear what Tonry means by this statement. He may be suggesting that the fact that police officers discriminate against blacks does not necessarily mean that blacks will suffer discrimination at later stages of the criminal process. He may also be suggesting that the fact that police officers and others are suspicious of blacks because of their skin color or dress is not particularly harmful. Both interpretations fail to appreciate how the nature of the initial police contact may effect the ultimate outcome of a criminal case.

On the other hand, Tonry does not acknowledge the harm inherent in the fact that police officers disproportionately stop and detain African American men when they have neither probable cause for an arrest nor the articulable suspicion required for a "Terry stop."⁶⁰ That police officers are generally more suspicious of blacks, and therefore stop and detain them more frequently than whites, is inherently discriminatory.⁶¹ Such stops and detentions are by their very nature invasive and intrusive.⁶² Also, the fact that police stop and detain blacks more frequently than whites⁶³ naturally results in a disproportionate number of black arrests.⁶⁴ A police stop without probable cause or an articulable suspicion coupled with abusive language or behavior by the police may escalate into a

60. *Terry v. Ohio*, 392 U.S. 1 (1968). *Terry* gives police officers tremendous discretion to stop and detain individuals with little or no guidance as to what constitutes "articulable suspicion." 392 U.S. at 21. Police officers have acknowledged the use of race as a factor in deciding to stop and detain a suspect and courts have approved the use of race in certain circumstances. See cases cited *supra* note 5.

61. See Donald J. Black & Albert Reiss, Jr., *Police Control of Juveniles*, 35 AM. SOC. REV. 63, 63 (1970); Daniel Georges-Abeyie, *Definitional Issues: Race, Ethnicity, and Official Crime/Victimization Statistics*, in *THE CRIMINAL JUSTICE SYSTEM AND BLACKS* (1984); see also Kathryn K. Russell, *The Racial Hoax as Crime: The Law as Affirmation*, 71 IND. L.J. 593, 607-09 (1996) (arguing that young, black men are labeled as deviants before they have any contact with the criminal justice system and that police interactions with black men tend to reinforce existing stereotypes).

62. See *Terry*, 392 U.S. at 24-25.

63. See generally Johnson, *supra* note 5.

64. See DAVID H. BAYLEY & HAROLD MENDELSON, *MINORITIES AND THE POLICE: CONFRONTATION IN AMERICA* 195 (1969); Lois B. Defleur, *Biasing Influences on Drug Arrest Records: Implications for Deviance Research*, 40 AM. SOC. REV. 88, 91-92 (1975); Richard C. Hollinger, *Race, Occupational Status, and Pro-Active Police Arrest for Drinking and Driving*, 12 J. CRIM. JUST. 173, 181-82 (1984); Weldon T. Johnson et al., *Arrest Probabilities for Marijuana Users as Indicators of Selective Law Enforcement*, 83 AM. J. SOC. 681, 691 (1977); Lawrence W. Sherman, *Causes of Police Behavior: The Current State of Quantitative Research*, 17 J. RES. CRIME & DELINQ. 69, 79 (1980).

confrontation that results in arrest whether or not the stop produces other evidence of criminal activity.⁶⁵ The fact that police officers do not make illegal stops of whites with the same frequency necessarily means that whites engaging in criminal activity may more easily evade arrest⁶⁶ and that confrontations between whites and police officers that may escalate into arrests will not occur as often.⁶⁷

To support his argument that arrests are not racially biased Tonry quotes Coramae Richey Mann's observation that "the few available studies of this issue offer support to both sides of the question."⁶⁸ However, Tonry takes Mann's statement out of its context — a comprehensive discussion of the relevant sociological literature that concludes that police officers *do* engage in discriminatory practices and policies.⁶⁹ As such, he engages in the same selective and deceptive use of data of which he accuses former Attorney General Barr. Ironically, Mann notes that "[t]ragically, many white social scientists . . . not only appear blind to the pervasive problem of white police maltreatment of peoples of color, but also disregard documentation proffered by the abused as anecdotal and belittle the opinions of experts in the field, particularly racial minorities with experience and expertise."⁷⁰

2. Prosecution

Tonry also fails to acknowledge that racial bias plays a role during the prosecution stage of the criminal process. Like police officers, prosecutors exercise a tremendous amount of discretion in most of their official decisions, particularly in charging and plea bargaining.⁷¹ Courts have been reluctant to interfere with the exercise of this discretion. They point to the prosecutors' expertise and experience in evaluating which cases warrant prosecution as well as to the separation of powers doctrine.⁷²

There is always potential for abuse whenever such unregulated discretion exists. The Supreme Court has addressed claims of dis-

65. See *supra* note 7.

66. Such random stops might produce evidence of a variety of crimes such as drug offenses, weapons offenses, auto theft, larceny, burglary, and driving while intoxicated. See *supra* text accompanying notes 1-10 for a discussion of the discretionary nature of the arrest power and its discriminatory effect on African Americans.

67. Even when police officers stop white suspects, they may avoid the language and behavior that often lead to such confrontations.

68. P. 71 (quoting MANN, *supra* note 4, at 139).

69. See generally MANN, *supra* note 4, at 133-55.

70. *Id.* at 133-34.

71. See *infra* notes 82-84 and accompanying text; see also James Vorenberg, *Decent Restraint of Prosecutorial Power*, 94 HARV. L. REV. 1521 (1981) (discussing the discretion of prosecutors in charging and other decisions); *Developments in the Law*, *supra* note 4.

72. See *infra* notes 81-82.

criminy prosecutorial decisions to seek the death penalty and to use peremptory strikes during jury selection. In *McCleskey v. Kemp*,⁷³ for example, an African American sentenced to death in Georgia claimed that the prosecutor sought and obtained the death penalty more frequently in cases involving white victims and black defendants than in other cases.⁷⁴ The Supreme Court rejected McCleskey's argument that the administration of the Georgia capital punishment system violated the Equal Protection Clause.⁷⁵ On the other hand, in *Batson v. Kentucky*,⁷⁶ the Supreme Court held that a prosecutor's use of peremptory strikes to eliminate African Americans from juries did violate the Equal Protection Clause.⁷⁷

The fact that so few cases alleging discriminatory prosecution practices succeed may be more a function of the legal limitations on such challenges than the merits of the claims. For example, while criminal defendants may theoretically pursue selective prosecution claims under 42 U.S.C. §§ 1981-83, courts have discouraged these claims by making it very difficult to establish standing.⁷⁸ Furthermore, a plaintiff who manages to establish standing must then demonstrate discriminatory intent — rather than mere disparate impact — to successfully challenge the constitutionality of facially neutral practices and policies.⁷⁹

Defendants more commonly challenge racially selective prosecution by moving for the dismissal of their indictments. Here again, however, the defendant must prove intentional discrimination by an individual prosecutor. In addition, some courts have required defendants to make a *prima facie* showing of discriminatory effect and

73. 481 U.S. 279 (1987).

74. McCleskey proffered a study by David Baldus, Charles A. Pulaski, and George Woodworth, commonly known as the Baldus study, which presents statistical evidence that prosecutors seek and obtain the death penalty more frequently in cases involving white victims. The Baldus study examined 400 factors that may have influenced the sentences of 2400 people convicted of homicide in Georgia. It concluded that those whose victims were white were 4.3 times more likely to receive the death penalty than those whose victims were black. See DAVID C. BALDUS ET AL., *EQUAL JUSTICE AND THE DEATH PENALTY: A LEGAL AND EMPIRICAL ANALYSIS* (1990).

75. See *McCleskey*, 481 U.S. at 291-99.

76. 476 U.S. 79 (1986).

77. The *Batson* Court laid out a three-part test to establish purposeful discrimination in the selection of a petit jury. The defendant must show: (1) that he is a member of a "cognizable racial group"; (2) that the prosecutor exercised peremptory challenges to exclude members of defendant's race; and (3) that the facts raise an inference that the prosecutor used peremptory challenges to exclude jurors based on their race. See *Batson*, 476 U.S. at 96-98.

78. To establish standing, (1) the plaintiff must demonstrate a direct injury-in-fact, see *Warth v. Seldin*, 422 U.S. 490, 501 (1975); (2) the injury must be traceable to the unlawful conduct of the prosecutor, see *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 261 (1977); and (3) the injury must be redressable by the relief that the plaintiff has requested, see *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 38 (1976).

79. See *Washington v. Davis*, 426 U.S. 229 (1976).

purpose before even obtaining an evidentiary hearing on their claim.⁸⁰

Tony would probably agree that the Supreme Court's equal protection analysis should not be the measure of whether particular acts, practices, or policies discriminate against African Americans (p. 35). The requirement that a defendant show intentional discrimination on the part of an individual prosecutor provides no relief for the equally harmful but unintentional discrimination. The fact that a prosecutor can identify a race-neutral justification for his actions does not establish the absence of racist or discriminatory behavior.⁸¹ Indeed, courts permit prosecutors to consider such factors such as the likelihood of conviction, the strength of the evidence, the interest of the victim in prosecution, and the seriousness of the offense in deciding how to resolve a case.⁸² However, prosecutors may subconsciously deem a case involving a white victim and a black defendant as more serious than other cases.⁸³ If a prosecutor views a case as more serious, she will then devote more resources and time toward investigating it and preparing it for trial. Consequently, the "strength of the evidence" and the "likelihood of conviction" will improve. Thus, seemingly race-neutral factors can have a discriminatory impact when the prosecutor engages in subconscious discrimination.⁸⁴

Although difficult standing requirements and equal protection standards have limited the number of successful legal challenges to discriminatory prosecutorial practices, empirical studies consistently demonstrate that race does indeed affect prosecutorial decisions. These studies were conducted in the late 1970s and 1980s, and most of them used multiple regression analysis to control for

80. See *supra* note 43.

81. In his concurrence in *Batson*, Justice Marshall advocated the elimination of peremptory strikes because of his belief that prosecutors could always offer a race-neutral justification for an otherwise discriminatory decision. Justice Marshall argued:

[A]ny prosecutor can easily assert facially neutral reasons for striking a juror, and trial courts are ill equipped to second-guess those reasons. . . . A prosecutor's own conscious or unconscious racism may lead him easily to the conclusion that a prospective black juror is "sullen," or "distant," a characterization that would not have come to his mind if a white juror had acted identically. A judge's own conscious or unconscious racism may lead him to accept such an explanation as well supported. As Justice Rehnquist concedes, prosecutors peremptories are based on their "seat-of-the-pants instincts" as to how particular jurors will vote. . . . Yet "seat-of-the-pants instincts" may often be just another term for racial prejudice.

Batson v. Kentucky, 476 U.S. 79, 106 (1986) (Marshall, J., concurring).

82. See *Town of Newton v. Rumery*, 480 U.S. 386, 396 (1987) (holding that prosecutors should be granted broad discretion since it is they, not the courts, who must evaluate the strength of the case, including the weight of the evidence, the victims' interest in prosecution, and enforcement priorities).

83. See *BALDUS ET AL.*, *supra* note 74.

84. See *Developments in the Law*, *supra* note 4, at 1520-27 (discussing race and the prosecutor's charging decision).

nonracial factors such as the defendant's prior record, the availability of witnesses, the use of weapons, the type of offense, and the victim's prosecution preference.⁸⁵ The studies showed that cases involving black defendants and white victims were prosecuted more vigorously than cases involving white defendants and black victims.⁸⁶ That is, prosecutors sought more serious charges, declined to offer plea bargains, and declined to dismiss at the initial screening more frequently in these cases.⁸⁷ Likewise, they were more likely to dismiss or downgrade charges against white defendants.⁸⁸

One cannot understate the impact of these discretionary decisions by prosecutors on the outcome of a criminal case. The decision to dismiss a case or to offer a plea bargain lies totally within the prosecutor's discretion. Unless the defendant can convince a jury of his innocence, these prosecutorial decisions often determine the outcome of a case. The determinative nature of prosecutorial decisions is further amplified by the existence of federal sentencing guidelines and mandatory minimum sentencing laws that virtually remove the discretionary power of judges at the sentencing stage of the process.

Tonry should hold prosecutors and police responsible for the discriminatory impact of their decisions in the same way that he holds the Reagan and Bush administrations responsible for the discriminatory impact of their crime policies. Tonry seems to base his conclusions about the arrest process on his view that "few or no reliable systematic data are available that demonstrate systematic discrimination" (p. 71). But where are the data, or even the anecdotal evidence, to support his statement that the War on Drugs was a "calculated effort" foreordained to increase the percentages of blacks in prison (p. 82)? Perhaps this conclusion reasonably follows from his belief that the proponents of these policies had to know the likely outcome of their decisions. Tonry, however, refuses to draw any inferences at all about the arrest process. In that context,

85. For an explanation of multiple regression analysis, see Franklin M. Fisher, *Multiple Regression in Legal Proceedings*, 80 COLUM. L. REV. 702 (1980).

86. See WILLIAM J. BOWERS ET AL., LEGAL HOMICIDE 340-44 (1980); William J. Bowers & Glenn L. Pierce, *Arbitrariness and Discrimination Under Post-Furman Capital Statutes*, 26 CRIME & DELINQ. 563, 612-14 (1980); Gary D. LaFree, *The Effect of Sexual Stratification by Race on Official Reactions to Rape*, 45 AM. SOC. REV. 842, 852-53 (1980); Martha A. Myers & John Hagan, *Private and Public Trouble: Prosecutors and the Allocation of Court Resources*, 26 SOC. PROBS. 439 (1979); Michael L. Radelet & Glenn L. Pierce, *Race and Prosecutorial Discretion in Homicide Cases*, 19 LAW & SOC. REV. 587, 615-19 (1985); Cassia Spohn et al., *The Impact of the Ethnicity and Gender of Defendants on the Decision To Reject or Dismiss Felony Charges*, 25 CRIMINOLOGY 175 (1987).

87. For an overview of these studies, see *Developments in the Law*, *supra* note 4, at 1525-32.

88. See *id.*

he demands "reliable, systematic data" — and then he ignores the data already available.

B. *The Evidence of Racial Bias in Tonry's Own Statistical Analysis*

Tonry underestimates the possible effect of discretionary police action on arrest records. Police officers are not required to make an arrest when a crime is reported or even when they witness a crime in progress. However, if a police officer tends to break up bar fights among whites by sending them home and resolves similar fights among blacks by arresting them, the arrest statistics for assault would not accurately reflect criminality among blacks and whites. In other words, the wide discretion of police officers may result in inflated black arrest rates for certain offenses. Because police decisions *not* to stop and *not* to arrest are not documented, it is impossible to know how much or how little arrest rates reflect actual criminality.

There is another problem with using arrest rates to measure criminality. Since only approximately one-third of all individuals arrested for serious offenses are ever formally charged with these crimes,⁸⁹ a comparison of arrest rates with imprisonments rates will not accurately reflect the extent of racial bias in the criminal process. A more accurate measure of racial bias could be achieved by examining the disposition of criminal offenses at each stage of the process.⁹⁰

For example, if a police officer arrests two suspects, one white and one black, for assault with a dangerous weapon, the prosecutor could decide to charge formally the white suspect with misdemeanor assault and the black suspect with felony assault. That decision alone may very well determine whether or not each defendant ultimately goes to prison since it is reasonable to surmise that defendants are more likely to be imprisoned for more serious offenses. Tonry himself states that "the seriousness of the current offense is, by a wide margin, the best predictor of which offenders are sent to prison and for how long" (p. 67). Even if the judge may exercise discretion at the sentencing phase, conscious or unconscious racial bias may affect her decision. Thus, records indicating the disposition of criminal offenses by race at the arrest, prosecution, and sentencing stages would more accurately reflect the extent of racial bias in the entire criminal process than arrest records alone.

89. See Gwynne Peirson, *Institutional Racism and Crime Clearance*, in *BLACK PERSPECTIVES ON CRIME AND THE CRIMINAL JUSTICE SYSTEM* 107, 110 (Robert L. Woodson ed., 1977).

90. See *id.*

Despite the problems inherent in relying on arrest statistics, Tonry relies on Alfred Blumstein's 1982 study of racial arrest and imprisonment patterns to support his conclusion that racial bias plays only a minor role in the criminal justice system.⁹¹ Blumstein's analysis assumes "that in a nonbiased system, racial proportions in arrests would be mirrored in racial proportions imprisoned" (p. 66). Thus, Blumstein compares black arrest rates in eleven categories of offenses with the corresponding black imprisonment rates for these offenses (p. 65).

Tonry's interpretation of Blumstein seems disingenuous at best. Of the eleven categories of offenses for which Blumstein compares black arrest and imprisonment rates, ten categories indicate an unexplained disproportionately high rate of black imprisonment (p. 66). In other words, the percentage of blacks imprisoned for each of these offenses is greater than the percentage of whites arrested for each. For some offenses such as homicide and aggravated assault, the percentage of unexplained disproportionality is relatively low — 2.8% and 5.2% respectively (p. 66). However, for seven other offenses, the percentage is much higher — 26.3 for rape, 27.3 for other violent crimes, 29.5 for public order offenses, 33.3 for burglary, and 45.6 for larceny and auto theft offenses (p. 66). The highest percentage — 48.9 — exists in drug cases (p. 66), the one category in which Tonry concedes the presence of racial bias. Tonry averages the percentages and finds a twenty percent overall rate of unexplained disproportionality in black imprisonment (p. 67).

Tonry's explanation of the disproportionality is weak and inconclusive. He states that the disproportion "might be illegitimate, like conscious racial bias or unconscious reliance on stereotypes detrimental to blacks. Some might result from idiosyncracies of individual judges" (p. 67). Tonry then notes, without committing either way, that some of the disproportionate imprisonment may reflect legitimate considerations like "prior criminal records or the effects of penalties on the offender's family."⁹² Throughout this section, he speaks of racial bias as if it were a hypothetical phenomenon rather than a reality. For example, at one point, he states, "If, for example, black offenders with white victims were punished more harshly than white offenders with white victims, and black offenders with black victims less harshly, the former would reflect bias against black offenders and the latter bias against black victims, and aggregate imprisonment data might reveal neither pattern."⁹³

91. See Alfred Blumstein, *Racial Disproportionality of U.S. Prison Populations Revisited*, 64 U. COLO. L. REV. 743 (1993).

92. P. 67. Here again, Tonry fails to acknowledge that racial bias may affect the prior criminal records.

93. P. 68. See *supra* text accompanying notes 85-87 and note 74 for a discussion of studies that reveal harsher treatment of black defendants in cases involving white victims.

Tonry also examines Patrick Langan's analysis of the 1985 Bureau of Justice Statistics. Langan compared victimization survey data with imprisonment rates in an attempt to account for racial bias in arrest patterns. Tonry asserts that Langan's statistics provide even more proof of his thesis. Here again, however, Tonry overlooks significant percentages of unexplained disproportionality in imprisonment rates.

Langan compares victims' identification of black assailants with black imprisonment rates for five offenses — robbery, aggravated assault, simple assault, burglary, and larceny — in the years 1973, 1979, and 1982. Although the percentages of unexplained disproportionality are insignificant for robbery and larceny, they are quite significant for the other three offenses, particularly for aggravated and simple assault. In 1973, twenty-nine percent of aggravated assault victims reported that their assailants were black but fifty-two percent of prison admissions for this crime were black (p. 76). In 1979, these percentages were twenty-eight and forty-seven, respectively (p. 76). In 1982, the gap widened to twenty-two and fifty, respectively (p. 76). The simple assault category yielded comparable statistics (p. 76). Tonry does not explain these significant disproportions, stating only that they "may be misleading because of small numbers and random variation" (p. 77). As with the Blumstein analysis, he calculates the "average" disproportion for all offenses and reports that "only" twenty percent of the disproportion is unexplained (p. 77). Significantly, Blumstein replicates his study using 1991 data, and the unexplained disproportionality increased to twenty-four percent (pp. 77-78).

Assuming one accepts the legitimacy of the studies by Blumstein and Langan,⁹⁴ they hardly support Tonry's thesis that racial bias is a "relatively small" problem in the criminal justice system. In fact, Tonry's belief that racial arrest proportions would mirror racial imprisonment proportions "in a nonbiased system" would presumably lead him to the conclusion that the system is biased, since those proportions do not even remotely "mirror" one another. The twenty percent disproportionality suggests that the incarceration of a phenomenal number of African Americans may be based, at least in part, on racial bias in the criminal process.⁹⁵ There were over 735,000 African Americans in prison in 1994.⁹⁶ Twenty percent of 735,000, or 147,000, is a staggering number. The more re-

94. Tonry states that official criminal justice records, such as those studied by Blumstein and Langan, "are at least as much an indicator of bureaucratic policies and officials' discretionary decisions as of criminal events." P. 56. Nevertheless, he vouches for the credibility of their findings.

95. Blumstein acknowledges that part, or all of, or even more than the twenty percent could reflect racial bias. Blumstein, *supra* note 91, at 749.

96. See U.S. DEPT. OF JUSTICE, BUREAU OF JUSTICE STATISTICS BULLETIN (Feb. 1996).

cent estimation of twenty-four percent raises the number to over 176,000. Even if only ten percent of the disproportionality resulted from racial bias, the number would still reach 73,000. These numbers cannot justify Tonry's characterization of racial bias as a "relatively small" problem. There would be a significant problem if even 1000 African Americans were imprisoned on this basis. That the widely accepted studies of Blumstein and Langan suggest a much greater number should be a cause for alarm.

IV. PROPOSALS FOR CHANGE

Tonry contends that the African-American crime rate reflects social and economic disadvantage (p. 125). He argues that a just system of punishment would take account of offenders' disadvantaged backgrounds and mitigate their punishments when feasible (p. 151). Tonry notes that "basic changes in the social and economic conditions that shape the lives of disadvantaged black Americans and cause their disproportionate involvement in crime are beyond the power of the criminal justice system" (p. 39). However, he suggests that certain policy changes would help to protect African Americans in the system.

Tonry proposes a six-part harm reduction strategy. Under his first proposal, policy makers would consider the effect of potential policies on racial minorities (p. 182). Tonry criticizes the difficult intent standard in equal protection doctrine⁹⁷ and argues that policy makers must hold themselves to something higher than constitutional minimums. He urges them to enact laws and policies that avoid foreseeable racial disparities (p. 185).

Tonry's second proposal advocates the establishment of a sentencing regime with strong presumptive limits on punishment severity (p. 191). He suggests that upper limits on sentences for particular crimes will avoid unduly harsh outcomes that might otherwise emanate from the biases of particular judges (p. 191).

The third and fourth parts of Tonry's strategy relate to his view that sentencing policies should direct judges to impose the "least restrictive appropriate alternative sentence" (p. 192). The third proposal advocates the repeal of all mandatory penalties so that judges can impose sentences based on the circumstances of each case (p. 195). The fourth proposal, closely related to the third, would allow for the mitigation of sentences as warranted by the offender's characteristics or circumstances (p. 195). Implementation of these proposals would require the repeal of the Federal Sentenc-

97. See pp. 183-84. See *supra* text accompanying notes 79-84 for a discussion of the intent standard.

ing Guidelines established by the Sentencing Reform Act of 1984.⁹⁸ Tonry explains that the Guidelines exacerbated racial disparities in sentencing (pp. 164-70) because its proponents failed to recognize that relatively few middle class and or white offenders are prosecuted in federal court (pp. 167-68).

Tonry's fifth proposal suggests that we reinvest in treatment and other rehabilitative corrections programs (p. 201). He discusses studies that examine the effectiveness of treatment programs and concludes that certain types of treatment programs do reduce recidivism (p. 202). He anticipates and meets the argument that we should not provide services to criminals that we do not provide to law-abiding citizens by pointing out that the government already pays \$25,000 to \$35,000 per year to house, feed, and otherwise support an adult prisoner while paying little or nothing to support his law-abiding brother (p. 204). Finally, he notes that money to invest in treatment programs would become available if the government stopped investing so much in failed crime-control policies like interdiction and the imprisonment of nonviolent offenders (pp. 205-06).

Finally, Tonry urges elected officials to deal honestly with the public. He asks them to stop pandering to public fears, to have a frank and open discussion about the ineffectiveness of current crime policies, and to discontinue policies that do not work and that worsen the lot of blacks in America (p. 180).

All of Tonry's proposals are viable, sound suggestions that could help to lessen the injustices in the current system. The improvements that could result from his proposals would inure to the benefit of all citizens, including African Americans. Some of the proposals, particularly his proposal that policymakers consider the potential racial impact of crime policies, might even help to reduce racial bias in the criminal process.

Tonry's underestimation of racial bias in the criminal justice system undoubtedly explains his failure to propose solutions for its elimination. He appears satisfied with his conclusion that racial bias is not "the principal reason" that blacks are disproportionately imprisoned (p. 79). In fact, he suggests that it would be "more socially constructive" to change socioeconomic conditions and criminal justice policies than to "ferret out a willful and pervasive racial bias in a criminal justice system in which most officials and participants believe in racial equality" (p. 80).

Should we not do both? The ferreting out of racial bias in the criminal justice system, whether willful or unintentional, occasional or routine, should be a priority in a civilized and just society. As

98. See Pub. L. No. 98-473, tit. 2, ch. 2, 98 Stat. 1837, 2017-2026 (1984) (codified as amended at 28 U.S.C. §§ 991-998 (1994)).

Justice Blackmun noted in his dissent in *McCleskey*, “ ‘Discrimination on the basis of race, odious in all aspects, is especially pernicious in the administration of justice.’ . . . Disparate enforcement of criminal sanctions ‘destroys the appearance of justice and thereby casts doubt on the integrity of the judicial process.’ ”⁹⁹

The important question is not whether racial bias is a “major” or “minor” cause of the disproportionate imprisonment of African Americans. The focus should be on how to discover and eliminate racial bias in the criminal justice system, wherever and whenever it exists. Law enforcement experts and criminologists should examine and propose solutions to the problem of racial bias in the discretionary arrest decisions of police officers. We should consider monitoring both police and prosecutor conduct.¹⁰⁰ The monitoring of police conduct alone could have an effect on racially biased conduct. The discovery of discriminatory practices and policies will help us to formulate policies which protect all citizens without discriminating against some.

99. 481 U.S. 279 at 346 (Blackmun, J., dissenting) (quoting *Rose v. Mitchell*, 443 U.S. 545, 555-56 (1979)).

100. Eleven states and the District of Columbia have published reports on race and ethnic bias in their courts. See JUDITH RESNIK, ACTIVITIES AND PUBLICATIONS OF COURTS AND ORGANIZATIONS OF JUDGES AND BAR ASSOCIATIONS CONCERNED ABOUT THE EFFECTS OF GENDER, RACE, AND ETHNICITY IN THE COURTS AND LEGAL PROFESSION 11-12 (Nov. 1995). The reports published in Florida, New Jersey, and New York recommended that police practices be monitored. See Amicus Brief of the NAACP Legal Defense Fund in Support of the Respondent in *United States v. Armstrong*, Appendix A, at 3a, 12a-13a. The reports published in Georgia, Iowa, New York, and Oregon recommended that prosecutors' discretionary decisions be documented and monitored. See *id.* app. A, at 5a-6a, 8a, 12a-13a, 15a.