

Criminal Justice and Civil Rights Primer

10.27.2015

The Leadership Conference on Civil and Human Rights

Introduction

Without doubt, the tragic events in Ferguson, Baltimore, North Charleston, and other U.S. cities provide an inflection point for our nation—and an urgent opportunity to discuss and address systemic and widespread racial disparities and bias in society and in the criminal justice system.

Last year, President Obama announced a series of reforms in response to the police shooting of unarmed black teenager Michael Brown in Ferguson, Missouri, and similar shootings across the country. Among the reforms are initial investments in body-worn cameras and community policing, as well as the creation of a task force to study best practices in 21st century community policing.

These are important down payments on the systemic reforms needed to address this national crisis. However, advocates believe it will take a much greater investment in community policing and an outright ban on profiling to drive the significant changes necessary to reform law enforcement. It will also take deep-seated changes to the court and prison systems to start correcting the biases in policing, sentencing, and incarceration that plague our justice system.

Unjust bias in the justice system also leads to racial disparities in sentencing and incarceration rates: Between 2007 and 2009, black men received federal sentences that were 14 percent longer than those for white men with similar arrest offenses.¹ Blacks and Latinos make up 56 percent of those incarcerated,² yet only 30 percent of the U.S. population.³ The United States is the world's leading jailer with 2.2 million people behind bars. It is a system that costs the United States \$80 billion a year. Furthermore, the road to reintegration into society is obstructed by federal and state policies that negatively affect the formerly incarcerated after their release, all but ensuring that 67 percent will recidivate.⁴

New technology has provided an increasingly ubiquitous tool with the potential to build trust between police and the communities they serve. It can also help enhance accountability and transparency in policing and the justice system overall. At the same time, the arrival of new

technology does not guarantee that a police agency will better protect the civil rights of the community it serves. Such technology could also be used to intensify disproportionate surveillance and disproportionate enforcement in heavily policed communities of color. Without the right safeguards, there is a real risk that these new tools could become instruments of injustice.

Discriminatory Law Enforcement and Prosecutorial Practices

Racial Profiling

Racial profiling – which occurs when law enforcement authorities target particular individuals based not on their behavior, but rather on the basis of personal characteristics, such as their race, ethnicity, national origin, or religion – is an unjust and ineffective method of law enforcement that makes us less, not more, safe and secure. The practice is nonetheless pervasive and used by law enforcement authorities at the federal, state, and local levels.⁵ More than a decade after President George W. Bush announced that racial profiling is “wrong and we will end it in America,” communities of color across the country are still subjected to profiling in a variety of contexts.

Racial profiling is consistently shown to be an ineffective law enforcement tactic.⁶ It wastes police resources by diverting attention away from proven, more effective, evidence-based law enforcement techniques. For example, across the United States, traffic stops and “stop and frisk” practices are often used as a pretext for determining whether minority individuals are engaged in criminal activity. In 2011, the most recent year for which there is “stop and frisk” data, Black drivers were more likely than white drivers and Hispanic drivers to be searched by police during a traffic stop.⁷ The data indicated that people of color, including African Americans and Latinos, are no more likely, and very often less likely, to have drugs or weapons than whites.⁸ By relying on stereotypes rather than lawful investigative procedures, the lives of innocent people are needlessly harmed by law enforcement agencies and officials.

In the aftermath of the 9/11 terrorist attacks, the federal government focused massive investigatory resources on Arabs, Muslims, South Asians, and Sikhs, singling them out for questioning, detention, and other law enforcement activities. Many of these counterterrorism initiatives involved racial profiling. In the 14 years since the terrorist attacks, the anti-racial profiling consensus that had developed prior to 9/11 evaporated and the use of racial profiling has expanded, not only in the counterterrorism context, but also in the context in which it originally arose – the fight against drug trafficking and other “street-level” crimes – as well as in the effort to enforce immigration laws.⁹

Though incomplete, the Department of Justice’s (DOJ’s) 2014 Guidance for Federal Law Enforcement Regarding the Use of Race, Ethnicity, Gender, National Origin, Religion, Sexual Orientation, or Gender Identity,¹⁰ provides an example for state and local law enforcement

agencies of unbiased law enforcement practices. There have also been some legislative efforts to tie federal funding to a requirement of state, local, and Indian tribal law enforcement agencies to collect data on both routine and spontaneous investigatory activities. The End Racial Profiling Act (ERPA) would authorize DOJ to provide grants to state and local law enforcement agencies for the development and implementation of best policing practices, such as technology integration, and other management protocols that discourage profiling.

Police Misconduct

Accounts of police misconduct and police brutality throughout the 1960s and 1970s are burned into the public consciousness of the United States. In its recent report to the Committee on the Elimination of Racial Discrimination (CERD), the U.S. government notes its efforts to address the persistent problem of police brutality and racial profiling – most notably, DOJ’s recent investigation of the New Orleans Police Department, which led to one of DOJ’s most comprehensive reform agreements in its history.¹¹

As the government report states, between FY 2009 and FY 2012, the DOJ aggressively investigated police departments, prisons, and other institutions to ensure compliance with the law and to bring legal action where necessary against both institutions and individuals.¹²

While strides have been made in the areas of police misconduct and brutality, federal, state, and local police continue to disproportionately use force and use more deadly force against individuals and communities of color.¹³ Anecdotal evidence of individual cases suggests that police continue to use force and other law enforcement tactics disproportionately against individuals of color. However, there is a great need for reliable and comprehensive data disaggregated by race.¹⁴ The National Police Misconduct Statistics and Reporting Project, run by the Cato Institute, reports that there were 4,861 unique reports of police misconduct that involved 6,613 sworn law enforcement officers and 6,826 alleged victims in 2010, the most recent year for which there is data.¹⁵ There were 247 deaths associated with the tracked reports in 2010 and 23.8 percent of the reports involved excessive use of force, followed by sexual misconduct complaints at 9.3 percent.¹⁶ States have spent an estimated \$346 million on misconduct-related civil judgments and settlements, not including sealed settlements, court costs, and attorneys’ fees.¹⁷ For example, the New York Police Department was recently found liable for a pattern and practice of racial profiling and unconstitutional stop-and-frisks.¹⁸

Additionally, abuses by the U.S. Customs and Border Protection (USCBP), the largest federal law enforcement workforce, which is responsible for safety and security for the nation’s borders and surrounding communities, have recently come to light.¹⁹ From 2010 to 2013, at least 22 people have been killed by Border Patrol agents, most along the Southwest border, and hundreds have filed formal complaints of official misconduct, including beatings, sexual abuse, and other assaults. Reports indicate USCBP failed to properly investigate these claims and refused to tell families of

those injured or killed by border agents if the agency had determined that the agent had acted improperly or had been disciplined.²⁰

DOJ's Special Litigation Section investigates state and local law enforcement agencies for compliance with federal civil rights law, including claims of police misconduct.²¹ Civil enforcement actions by the Special Litigation Section are small in number: the Section has had only 33 cases and matters since the year 2000, a miniscule number compared to the number of reports of police misconduct throughout the country.²² Furthermore, the Special Litigation Section has not opened matters in some of the jurisdictions with the highest police misconduct reporting rates, such as Galveston, TX, Lee County, PA, and Denver, CO.²³ Criminal prosecution of police for misconduct is even less common, compounded by the "code of silence," under which police cover up evidence or refuse to testify, making the investigation and prosecution of these cases extremely difficult.²⁴ Prosecution, conviction, and incarceration rates for police are all much lower than the rates for ordinary citizens.²⁵

Impact of Prosecutorial Discretion on Individuals of Color

Prosecutorial discretion has disproportionately negative effects on defendants of color.²⁶ Black and Hispanic defendants, all else being equal, are more likely than whites to be sentenced to terms of incarceration.²⁷ And according to the U.S. Sentencing Commission, "differences in charging and plea practices have contributed to federal sentencing disparities."²⁸ Moreover, Black defendants in the federal system typically receive sentences that are almost 10 percent longer than comparable whites arrested for the same crime and that the prosecutor's initial charging decision can account for at least half of this disparity.²⁹ A number of factors contribute to this difference, including the fact that federal prosecutors can be almost twice as likely to file charges carrying mandatory minimum sentences against black defendants.³⁰ Black and Hispanic defendants are also less likely to be offered alternatives to detention.³¹

In August 2013, DOJ announced a new policy to guide prosecutorial discretion in U.S. Attorney offices, which aims to ensure that low-level, nonviolent drug offenders who have no ties to large-scale organizations, gangs, or cartels will not be charged with offenses that impose mandatory minimum sentences. Attorney General Holder also called for enhanced use of diversion programs such as drug treatment and community service initiatives. Data suggest that federal drug prosecutions have been at their lowest point in more than twenty years.³²

Pre-trial Justice

On any given day, 60 percent of the U.S. jail population is composed of people who are not convicted but are being held in detention as they await the resolution of their charge. Studies indicate that courts are more likely to view African Americans³³ and Latinos³⁴ as flight risks or

public threats; these groups³⁵ more often receive higher bail or mandatory pretrial detention. And because African Americans, Latinos and persons with disabilities are disproportionately poor, setting higher bail for them increases the likelihood that they will be unable to pay for release.³⁶ In county courts across the nation, an average³⁷ of 30 percent of pretrial detainees who are given bail less than \$5,000 cannot afford the payment.³⁸

Disparities in Sentencing

Today, African Americans and Latinos constitute about 60 percent of imprisoned individuals. African American males are six times more likely to be incarcerated than non-Hispanic white males. For black males in their thirties, one in every ten is in prison or jail on any given day. Hispanic males are imprisoned at about 2.5 times the rate of non-Hispanic whites. Racial and ethnic disparities among women are less substantial than among men but remain prevalent.³⁹ A comprehensive review conducted for the National Institute of Justice concluded that “Black and Hispanic offenders sentenced in State and Federal courts face significantly greater odds of incarceration than similarly situated white offenders.”⁴⁰

The proliferation of the use of mandatory minimum penalties, particularly at the federal level, as a result of the “War on Drugs” has had a significant impact on minority communities and fueled the country’s incarceration rates. For example, the U.S. Sentencing Commission found that in 2010, of the nearly 80,000 cases for which it had information, almost 25 percent of the offenders were sentenced to some sort of mandatory minimum penalty.⁴¹ Moreover, three-quarters of those serving a mandatory sentence for a federal drug trafficking offense were minorities.⁴² And in those instances in which relief from the mandatory minimum penalty occurred, it occurred least often for Black offenders.⁴³ In fact, Black offenders were the most likely to serve a mandatory minimum sentence as compared to any other group of federal offenders.⁴⁴

The U.S. government has recently demonstrated a commitment to addressing racial disparities in the criminal justice system. In 2010, Congress passed the Fair Sentencing Act of 2010, which reduced the sentencing disparity between powder and crack cocaine offenses, capping a long effort to address the disproportionate impact the sentencing disparity had on African American defendants. Further, the efforts by the DOJ and the Executive branch to address the overrepresentation of people of color in the system through changes in prosecutorial charging policy and executive clemency deserve recognition.⁴⁵

However, these reforms alone are not enough to stem the tide of mass incarceration and racial disparities in our justice system. Despite these efforts to reform the system, forty-eight states, the District of Columbia, and the federal government still impose extra sentencing penalties for certain drug offenses committed in specific geographic areas, such as within a certain distance of schools, child care programs, or public housing.⁴⁶ Not only do these enhancements fail to meet the intended goal of deterring harmful activity away from particular places,⁴⁷ but overlapping

sentencing enhancement zones blanket urban communities and create a two-tiered system of justice that results in disproportionately longer prison sentences for people of color.⁴⁸

Barriers to Re-Entry

Every year, nearly 700,000 people are released from state and federal prisons in the United States. For these individuals, and for the society they seek to re-enter, policies that fail to account for how these individuals will successfully reintegrate have a real human cost. A prison system that focuses primarily on punishment, rather than rehabilitation – and creates barriers to family unification, employment, education, and civic participation – makes it increasingly difficult for the people reintegrating into their community to remain crime-free and become fully contributing members of society.

Restrictions on the sorts of jobs that people with criminal records can hold have been increasing for several decades and have accelerated in recent years. Additionally, use of criminal background checks in employment is widespread. More than 90 percent of companies reported using criminal background checks for their hiring decisions, which is up from 51 percent in 1996.⁴⁹ These background checks are used for a wide range of jobs, from warehouse workers and delivery drivers to sales clerks.

Criminal background checks carried out by employers frequently result in individuals with criminal records not being hired, or being fired for having not mentioned their criminal past in their job interview. Because people of color are arrested and convicted at rates that far exceed their representation in the population at large, criminal records-based discrimination can be a proxy for discrimination based on race. The effect of these racially disparate statistics is substantial.

At the same time, there is little research that shows any correlation between the existence of a criminal record and the propensity to commit crimes at the workplace.⁵⁰ It is also worth noting that background checks are often plagued by errors in reporting data, because the reports often inappropriately include information about sealed or expunged offenses (like juvenile offenses) or arrests that don't lead to conviction.⁵¹ Federal Bureau of Investigation (FBI) records routinely fail to report important information on the outcome of arrests. Clear federal mandates require background reports to be complete and accurate, yet 50 percent of the FBI's records fail to include information on the final disposition of the case. With 17 million background checks conducted in 2012, the errors in the federal database adversely affect workers who have had contact with the criminal justice system.⁵²

In short, getting a job may be one of the most important steps toward successful re-entry for people who have been incarcerated. The fact that some employers cast an overly broad net by

issuing a blanket ban on hiring all individuals with criminal backgrounds has a disproportionate impact on people of color and may run afoul of civil and human rights protections.

At the federal level, the security precautions taken post-9/11 have interacted with the War on Drugs, in particular, to create a set of unintended consequences that bar huge numbers of people, a disproportionate number of whom are Black and Latino, from working in ports and other important, well-paying sectors, despite the fact that their crimes have nothing to do with terrorism.

Thus, one of the great paradoxes within the criminal justice system is that even when incarcerated people have access to education and training inside prison, too often restrictions on employment when they are released mean that they cannot fully utilize the skills they have acquired while living out their sentences behind bars. It's a uniquely dysfunctional and costly form of double indemnity.

Conclusion

Over the last year the nation has seen a growing movement to promote greater fairness and equity in our criminal justice system, including addressing policing practices that have a disproportionate impact on low-income communities, communities of color, and African Americans in particular. These practices, which include racial profiling, excessive use of force, and implicit racial bias by law enforcement, have framed the national debate around justice reform and prompted a national conversation on the use of technology as one possible means to enhance accountability and transparency in policing, with a focus on an evidence-based approach to public safety.

Without the appropriate safeguards, however, we are at risk of compounding the very problems in the justice system we seek to fix. As we continue this national conversation, we must not forget that new technology and data tools are not a substitute for broader reforms that can address issues of profiling, excessive use of force, and implicit and explicit racial bias. There is more to be done – including establishing fair and effective policies and oversight mechanisms – to restore the confidence that so many have lost in our justice system.

¹ American Constitution Society, “Racial Disparities in Sentencing: Three Sources and Three Solutions”, February 17, 2015, <http://www.acslaw.org/acsblog/racial-disparities-in-sentencing-three-sources-and-three-solutions>.

² Carson, E. Ann. "Prisoners in 2013." *Washington, DC: Bureau of Justice Statistics* (2014). <http://www.bjs.gov/content/pub/pdf/p13.pdf>.

³ “U.S. Quick Facts.” *United States Census Bureau*. <http://quickfacts.census.gov/qfd/states/00000.html>.

⁴ MU News Bureau. “Prison Education Programs Reduce Inmate Prison Return Rate, MU Study Shows: Correctional facility educational programs a good investment for state of Missouri.” October 3, 2011, <http://munews.missouri.edu/news-releases/2011/1003-prison-education-programs-reduce-inmate-prison-return-rate-mu-study-shows/>.

⁵ See generally Leadership Conference Education Fund, “Restoring a National Consensus: The Need to End Racial Profiling in America,” March 2011, <http://www.civilrights.org/publications/reports/racial-profiling2011/racialprofiling2011.pdf>.

⁶ Leadership Conference Education Fund, “Restoring a National Consensus: The Need to End Racial Profiling in America,” March 2011, <http://www.civilrights.org/publications/reports/racial-profiling2011/racialprofiling2011.pdf>.

⁷ Kara McCarthy, “Study Finds Some Racial Differences in Perceptions of Police Behavior During Contact with the Public,” BUREAU OF JUSTICE STATISTICS, Sept. 24, 2013, <http://www.bjs.gov/content/pub/press/pbtss11rpa11pr.cfm>.

⁸ Kara McCarthy, “Study Finds Some Racial Differences in Perceptions of Police Behavior During Contact with the Public,” BUREAU OF JUSTICE STATISTICS, Sept. 24, 2013, <http://www.bjs.gov/content/pub/press/pbtss11rpa11pr.cfm>.

⁹ Leadership Conference Education Fund, “Restoring a National Consensus: The Need to End Racial Profiling in America,” March 2011, <http://www.civilrights.org/publications/reports/racial-profiling2011/racialprofiling2011.pdf>.

¹⁰ Department of Justice, “Guidance for Federal Law Enforcement Agencies Regarding the Use of Race, Ethnicity, Gender, National Origin, Religion, Sexual Orientation, or Gender Identity,” Aug. 2014, <http://www.justice.gov/sites/default/files/ag/pages/attachments/2014/12/08/use-of-race-policy.pdf>.

¹¹ Concluding Observations of the Committee on the Elimination of Racial Discrimination, U.N. Doc. CERD/C/USA/7?9 at 13 (May 8, 2013).

¹² Concluding Observations of the Committee on the Elimination of Racial Discrimination, U.N. Doc. CERD/C/USA/7?9 at 13 (May 8, 2013), p. 35.

¹³ According to the U.S. Bureau of Justice Statistics, between 2003 and 2009, at least 4,831 people died in the course of being arrested by local police. Of the deaths classified as law enforcement “homicides,” 2,876 deaths occurred of which 1,643 or 57.1 percent of the people who died were people of color. Victor E. Kappeler, *Being Arrested can be Hazardous to your Health, Especially if you are a Person of Color*, E. Ky. Univ. Police Studies Online (Feb. 18, 2014), <http://plsonline.eku.edu/insideloook/being-arrested-can-be-hazardous-your-health-especially-if-you-are-person-color>.

¹⁴ The National Police Misconduct Statistics and Reporting Project, run by the Cato Institute, collects some data on police misconduct, but does not contain data on the race of the victim or perpetrator.

¹⁵ Nat’l Police Misconduct Statistics and Reporting Project, 2010 Annual Report, available at <http://www.policemisconduct.net/statistics/2010-annual-report/>. (run by the Cato Institute, the NPMRP captures data that meet credibility criteria which have been gathered from multiple media sources throughout the United States) (“NPMRP”).

¹⁶ “2010 Annual Report.” *PoliceMisconduct.net*. Accessed November 16, 2015. <http://www.policemisconduct.net/statistics/2010-annual-report/>.

¹⁷ “2010 Annual Report.” *PoliceMisconduct.net*. Accessed November 16, 2015. <http://www.policemisconduct.net/statistics/2010-annual-report/>.

¹⁸ See *Floyd v. City of New York*, 813 F. Supp. 2d 417 (S.D.N.Y. 2011).

¹⁹ Brian Bennet, “Border agency removes its own chief of internal affairs,” *LA Times*, June 6, 2014. <http://www.latimes.com/nation/la-na-border-patrol-20140610-story.html>.

²⁰ Brian Bennet, “Border agency removes its own chief of internal affairs,” *LA Times*, June 6, 2014. <http://www.latimes.com/nation/la-na-border-patrol-20140610-story.html>.

²¹ The Special Litigation Section can, for example, review the practices of law enforcement agencies that may be violating people’s federal rights pursuant to the Violent Crime Control and Law Enforcement Act of 1994, 42 U.S.C. § 14141. If a law enforcement agency receives federal funding, the Special Litigation Section can investigate pursuant to the anti-discrimination provisions of the Omnibus Crime Control and Safe Streets Act of 1968, and Title VI of the Civil Rights Act of 1964, which forbid discrimination on the basis of race, color, sex or national origin by agencies receiving federal funds. It may act if it finds a pattern or practice by the law enforcement agency that systemically violates people’s rights. Harm to a single person, or isolated action, is usually not enough to show a pattern or practice that violates these laws. U.S. Dep’t of Justice, *Overview Conduct of Law Enforcement Agencies*, available at <http://www.justice.gov/crt/conduct-law-enforcement-agencies>.

²² U.S. Dept. of Justice, *Cases and Matters*, available at <http://www.justice.gov/crt/special-litigation-section-cases-and-matters0>.

²³ Nat’l Police Misconduct Statistics and Reporting Project, 2010 Annual Report, available at <http://www.policemisconduct.net/statistics/2010-annual-report/>.

²⁴ U.S. Commission on Civil Rights, “Revisiting Who Is Guarding the Guardians?” available at <http://www.usccr.gov/pubs/guard/ch5.htm>.

²⁵ U.S. Commission on Civil Rights, “Revisiting Who Is Guarding the Guardians?” available at <http://www.usccr.gov/pubs/guard/ch5.htm>.

²⁶ See, e.g., Leadership Conference Education Fund, “Justice on Trial: Racial Disparities in the American Criminal Justice System”, available at <http://www.protectcivilrights.org/pdf/reports/justice.pdf>.

²⁷ Nat’l Academy of Science, *The Growth of Incarceration in the United States: Exploring Causes and Consequences* 98 (2014).

²⁸ U.S. Sentencing Comm’n, *Report to Congress: Report on the Continuing Impact of United States v. Booker on Federal Sentencing* 7 (December 2012).

²⁹ Rehavi, M. Marit and Sonja B. Starr, *Racial Disparity in Federal Criminal Charging and its Sentencing Consequences*, *University of Michigan Law School: Program in Law & Economics Working Paper Series*, No. 12?002 (May 7, 2012) available at

<http://ssrn.com/abstract=1985377>; see also NAS 2014 Report on Incarceration at 98 (noting that even small differences in the length of incarceration served by Black and White justice-involved persons matter).

³⁰ See U.S. Sentencing Comm'n, Report to Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System (October 2011) (discussing, among other things, the role of prosecutorial discretion in charging offenses with mandatory minimum penalties and resulting sentencing disparity).

³¹ See, e.g., The Sentencing Project, Reducing Racial Disparity in the Criminal Justice System: A Manual for Practitioners and Policymakers 7 (2d ed. 2008) (noting that in the event of an arrest, alternatives to detention are more readily available in middle-class communities than low-income communities") available at <http://www.sentencingproject.org/doc/publications/rdreducingracialdisparity.pdf>.

³² See Syracuse University TRAC Report, Federal Drug Prosecutions Fall to Lowest Level in Over 13 Years (Mar. 18, 2014) available at <http://trac.syr.edu/tracreports/crim/347/>.

³³ Cynthia Jones, Give Us Free: Addressing Racial Disparities in Bail Determinations (2014) available at <http://www.nyujlpp.org/wp-content/uploads/2014/01/Jones-Give-Us-Free-16nyujlpp919.pdf>.

³⁴ Demuth, Stephen. "Racial and Ethnic Differences in Pretrial Release Decisions and Outcomes: A Comparison of Hispanic, Black, and White Felony Arrestees." *Criminology* 41, no. 3 (2003): 873-908. Available at <https://www.ncjrs.gov/App/publications/Abstract.aspx?id=204620>.

³⁵ Freiburger, T.L., Marcum, C.D., & Pierce, M.B. (2010). The Impact of Race on the Pretrial Decision. *American Journal of Criminal Justice*, 35(1): 76-86. <https://libres.uncg.edu/ir/asu/f/MarcumCD2010ImpactofRace.pdf>.

³⁶ Darren Hutchinson, "There's Never Been a Better Time for Bail Reform," *The Washington Post*, July 20, 2015, <https://www.washingtonpost.com/posteverything/wp/2015/07/20/theres-never-been-a-better-time-for-bail-reform/>.

³⁷ Samuel R. Wiseman, Pretrial Detention and the Right to Be Monitored, *Yale Law Journal*, Vol. 123, No. 5 (March 2014), <http://www.yalelawjournal.org/essay/pretrial-detention-and-the-right-to-be-monitored>.

³⁸ Darren Hutchinson, "There's Never Been a Better Time for Bail Reform." *The Washington Post*, July 20, 2015. <https://www.washingtonpost.com/posteverything/wp/2015/07/20/theres-never-been-a-better-time-for-bail-reform/>.

³⁹ NAACP. Criminal Justice Factsheet. <http://www.naacp.org/pages/criminal-justice-fact-sheet>.

⁴⁰ Cassia C. Spohn, "Thirty Years of Sentencing Reform: The Quest for a Racially Neutral Sentencing Process" *Criminal Justice* 427, 458 (U.S. Dep't of Justice 2000) available at <https://www.ncjrs.gov/criminaljustice2000/vol3/03i.pdf>.

⁴¹ U.S. Sentencing Comm'n, Report to Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System (October 2011) available at <http://www.ussc.gov/LegislativeandPublicAffairs/CongressionalTestimonyandReports/MandatoryMinimumPenalties/20111031RtCPDF/ExecutiveSummary.pdf>.

⁴² U.S. Sentencing Comm'n, Report to Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System (October 2011) available at <http://www.ussc.gov/LegislativeandPublicAffairs/CongressionalTestimonyandReports/MandatoryMinimumPenalties/20111031RtCPDF/ExecutiveSummary.pdf>.

⁴³ U.S. Sentencing Comm'n, Report to Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System (October 2011) available at <http://www.ussc.gov/LegislativeandPublicAffairs/CongressionalTestimonyandReports/MandatoryMinimumPenalties/20111031RtCPDF/ExecutiveSummary.pdf>.

⁴⁴ U.S. Sentencing Comm'n, Report to Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System (October 2011) available at <http://www.ussc.gov/LegislativeandPublicAffairs/CongressionalTestimonyandReports/MandatoryMinimumPenalties/20111031RtCPDF/ExecutiveSummary.pdf>.

⁴⁵ In February 2014, the Department of Justice announced a new initiative to address both the overcrowding in our federal prisons as well as, provide an opportunity for persons convicted of "low-level" nonviolent offenses that were typically drug related and carried mandatory minimum penalties an opportunity to apply for executive clemency (commutation) through a new streamlined process. Deputy Attorney General James Cole's Speech on Clemency: <http://www.justice.gov/opa/speech/remarks-prepared-delivery-deputy-attorney-general-james-cole-new-york-state-bar>.

⁴⁶ See, e.g., Judith Greene, Kevin Pranis and Jason Zeidenberg, Justice Policy Institute, Disparity by Design: How Drug-Free Zone Laws Impact Racial Disparity-and Fail to Protect Youth 3 (March 2006). Available at <http://www.justicepolicy.org/uploads/justicepolicy/documents/06-03repdisparitybydesigndp-jj-rd.pdf>.

⁴⁷ Judith Greene, Kevin Pranis and Jason Zeidenberg, Justice Policy Institute, Disparity by Design: How Drug-Free Zone Laws Impact Racial Disparity-and Fail to Protect Youth 3 (March 2006), p. 44 (noting that multiple studies indicate that such enhancement zones had no deterrent effect on criminal activity). Available at <http://www.justicepolicy.org/uploads/justicepolicy/documents/06-03repdisparitybydesigndp-jj-rd.pdf>.

⁴⁸ Judith Greene, Kevin Pranis and Jason Zeidenberg, Justice Policy Institute, Disparity by Design: How Drug-Free Zone Laws Impact Racial Disparity-and Fail to Protect Youth 3 (March 2006), p. 4 (explaining that overlapping zones are so severe that entire communities have become prohibited zones, which is particularly impactful on urban low income communities). Available at <http://www.justicepolicy.org/uploads/justicepolicy/documents/06-03repdisparitybydesigndp-jj-rd.pdf>.

⁴⁹ Rodriguez, Michelle N. and Emsellem, Maurice. “65 Million ‘Need Not Apply’: The Case for Reforming Criminal Background Checks for Employment.” *National Employment Law Project*. March 2011. <http://www.nelp.org/content/uploads/2015/03/65MillionNeedNotApply.pdf>.

⁵⁰ Rodriguez, Michelle N. and Emsellem, Maurice. “65 Million ‘Need Not Apply’: The Case for Reforming Criminal Background Checks for Employment.” *National Employment Law Project*. March 2011. <http://www.nelp.org/content/uploads/2015/03/65MillionNeedNotApply.pdf>.

⁵¹ See “Broken Records: How Errors by Criminal Background Checking Companies Harm Workers and Businesses.” *National Consumer Law Center*. 2012. <https://www.nclc.org/images/pdf/pr-reports/broken-records-report.pdf>.

⁵² Neighly, Madeline and Emsellem, Maurice. “Wanted: Accurate FBI Background Checks for Employment.” *National Employment Law Project*. July 2013., p.3. <http://www.nelp.org/content/uploads/2015/03/Report-Wanted-Accurate-FBI-Background-Checks-Employment.pdf>.