

## Purpose-Focused Sentencing: How Reforming Punishment Can Transform Policing

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# **PURPOSE-FOCUSED SENTENCING: HOW REFORMING PUNISHMENT CAN TRANSFORM POLICING**

JELANI JEFFERSON EXUM\*

Today's discussions about police reform have focused on changing police training and procedures. As accounts of deaths of African-Americans at the hands of police officers have played out in the news and social media, demands for racial justice in policing have become more prevalent. To end what I have coined as "the Death Penalty on the Street,"<sup>1</sup> there have been calls for diversity training, training on non-lethal force, and, of course, community policing.<sup>2</sup> While it is perfectly rational for the response to excessive police force to be a focus on changing policing methods, such reforms will only have limited success as long as attitudes about black criminality remain the same. Police can be trained to use deadly force more sparingly, and can even become more engaged with the communities they serve and protect, but there will always be a level of discretion to policing that is affected by any bias that a particular officer holds. In deciding how to act and react during encounters with individuals, police officers will, no doubt, rely on their own intuitions and fears about the criminal propensity of the person before them. When that fear is heightened because of the race of the individual, training – though no doubt helpful – may not be protection enough from unreasonable police fear and

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<sup>1</sup> The term was coined during my TEDxToledo talk. Jelani Exum, *The Death Penalty on the Street*, YOUTUBE (Oct. 10, 2014), <https://www.youtube.com/watch?v=sq7eAEjJm6U> (TedxToledo Talk delivered Sept. 2014).

<sup>2</sup> See, e.g., Anti-Defamation League, *Anti-Bias Training for Law Enforcement Professionals*, ADL.COM (last visited Jan. 28, 2016), <http://www.adl.org/education-outreach/anti-bias-education/c/anti-bias-training-for-law.html>; Elliot Jager, *Ferguson Cops Training to Use Non-Lethal First Bullet*, NEWSMAX.COM (Feb. 4, 2015), <http://www.newsmax.com/US/ferguson-police-lethal-guns/2015/02/04/id/622580/>; Lara Herschberg, *Community Policing Strategies Help Maintain Community Integrity, Safety*, JOURNAL OF HUMANITARIAN AFFAIRS (Jan. 21, 2013), <http://journalofhumanitarianaffairs.blogspot.com/2013/01/community-policing-strategies-help.html>.

force. Though we would like to hold them to a higher standard, police officers are merely human, so they carry with them the same biases and prejudices that any of us can hold. Studies have shown that, in general, Americans are – regardless of our race – biased against blacks, especially young black men.<sup>3</sup> African Americans are more likely seen as criminals, and most of us overestimate the amount of crime attributable to the black population.<sup>4</sup> Therefore, in order to truly address the problem of racial injustice in policing, we must address the racial biases held by our society that play out in our criminal justice system. Though perhaps not the obvious place for this revolution to start, sentencing reform has the potential to change the face of the punishment in our country, thus transforming the (usually black) face of whom we see as deserving of punishment by the police and the courts.

This Essay proposes “purpose-focused sentencing”<sup>5</sup> as a means of remedying the over-incarceration of blacks, thereby combatting attitudes about crime and black criminality, and in turn, affecting how police see and treat blacks. The goal is to reduce the racial disparity in incarceration, not solely through an overall lessened reliance on prisons and jails, but also by assessing and identifying appropriate sentences to fulfill criminal justice purposes. Once those purposes - deterrence, rehabilitation, incapacitation, and retribution - are identified and assessed, there will not be room to justify disparities in sentencing attributable only to the race of the defendant. All sentences, regardless of the peculiarities of an individual defendant, must be tailored to a specific result, rather than imposed at the whim of a particular judge or in accordance with legislation that has no basis in an identified sentencing goal. As a result, we will see prisons and jails being used much more exclusively (to the extent that incarceration is used at all) for violent, repeat felons, which statistics tell us are not where our racial disparities lie today.<sup>6</sup> When punishment is more closely aligned

<sup>3</sup> See Cheryl Staats, *State of the Science: Implicit Bias Review 2014*, KIRWANINSTITUTE (2014), <http://kirwaninstitute.osu.edu/wp-content/uploads/2014/03/2014-implicit-bias.pdf>.

<sup>4</sup> See Charles M. Blow, *Crime, Bias and Statistics*, N.Y. TIMES (Sep. 7, 2014), [http://www.nytimes.com/2014/09/08/opinion/charles-blow-crime-bias-and-statistics.html?\\_r=0](http://www.nytimes.com/2014/09/08/opinion/charles-blow-crime-bias-and-statistics.html?_r=0).

<sup>5</sup> Particular Purpose Sentencing is a type of purpose-focused sentencing that I proposed in my article, *Forget Sentencing Equality: Moving From the “Cracked” Cocaine Debate Toward Particular Purpose Sentencing*, 18 LEWIS & CLARK L. REV. 95 (2014). It is more fully described in part I of this Essay.

<sup>6</sup> See Besiki Kutateladze, et al., *Prosecution and Racial Justice in New York County*, VERA INST. OF JUSTICE, 199, 210 (Jan. 31, 2014), <https://www.ncjrs.gov/pdffiles1/nij/grants/247227.pdf>. (explaining that Blacks are 85% more likely to be sentenced for misdemeanor drug offenses than White drug offenders).

with what the offender has done, and what our goals of punishments are given that behavior, we can begin to combat the stereotype that the dangerous criminal is most likely black.

Once sentencing no longer feeds into the heightened public view of blacks as criminals, the spillover effect will be that the new wave of police officers will not see blacks this way either. And if they do, society certainly will not view this biased police violence against blacks as reasonable. This Essay offers a solution that will take years, if not generations, to implement; and it will perhaps take even longer for it to completely transform the face of policing. However, the proposal is a long-term approach that will immediately begin to move criminal justice in the right direction and encourage honest conversations about what we are trying to do in our system and how our current methods of punishment are only perpetuating racial injustice.

## I. THE PROPOSED SOLUTION: PURPOSE-FOCUSED SENTENCING REFORM

In a previous work, *Forget Sentencing Equality: Moving From the “Cracked” Cocaine Debate Toward Particular Purpose Sentencing*, I proposed a form of purpose-focused sentencing called “Particular Purpose Sentencing” as necessary sentencing reform.<sup>7</sup> Despite the name of the article, the argument was not against racial equality in sentencing. Instead, it recognized that calling for racial equality in sentencing, particularly in the cocaine sentencing context,<sup>8</sup> will not necessarily result in better sentencing. Instead, as argued, if racial inequality in drug sentencing was remedied by sentencing the overwhelmingly black cocaine defendants to the same sentences as powder cocaine defendants, we would simply be left with cocaine defendants of all races getting a sentence that is not serving any purpose of sentencing and is contributing to ineffective mass

<sup>7</sup> See generally Jelani Jefferson Exum, *Forget Sentencing Equality: Moving From the “Cracked” Cocaine Debate Toward Particular Purpose Sentencing*, 18 LEWIS & CLARK L. REV. 95 (2014).

<sup>8</sup> Despite it being made from the same underlying drug, crack cocaine is sentenced much more harshly than powder cocaine. The United States Sentencing Commission has reported that “the average sentence for crack cocaine offenses (118 months) is 44 months—or almost 60%—longer than the average sentence for powder cocaine offenses (74 months).” See Report to the Congress: Cocaine and Federal Sentencing Policy, U.S. SENTENCING COMM’N, 90 (May 2002), [http://www.ussc.gov/Legislative\\_and\\_Public\\_Affairs/Congressional\\_Testimony\\_and\\_Reports/Drug\\_Topics/200205\\_RtC\\_Cocaine\\_Sentencing\\_Policy/200205\\_Cocaine\\_and\\_Federal\\_Sentencing\\_Policy.pdf](http://www.ussc.gov/Legislative_and_Public_Affairs/Congressional_Testimony_and_Reports/Drug_Topics/200205_RtC_Cocaine_Sentencing_Policy/200205_Cocaine_and_Federal_Sentencing_Policy.pdf). Further, in its resulting 2002 Report to Congress, the Sentencing Commission explained its findings that an “overwhelming majority” of crack offenders were black—91.4% in 1992 and 84.7% in 2000. *Id.* at 62.

incarceration.<sup>9</sup> This is because, as explained in the article, current cocaine sentencing does not deter drug offenses, rehabilitate offenders, incarcerate only dangerous defendants, nor does it adequately reflect community sensibilities of just deserts or retribution.<sup>10</sup>

Rather than stopping with racial parity in sentencing, the article proposed Particular Purpose Sentencing, which requires Congress (and state legislatures in the case of state offenses), through the help of the United States Sentencing Commission, (or a state sentencing commission) to select a specific purpose of punishment that is sought to be achieved for every federal offense so that sentence types and lengths can be conformed to that goal.<sup>11</sup> For example, the Sentencing Commission may decide that the goal of punishment for drug offenses should be to deter illegal drug possession and use. Therefore, the sentences authorized for drug offenders would be imposed with this goal in mind. Perhaps this would mean drug treatment for drug possessors; but it could mean probation with strict terms for drug sellers to ensure that they cannot continue in the drug business, while also sending the message to potential drug dealers that there are serious long-term consequences to engaging in the drug trade. High-level drug offenders may be subject to significant restitution or some other financial sanction. The point, though, is that each sentence has one main goal in mind – in this case, deterring the possession and use of illegal drugs – rather than melding together a number of goals and letting a judge sort through appropriate purposes as he or she sees fit.

In this Particular Purpose Sentencing model, the Sentencing Commission

<sup>9</sup> Mass incarceration is ineffective because it has not been proven to reduce crime and its costs have become unsustainable. See Todd R. Clear, *Imprisoning Communities: How Mass Incarceration Makes Disadvantaged Neighborhoods Worse* 6-7, 9-10 (2007); Judith Greene & Marc Mauer, *Downscaling Prisons: Lessons From Four States*, SENTENCING PROJECT 1-2 (2010), available at [http://www.sentencingproject.org/doc/publications/publications/inc\\_DownscalingPrisons2010.pdf](http://www.sentencingproject.org/doc/publications/publications/inc_DownscalingPrisons2010.pdf); One in 100: Behind Bars in America 2008, Pew Center on Sts. 5-6 (2008), [http://www.pewtrusts.org/uploadedFiles/wwwpewtrustsorg/Reports/sentencing\\_and\\_corrections/one\\_in\\_100.pdf](http://www.pewtrusts.org/uploadedFiles/wwwpewtrustsorg/Reports/sentencing_and_corrections/one_in_100.pdf); Smart Reform Is Possible: States Reducing Incarceration Rates and Costs While Protecting Communities, AM. C.L. UNION 5-7 (2011), <http://www.aclu.org/files/assets/smartreformispossible.pdf>.

<sup>10</sup> See *Forget Sentencing Equality*, supra note 5, at 122-130.

<sup>11</sup> By sentencing purposes, this Article is referring to rehabilitation, incapacitation, deterrence (specific and general), and retribution. A discussion of the meanings of these purposes can be found in Part III of my article *Forget Sentencing Equality: Moving From the “Cracked” Cocaine Debate Toward Particular Purpose Sentencing*, 18 LEWIS & CLARK L. REV. 95 (2014). In short, however, rehabilitation means punishing to change the offender into a better person; incapacitation is aimed at containing dangerous offenders to protect the public; specific deterrence requires the selection of punishment to stop that particular defendant from offending again whereas general deterrence focuses on the punishment necessary to dissuade other potential offenders from committing crimes; and retribution punishes in accordance with the moral blameworthiness of the offender. *Id.*

would set forth a number of sentencing options that it has pre-determined already satisfies the desired goal. Judges would then be able to select from those options, keeping in mind the particular circumstances of the offender before him or her. As explained in my previous work, accountability is a built-in aspect of Particular Purpose Sentencing as well, requiring that penalties are regularly studied and tested for their success in satisfying their particular purpose and revised as needed. Thus, if in five years it becomes evident that the strict probation approach is not reducing cases of drug possession and use, then probationary lengths and terms will be adjusted in an effort to better reach the deterrence goal. This approach allows for continued, reasoned reform of sentencing law and policy in an effort to become ever closer to stated sentencing objectives.

While Particular Purpose Sentencing as specifically described requires legislative action, the more general purpose-focused sentencing can still be implemented without legislative directive. Though I believe that purpose-focused sentencing will be best achieved at the legislative level, until this type of Particular Purpose Sentencing is realized, judges can implement purpose-focused sentencing on their own with the assistance of sentencing research and evidence presented by prosecutors and defense counsel. The goal of purpose-focused sentencing is to re-align the sentencing endeavor from one that operates in a manner vulnerable to the biases of judges and other decision makers to one that is built upon identified purposes and that is regularly tested and refined in response to the rate of meeting those objectives. Judges can select and articulate a sentencing goal on their own in each case<sup>12</sup>, and counsel can then provide judges with the information needed in order to select a sentence that will truly satisfy that goal. Certain follow-up mechanisms (such as periodic interviews with or progress reports on ex-offenders) can then be implemented in order to allow judges to assess whether the sentences they impose actually achieve the desired purpose. Such information will allow judges to adjust their own sentencing approaches.

However it is accomplished – whether through the legislature, sentencing commission, or judicial action—once purpose-focused sentencing is embraced, and legislators and judges begin to articulate why specific sentences are appropriate for certain offenses, then it will be more

<sup>12</sup> Judges would have to, of course, stay within any statutory minimum and maximum sentencing provisions. However, purpose-focused sentencing can be the method used by an individual judge for selecting a sentence from those legally available to him or her.

apparent that the types and lengths of sentences currently imposed for most offenses do not effectively serve any sentencing purpose. When sentencing is brought into line with a selected sentencing purpose—be it retribution, deterrence, incapacitation, or rehabilitation—the unwarranted racial disparities seen in the punishment of offenders will necessarily be questioned, and possibly eventually eradicated, as well. Purpose-focused sentencing may not completely eliminate racial injustice in the criminal justice system.<sup>13</sup> At least, however, once a particular purpose is indicated as the goal of each offense, the disparity between the treatment of similarly situated defendants, only different in race, will have to be addressed. When sentencing is truly focused on sentencing purposes, the result may be sustainable racial equality in sentencing outcomes. While it may seem that sentencing reform is an issue separate from policing, a look at the biases that racial inequalities in sentencing perpetuate raises the possibility of sentencing reform being an important component of transforming attitudes about proper police behavior in this country.

## II. THE PROBLEM: BIAS-DRIVEN PERCEPTIONS OF BLACK CRIMINALITY

There has been much discussion among scholars and criminal justice activists about implicit bias in the criminal justice system. When talking about racial bias, implicit bias “describes the cognitive processes whereby, despite even the best intentions, people automatically classify information in racially biased ways.”<sup>14</sup> Researchers using the Implicit Association Test<sup>15</sup> have discovered that the majority of Americans tested carry implicit negative attitudes toward blacks, and associate blacks with negative stereotypes.<sup>16</sup> When applied to the criminal justice system, researchers have now begun assessing how implicit racial biases affect decisions made

<sup>13</sup> The author realizes that there are many forces in play in addition to sentencing biases that lead to racial disparities in the criminal justice system. Some of these forces include the discretionary decisions of other actors, such as the decisions of law enforcement officials to arrest and the charging decisions made by prosecutors.

<sup>14</sup> Robert J. Smith & Justin D. Levinson, *The Impact of Implicit Racial Bias on the Exercise of Prosecutorial Discretion*, 35 SEATTLE U. L. REV. 795, 797 (2012).

<sup>15</sup> The Implicit Association Test (IAT) comes in the form of an online test that “measures the strength of associations between concepts (e.g., black people, gay people) and evaluations (e.g., good, bad) or stereotypes (e.g., athletic, clumsy).” About the IAT, Project Implicit, <https://implicit.harvard.edu/implicit/iatdetails.html>.

<sup>16</sup> See Brian A. Nosek et al., *Harvesting Implicit Group Attitudes and Beliefs from a Demonstration Website*, 6 *Group Dynamics* 101, 101-05 (2002); See also Laurie A. Rudman & Richard D. Ashmore, *Discrimination and the Implicit Association Test*, 10 *Group Processes & Intergroup Rel.* 359, 361 (2007).

by police, prosecutors, judges, and jurors.<sup>17</sup> At any discretionary point in the criminal justice process, implicit bias has the opportunity to work to the disadvantage of black subjects. This undoubtedly includes the point at which the criminal process often starts – an encounter with the police. Therefore, if officers, as the rest of society, carry an implicit bias against black individuals, it stands to reason that they will more often see such individuals as possible criminals, and thus will be more on guard and more prone to use violence against those individuals. In turn, when police departments, prosecutors, jurors, and general society judge an officer faced with this black threat, they often see the officer's actions as reasonable because they buy into the story that the black person was a threat to the officer.<sup>18</sup>

While the bias against blacks has roots in our country's history of the subjugation of blacks as slaves and then as unequal citizens, today's bias is sustained through the story that statistics weave about blacks and crime. When we talk about race and criminal justice, we are often talking about disparities in arrest and incarceration rates. And while it is certainly true that those disparities exist, focusing on them allows us to perpetuate the story that the face of crime is brown or black. If that is the case, then it would mean the solution to crime lies in concentrating our law enforcement efforts, and thus the use of force by the police, in those black and brown crime-ridden communities. Even for those who realize that there is race-based injustice in the criminal justice system, it is easy to think of arrest disparities as causing incarceration disparities. In other words, the thought is that because police arrest blacks at a higher rate than whites, blacks end up incarcerated at a higher rate than whites. In that way, arrest rates drive incarceration rates. However, this Essay offers a different perspective by looking at inequalities in sentencing as fueling continued justification for not only inequalities in arrest rates, but for inequalities in police treatment

<sup>17</sup> See Joshua Correll et al., *Across the Thin Blue Line: Police Officers and Racial Bias in the Decision to Shoot*, 92 *J. PERSONALITY & SOC. PSYCHOL.* 1006, 1006-09 (2007); Justin D. Levinson, *Forgotten Racial Equality: Implicit Bias, Decisionmaking, and Misremembering*, 57 *DUKE L.J.* 345, 350 (2007); Justin D. Levinson et al., *Guilty by Implicit Racial Bias: The Guilty/Not Guilty Implicit Association Test*, 8 *OHIO ST. J. CRIM. L.* 187, 187-89 (2010); Jeffrey J. Rachlinski et al., *Does Unconscious Racial Bias Affect Trial Judges?*, 84 *NOTRE DAME L. REV.* 1195, 1195-96 (2009); Robert J. Smith & Justin D. Levinson, *The Impact of Implicit Racial Bias on the Exercise of Prosecutorial Discretion*, 35 *SEATTLE U. L. REV.* 795, 797 (2012).

<sup>18</sup> For example, a grand jury declined to indict Officer Darren Wilson who killed Michael Brown on August 9, 2014. There was also no indictment for the officer who killed Eric Garner in July 2014 for holding him in an impermissible chokehold. These and other like cases are discussed in my article, *The Death Penalty on the Street*, which, at the time of writing this Essay, is forthcoming in the *Missouri Law Review*.



as well.

### A. Bias-Bolstering Statistics

Statistics tell us that African Americans are overrepresented in the criminal justice system.<sup>19</sup> From arrests to incarceration, we see blacks making up more than their 13% share of the U.S. population.<sup>20</sup> A recent study of 3,528 police departments found that blacks are more likely to be arrested in almost every city for almost every type of crime.<sup>21</sup> At least 70 police departments arrested black people at a rate ten times higher than non-black people.<sup>22</sup> African Americans make up 37% of the U.S. prison population and almost 36% of the jail population in the U.S.<sup>23</sup> While many blacks read into these numbers an unfairness in the criminal justice system, polls suggest that a majority of Whites – and thus, likely a majority of Americans, since Whites make up 77% of the U.S. population<sup>24</sup> – see the criminal justice system as largely fair when it comes to race. A Gallup poll administered in 2014 showed that, when asked if the American justice system is biased against black people, 68% of black Americans said yes, the system is biased, while 26% said it was not.<sup>25</sup> Interestingly, whites' views of the criminal justice system were almost exactly the opposite – with only 25% of whites saying the system is biased and 69% saying there is no bias against blacks in the criminal justice system.<sup>26</sup> If the majority opinion is that the system is fair, and not biased against blacks, then the only explanation for the racial disparities seen in arrest and incarceration rates is that blacks in fact commit more than their fair share of crime, and are thus justly punished for it. In this way, such statistics are actually bias-bolstering statistics because they contribute to a belief in and affirmation of

<sup>19</sup> See Blow, *supra* note 4.

<sup>20</sup> See, U.S. Census Bureau, State & County QuickFacts, *available at*: <http://quickfacts.census.gov/qfd/states/00000.html>.

<sup>21</sup> Jessica Eaglin & Danyelle Solomon, Reducing Racial and Ethnic Disparities in Jail: Recommendations for Local Practice, 17 (Brennan Center for Justice at New York University School of Law, 2015), *available at*: <http://www.brennancenter.org/sites/default/files/publications/Racial%20Disparities%20Report%20062515.pdf>. (hereinafter, 2015 Brennan Center Report).

<sup>22</sup> *Id.*

<sup>23</sup> *Id.* at 12, Figure 1.

<sup>24</sup> See U.S. Census Bureau, State & County Quick Facts (detailing U.S. demographic information), *available at* <http://quickfacts.census.gov/qfd/states/00000.html>.

<sup>25</sup> See Frank Newport, Gulf Grows in Black-White Views of U.S. Justice System Bias, Gallup (July 22, 2013), <http://www.gallup.com/poll/163610/gulf-grows-black-white-views-justice-system-bias.aspx>.

<sup>26</sup> *Id.*

black criminality. Studies show that this is just what people tend to think.

It is often acknowledged that the United States has the highest incarceration rate in the world. Our over-incarceration problem has become a mantra, with sentencing reformers regularly recite the phrase, “The U.S. has 5% of the world’s population, but 25% of the world’s prisoners.”<sup>27</sup> There are currently 2.3 million Americans in prisons and jails throughout the country.<sup>28</sup> Right now, more than 25% of Americans have a criminal conviction.<sup>29</sup> Furthermore, those in prison stay in prison for a long time, compounding the prison population problem as more inmates are added to the already large numbers. The average length of prison sentences has increased by 36% since 1990.<sup>30</sup> Much of this is due to the continued upward trend of imprisonment lengths brought on by longer sentences for nonviolent first-time offenders, increasingly punitive repeat offender provisions, and other mandatory minimum sentencing laws.<sup>31</sup> With such a vast ex-offender population in the country, it is puzzling that there is still such popular belief that our country’s crime problem is a black problem. However, studies show that Americans over-attribute criminal activity to blacks. A 2014 study by The Sentencing Project showed that, when asked about burglaries, illegal drug sales, and juvenile crimes, whites overestimated the percentage of those crimes committed by African Americans by as much as 30%.<sup>32</sup> Across races, people overestimated black

<sup>27</sup> See e.g., American Civil Liberties Union, *The Prison Crisis*, available at <https://www.aclu.org/prison-crisis>.

<sup>28</sup> See Brennan Center Report *supra* note 20, at 1.

<sup>29</sup> See Brennan Center for Justice, *Justice for All*, <http://www.brennancenter.org/issues/justice-all> (last visited Jan. 22, 2016).

<sup>30</sup> The Pew Charitable Trusts, *Time Served: The High Cost, Low Return of Longer Prison Terms*, <http://www.pewtrusts.org/en/research-and-analysis/reports/2012/06/06/time-served-the-high-cost-low-return-of-longer-prison-terms> (last visited Jan. 22, 2016). See Kamala Mallik-Kane et al., *Examining Growth in the Federal Prison Population, 1998 to 2010*, Urb. Inst. 1, 1 (2012), available at <http://www.urban.org/UploadedPDF/412720-Examining-Growth-in-the-Federal-Prison-Population.pdf> (explaining that an increase in prisoners’ expected time to be served was, by far, the leading factor contributing to federal prison population growth, accounting for over one-half of the population increase during the 1998-2010 period).

<sup>31</sup> William J. Stuntz, *The Collapse of American Criminal Justice* at 253, 264 (2011); see Report to Congress: *Mandatory Minimum Penalties in the Federal Criminal Justice System*, U.S. Sentencing Comm’n 63 (October 2011), available at [http://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/mandatory-minimum-penalties/20111031-rtc-pdf/Chapter\\_04.pdf](http://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/mandatory-minimum-penalties/20111031-rtc-pdf/Chapter_04.pdf) (discussing the many ways in which federal mandatory minimum sentences have contributed to the growing federal prison population and found that mandatory minimums apply to more offenses, impose longer terms of imprisonment, and are used more frequently by prosecutors today than they were 20 years ago).

<sup>32</sup> The Sentencing Project, *Race and Punishment: Racial Perceptions of Crime and Support for Punitive Policies*, “Racial Perceptions of Crime”, 13-14 (2014).

participation in violent crime by over 10%.<sup>33</sup> Implicit bias studies further reveal just how pervasive such negative sentiments about blacks are in this country. A further look at statistics, however, indicates a largely unacknowledged, and therefore, unaddressed, racial bias in the criminal justice system.

### *B. Bias-Revealing Statistics*

When actual crime commission is taken into account, it is quite clear that the criminal justice system is operating with a bias against blacks. For instance, when arrests are considered, bias-bolstering statistics say that African Americans are almost four times more likely to be arrested for selling drugs and almost three times more likely to be arrested for possessing drugs.<sup>34</sup> One could, and people often do, infer from this data that blacks must be the main sellers and users of illegal drugs. However, when bias-revealing statistics are added to the narrative, the tenor of the story changes. One such bias-revealing statistic is that whites are actually more likely to sell drugs and equally likely to consume them.<sup>35</sup> Such bias-revealing statistics unveil underlying injustices in the criminal justice system.

We see the same racially inequities exposed in the bias-revealing statistics for incarceration. Research from various jurisdictions indicates that African Americans are more likely to receive jail sentences when convicted of low-level offenses. For instance:

A 2014 Vera Institute study of New York County found that 30 percent of African American defendants were sentenced to jail for misdemeanor offenses, compared to 20 percent of Hispanic defendants and 16 percent of white defendants. African Americans were 89 percent more likely to be jailed for misdemeanor “person offenses” (such as assault) and 85 percent more likely to be incarcerated for misdemeanor drug offenses compared to white defendants. Hispanic defendants were 32 percent more likely to be incarcerated for misdemeanor person offenses.<sup>36</sup>

Therefore, when we are comparing people who have been convicted of the same type of crime, we see race as an unduly relevant factor in determining

<sup>33</sup> *Id.*

<sup>34</sup> Brennan Center Report *supra* note 20, at 7.

<sup>35</sup> *Id.*

<sup>36</sup> Brennan Center Report *supra* note 20, at 18.

what length of sentence the individuals receive.

These sorts of unjustified disparities in and of themselves ought to motivate us to reform the criminal justice system. However, the view of blacks as more likely to be criminals than people of other races remains pervasive, as does the view that the criminal justice system is fair to blacks. Perhaps some would say that if we fixed arrest disparities, we would have less blacks entering the criminal justice system, and therefore less disparity in incarceration as well. It may be a question of the chicken and egg variety, but this Essay argues that so long as we continue to have incarceration disparities, we fuel the false sense that blacks are more likely criminals, and therefore law enforcement must be used against them. Attacking racial disparities in incarceration may be just the key to attacking the bias that leads to police violence against blacks.

### III. THE CONSEQUENCES: ATTITUDES ABOUT BLACK CRIMINALITY SUPPORT THE “REASONABLENESS” OF POLICE VIOLENCE – THE EXAMPLE OF MICHAEL BROWN

As discussed, implicit bias can be used to explain the phenomenon of people thinking of blacks in more negative ways than those of other races. However, if history created this bias, then current rates of incarceration perpetuate it. The result is that, when police behave badly, their actions are often seen as reasonable. Therefore, at least one reason for the pervasiveness of police violence against citizens is that there is the notion that such extreme force is necessary, and therefore justified. The United States Supreme Court has clearly explained that use of force by police officers should be analyzed using the Fourth Amendment reasonableness standard.<sup>37</sup> The Court has decided that the proper question regarding the excessiveness of police force is whether the police officer acted as a reasonable law enforcement officer.<sup>38</sup> It only takes a look at recent accounts of police violence against individuals to conclude that an officer's actions are often deemed reasonable even when that officer has taken the life of an unarmed person. Various groups - from police departments, to prosecutors, to grand juries, and even trial juries – have absolved officers of guilt or responsibility in these instances, even when it is later determined that the killed individual could not have used, and was not trying to use,

<sup>37</sup> See, e.g., *Graham v. Connor*, 490 U.S. 386 (1989).

<sup>38</sup> *Id.* at 397.

deadly force against the officer.<sup>39</sup> Labeling the officer's actions reasonable in these instances reveals an underlying belief by the officer and those evaluating the officer's actions that the person whom the officer killed somehow deserved punishment for their objectionable behavior. When officers are excused for killing the unarmed, it shows that those judging the officer's use of force believed that the officer had reason to be frightened. The underpinnings of this reasoning is the belief that the person killed – especially if that person was black, and even more so if he was a black male – is frightening and criminally prone. Therefore, even though the person killed was unarmed, and thus not a real threat to the officer, the officer's perception was arguably reasonable.

Michael Brown's death at the hands of Officer Darren Wilson has become today's main story used to highlight, criticize, and also to defend the use of deadly force by police officers. It is also a tragic example of how attitudes about black criminality feed into support for officers killing unarmed, and thus non life-threatening, citizens. On August 9, 2014, Officer Darren Wilson shot and killed 18-year old Michael Brown – an unarmed black male – in Ferguson, Missouri, a suburb of St. Louis.<sup>40</sup> Though, in the weeks following the shooting, it was alleged that Michael had robbed a convenience store just before his encounter with Officer Wilson, Police Chief Tom Jackson reported after the shooting that Officer Wilson was not aware of the alleged robbery.<sup>41</sup> Rather, Officer Wilson first approached Michael for standing in the street and impeding traffic.<sup>42</sup> According to Officer Wilson, Michael threatened his life by assaulting him and trying to take his gun.<sup>43</sup> Officer Wilson's version of the story depicts

<sup>39</sup> For examples, *see supra* note 11.

<sup>40</sup> For a comprehensive explanation of the Michael Brown shooting, *see What Happened in Ferguson*, THE NEW YORK TIMES, available at <http://www.nytimes.com/interactive/2014/08/13/us/ferguson-missouri-town-under-siege-after-police-shooting.html>.

<sup>41</sup> Joe Millitzer and Vera Culley, *Chief Jackson: The convenience store robbery and Michael Brown shooting not connected*, FOX2NOW (Aug. 15, 2014, 02:56 PM), <http://fox2now.com/2014/08/15/live-updates-ferguson-police-chief-tom-jackson-speaks-at-a-press-conference/>.

<sup>42</sup> In his grand jury testimony (hereinafter, "Grand Jury Transcript"), Officer Wilson explained what caught his attention about Michael Brown:

I see them walking down the middle of the street. And first thing that struck me was they're walking in the middle of the street. I had already seen a couple cars trying to pass, but they couldn't have traffic normal because they were in the middle, so one had to stop to let the car go around and then another car would come.

State of Missouri v. Darren Wilson, Grand Jury Volume V, 207, Sept. 16, 2014, available at <http://www.documentcloud.org/documents/1371222-wilson-testimony.html>.

<sup>43</sup> In his grand jury testimony, Officer Wilson alleges that Michael punched him in the face (Id. at p. 210), reached into his car (Id. at p. 212), repeatedly swung at him (Id. at p. 213-14), and grabbed the

Michael as an enraged monster with whom no negotiating would tame.<sup>44</sup> In fact, Wilson described Michael as looking like a “demon”<sup>45</sup> and claimed that he had the super-human strength to run through the officer’s gunfire. In Officer Wilson’s own words, we hear an initial animosity toward Michael Brown and conclusions about his character and criminality. Sadly, Officer Wilson’s view of Michael Brown is not surprising. It mirrors the societal bias against blacks that has been documented in the studies and research previously discussed. While much focus is on changes in policing, changing the face of punishment through purpose-focused sentencing reform has a place in moving us toward racial justice on the streets as well.

#### IV. MOVING BEYOND THE BIAS TOWARD PURPOSE: A ROLE FOR SENTENCING REFORM

If one accepts that our problem of over incarcerating blacks because of biased and purposeless sentencing practices plays a role in fostering our policing problem, then sentencing reform is a logical solution to police injustice against blacks. Purpose-focused sentencing reform will allow us to reveal that the racial disparities in sentencing have nothing to do with sentencing goals and purposes, but are instead fueled by the same bias that powers police brutality as well as the view that the criminal justice system is fair to blacks despite those disparities. Our current rates of incarceration are not significantly deterring crime. They are out of line with societal views of how low-level, non-violent offenders should be punished, and thus are not fulfilling the retribution purpose properly nor effectively focusing our incapacitation efforts on the truly dangerous.<sup>46</sup> Our high levels of incarceration ignore a rehabilitative purpose as well and often hurt, rather than help families and communities.<sup>47</sup> To fix this, purpose must be identified and fulfilling that purpose must be aggressively sought.

While there likely is not one right sentence for any given scenario, if

Officer’s gun (Id. at p. 214-15, p. 223).

<sup>44</sup> At one point in his grand jury testimony, Officer Wilson says that he felt “like a five-year-old holding onto Hulk Hogan” (Id. at p. 210, lines 18-22).

<sup>45</sup> *Id.* at p. 225, lines 2-3.

<sup>46</sup> See PEW, Public Opinion on Sentencing and Corrections Policy in America (2012), available at [http://www.pewtrusts.org/~media/assets/2012/03/30/pew\\_nationalsurveyresearchpaper\\_final.pdf?la=en](http://www.pewtrusts.org/~media/assets/2012/03/30/pew_nationalsurveyresearchpaper_final.pdf?la=en) (Finding that voters overwhelmingly support a variety of policy changes that shift non-violent offenders from prison to more effective, less expensive alternatives).

<sup>47</sup> See generally, Jalila Jefferson-Bullock, The Time is Ripe to Include Considerations of the Effects on Families and Communities of Excessively Long Sentences, 83 UMKC L. Rev. 73 (Fall 2014).

given guidance as to the appropriate sentencing purpose, at least judges can all be likeminded about the goals, though they may come to different sentencing conclusions in any given case.<sup>48</sup> The idea is for the sentencing purpose to become “the starting point and the initial benchmark.”<sup>49</sup> Even if judges differ in how they interpret what amount of imprisonment, if any, will fulfill the stated sentencing purpose, each judge’s attempt to fulfill the same sentencing purpose will provide valuable information to sentencing commissions as they study the efficacy of sentencing law. In this way, purpose-focused sentencing may address racial disparities as well. If the sentences that are being imposed for certain offenses seem to be doing nothing other than creating racial disparities in punishment, it would be the commission’s charge to revise the sentences applicable for those crimes so that they begin to accomplish their particular purpose.

There is a role for sentencing reform in transforming policing. As sentencing law and practice comes in line with sentencing goals, unwarranted racial disparities can simultaneously begin to be eliminated. As punishment fundamentally changes, the criminal justice system will begin to look radically different as well. In this way, we can begin to dismantle the deep-rooted racial prejudice that plagues our criminal justice system, and more particularly, the biases that lead to police violence against blacks and society’s failure to adequately remedy that violence. We need only commit to taking the time to achieve a long-term resolution to what is a systemic American problem.

<sup>48</sup> This “inherent conundrum[] in applying punishment theory” was explained well in the case book, *Sentencing Law and Policy*. The authors wrote, “[t]hrough selection of multiple purposes creates the added challenge of establishing priorities, even a jurisdiction’s decision to pursue only one theory of punishment does not magically simplify the conundrums inherent in developing a sound sentencing system. For one thing, each theory of punishment has conceptual variations.” NORA V. DEMLEITNER, ET AL., *SENTENCING LAW AND POLICY: CASES, STATUTES, AND GUIDELINES* 9 (2d ed. 2007). The passage then goes on to describe those variations in interpretation among each theory of punishment. I recognize this difficulty. However, I maintain that there is value in attempting to select and study a particular purpose over proceeding with a purposeless system or one that pretends to serve all purposes. By actually attempting to achieve purpose in sentencing, we will undoubtedly learn from studying the results of the sentences selected.

<sup>49</sup> The quoted language is the position that the Supreme Court has said the Guidelines now occupy; *See Gall v. United States*, 552 U.S. 38, 49 (2007).