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## “Lord Forgive Me, But He Tried to Kill Me”\*: Proposing Solutions to the United States’ Most Vexing Racial Challenges

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# “Lord Forgive Me, But He Tried to Kill Me”\*: Proposing Solutions to the United States’ Most Vexing Racial Challenges

andré douglas pond cummings\*\*

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\* YOUNG BUCK, *Bang Bang*, on STRAIGHT OUTTA CASHVILLE (G-Unit Records 2004). In this urban tale, Young Buck describes an encounter with a rookie police officer where he hypothetically kills the officer who made a move first to kill Young Buck. This narrative encounter encapsulates the incredible fissure that separates many young black males and law enforcement officers in United States cities. Young Buck narrates:

It’s death before dishonesty, dope deals and robbery;  
Poppa wasn’t around, but that shit didn’t bother me;  
I’d probably be in the penitentiary;  
But I played the cards the dear Lord sent to me;  
The whole truth, I use this booth to speak to my thug niggas;  
Why you mad at me? The Government’s the drug dealers;  
Before I let this police kid harass me;  
This rookie ass cop gonna have to blast me;  
He asked me for identification, I looked at him and laughed;  
He made a move and I heard a blast;  
That’s what you get, bitch

*Id.*

\*\* Professor of Law. J.D. Howard University School of Law. I am grateful to Trent Grable, Indiana Tech Law School for his terrific research assistance. I am appreciative to Professors Yvette Lindgren and Todd Clark for reading and commenting on early drafts of this Article. I am further grateful for the excellent editorial assistance of the staff of the *Washington & Lee Journal of Civil Rights and Social Justice*. Of course, any errors within are my own.

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### *I. Introduction*

While great progress has been made in the United States in the past fifty years in connection with race relations, three critical issues continue to vex our nation. The United States, despite its progress, continues to struggle mightily with (a) the police killing of unarmed black men; (b) racially disproportionate mass incarceration; and (c) violent homicides of black men and boys.

Nightly newscasts detail seemingly weekly killings of unarmed African American men by law enforcement officers.<sup>1</sup> Mass

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1. See Eyder Peralta & Bill Chappell, *Ferguson Jury: No Charges for Officer in Michael Brown’s Death*, NPR (Nov. 24, 2014, 3:37 PM), <http://www.npr.org/sections/thetwo-way/2014/11/24/366370100/grand-jury-reaches-decision-in-michael-brown-case> (describing the outcome for the trial against the officer in Michael Brown’s Death) (on file with the Washington and Lee Journal of Civil Rights and Social Justice); see also James Queally, *Tamir Rice Report: Cleveland Policeman Who Fired Fatal Shots Said He Had “No Choice,”* L.A. TIMES (June 13, 2015, 8:24 PM), <http://www.latimes.com/nation/nationnow/la-na-nn-tamir-rice-investigation-documents-20150613-story.html> (describing the police shooting of Tamir Rice) (on file with the Washington and Lee Journal of Civil Rights and Social Justice); Richard Perez-Pena, *University of Cincinnati Officer Indicted in Shooting Death of Samuel Dubose*, N.Y. TIMES (July 29, 2015), [http://www.nytimes.com/2015/07/30/us/university-of-cincinnati-officer-indicted-in-shooting-death-of-motorist.html?\\_r=0](http://www.nytimes.com/2015/07/30/us/university-of-cincinnati-officer-indicted-in-shooting-death-of-motorist.html?_r=0) (describing the police shooting of Samuel Dubose and the prosecution of the officer involved) (on file with the Washington and Lee Journal of Civil Rights and Social Justice); Amy Davidson, *Freddie Gray’s Death Becomes a Murder Case*, NEW YORKER (May 1, 2015), <http://www.newyorker.com/news/amy-davidson/freddie-grays-death-becomes-a-murder-case> (describing the police shooting of Freddie Gray and the prosecution of the officers) (on file with the Washington and Lee Journal of Civil Rights and Social Justice); Taryn Finley, *Philando Castile’s Family Asks DOJ To Investigate His Death*, HUFFINGTON POST (Aug. 12, 2016), [http://www.huffingtonpost.com/entry/philando-castiles-family-doj-investigation\\_us\\_57adcdcb4b069e7e504bdc5](http://www.huffingtonpost.com/entry/philando-castiles-family-doj-investigation_us_57adcdcb4b069e7e504bdc5) (describing the police shooting of Philando Castile and the investigation of the officer involved) (on file with the Washington and Lee Journal of Civil Rights and Social Justice); Alan Blinder & Timothy Williams, *Ex-South Carolina Officer Is Indicted in Shooting Death of Black Man*, N.Y. TIMES (June 8, 2015), <http://www.nytimes.com/2015/06/09/us/former-south-carolina-officer-is-indicted-in-death-of-walter-scott.html> (describing the police shooting of Walter Scott and the indictment of the officer involved) (on file with the Washington and Lee Journal of Civil Rights and Social Justice); Rory Carroll, *Ricardo Diaz Zeferino: Videos of Police Shooting Unarmed Man in Bike Theft Go Public*, GUARDIAN (July 14, 2015, 11:55 PM), <http://www.theguardian.com/us-news/2015/jul/15/ricardo-diaz-zeferino-video-of-shooting-by-los-angeles-police-made-public> (describing the police shooting of Ricardo Diaz Zeferino and the recently released video of the incident) (on file with the Washington and Lee Journal of Civil Rights and Social Justice); Mark Berman, *No Indictments After Police Shoot and Kill Man at an Ohio Wal-Mart; Justice Dept. Launches Investigation*, WASH. POST (Sept. 24, 2014), <http://www.washingtonpost.com/news/post-nation/wp/2014/09/24/no-indictments-after-police-shoot-and-kill-man-at-an-ohio-wal-mart-justice-dept-launches-investigation/> (describing the police shooting of John Crawford III and the decision not to indict the officer involved) (on file with the Washington and Lee Journal of Civil Rights and Social Justice); Jeremy Gorner, *Chicago Poised to Pay \$5 Million to Family of Teen Shot 16 Times by Police*, CHI. TRIBUNE (Apr. 10, 2015, 10:35 PM), <http://www.chicagotribune.com/news/local/breaking/ct-million-dollar-police-settlement-met-20150410-story.html> (describing the police shooting of Laquan McDonald and the proposed settlement between the City of Chicago and

incarceration, while plateauing in the last several years, continues to see millions of United States citizens incarcerated at rates unmatched by any other country in the world. Those incarcerated are disproportionately African American and Latino males jailed for non-violent drug and property crimes.<sup>2</sup> Statistics show that African American citizens suffer 55 percent of all homicide deaths in the United States while making up just 13 percent of the population.<sup>3</sup> In nearly every major city in the United States, African American males constitute 65 to 75 percent of those homicide deaths while often making up a small percentage of those cities' populations.<sup>4</sup> These homicide statistics are so dramatic, it appears that an epidemic is occurring in America.<sup>5</sup>

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McDonald's mother) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

2. See Roy Walmsley, *The World Prison Population List*, INT'L CTR. FOR PRISON STUD., 2009, at 1, [http://www.prisonstudies.org/sites/default/files/resources/downloads/wppl\\_10.pdf](http://www.prisonstudies.org/sites/default/files/resources/downloads/wppl_10.pdf) (emphasizing that the United States, with 2,293,157 prisoners, ranks first in the world above China's 1,565,771 sentenced prisoners); see also Vincent Schiraldi & Jason Ziedenberg, *The Punishing Decade: Prison and Jail Estimates at the Millennium*, JUST. POL'Y INST. 5 (2000), [http://www.justicepolicy.org/images/upload/00-05\\_REP\\_PunishingDecade\\_AC.pdf](http://www.justicepolicy.org/images/upload/00-05_REP_PunishingDecade_AC.pdf) (discussing the high incarceration rate in the United States).

3. *Blacks Suffer Disproportionate Share of Firearm Homicide Deaths*, PEW RES. CTR. (May 21, 2013), <http://www.pewresearch.org/daily-number/blacks-suffer-disproportionate-share-of-firearm-homicide-deaths/> (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

4. See Appendix A (indicating homicide rates by race of most major cities in the United States); see also Leon T. Andrews, Jr., *REAL: Race, Equity, and Leadership*, NAT'L LEAGUE OF CITIES (Nov. 2015), <http://mbc-leo.org/pdf/2015-11-14-REAL-Presentation.pdf> (describing the high rate of homicide for African American males compared to other gender and races); Antoinette Davis, *Troubling Rates of Local Homicide for Black Males*, NAT'L COUNCIL ON CRIME & DELINQ. (Nov. 5, 2015), <http://www.nccdglobal.org/blog/troubling-rates-of-local-homicide-for-black-males> (on file with the Washington and Lee Journal of Civil Rights and Social Justice) (noting the rates of homicide for black males); *infra* note 66 (noting the statistics on homicide for black males in large cities including Boston, Baltimore, and Minneapolis).

5. See *Epidemic*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/epidemic> (affecting or tending to affect a disproportionately large number of individuals within a population, community, or region at the same time) (on file with the Washington and Lee Journal of Civil Rights and Social Justice). Compare Jon Swaine, Oliver Laughland, Jamiles Lartey & Ciara McCarthy, *Young black men killed by US police at highest rate in year of 1,134 deaths*, GUARDIAN (Dec. 31, 2015, 3:00 PM), <https://www.theguardian.com/us-news/2015/dec/31/the-counted-police-killings-2015-young-black-men> ("Despite making up only 2% of the total US population, African American males between

Twenty-five years ago, Ice Cube dubbed African American males an “endangered species,”<sup>6</sup> and little has changed since that time to indicate that much is better. Young black men in the United States face an incredible risk of being killed, whether by law enforcement officers or each other, or if not killed, imprisoned.<sup>7</sup> If a young black man is locked up, that prison bid is commonly understood to foreclose many later opportunities that upon release are necessary to lead a happy and healthy life.<sup>8</sup>

Death or prison awaits an alarming number of young black men in today’s America. These dire circumstances are simply unacceptable in a developed and wealthy nation like the United States of America.<sup>9</sup>

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the ages of 15 and 34 comprised more than 15% of all deaths logged this year by an ongoing investigation into the use of deadly force by police”) (on file with the Washington and Lee Journal of Civil Rights and Social Justice), *with The Black Death, 1348*, EYEWITNESS TO HIST. (2001), <http://www.eyewitnesstohistory.com/plague.htm> (“By the time the epidemic played itself out three years later, anywhere between 25% and 50% of Europe’s population had fallen victim to the pestilence”) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

6. ICE CUBE, *Endangered Species (Tales from the Darkside)*, on AMERIKKA’S MOST WANTED (Priority Records 1990).

7. Justin Wolfers, David Lehardt, & Kevin Quealy, *1.5 Million Missing Black Men*, N.Y. TIMES (Apr. 20, 2015), [http://www.nytimes.com/interactive/2015/04/20/upshot/missing-black-men.html?\\_r=0](http://www.nytimes.com/interactive/2015/04/20/upshot/missing-black-men.html?_r=0) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

8. See MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2012) (describing how millions of African Americans are locked behind bars and then given a permanent second-class status in society); see also John Oliver, *Prisoner Re-entry: Last Week Tonight with John Oliver (HBO)*, YOUTUBE (Nov. 8, 2015), <https://www.youtube.com/watch?v=gJtYRrH5G2k> (describing the enormous obstacles former prisoners face after they are released from prison).

9. See Nate Silver, *Black Americans Are Killed at 12 Times The Rate Of People In Other Developed Countries*, FIVETHIRTYEIGHT (June 18, 2015, 5:33 PM), <http://fivethirtyeight.com/datalab/black-americans-are-killed-at-12-times-the-rate-of-people-in-other-developed-countries/> (“[T]he U.S.’s rate of homicide deaths, 5.2 per 100,000 persons, is easily the highest. The next-highest are Brunei (2.0), Finland (2.0) and Israel (1.9). And the U.S. homicide death rate is more than three times higher than neighboring Canada (1.5)”) (on file with the Washington and Lee Journal of Civil Rights and Social Justice). Silver goes on to say, “[b]ut there’s no other highly industrialized country with a homicide death rate similar to the one black Americans experience. Their homicide death rate, 19.4 per 100,000 persons, is about 12 times higher than the average rate among all people in other developed countries.” *Id.*

In examining and detailing the racial challenges that continue to vex the United States, it is never difficult to point to statistics and evidence that extrapolate the problem. What is difficult is proposing solutions and optimistic prognostications for what can be done to ease these racial tensions that cause our persistent racial difficulties in order to preserve and value the lives of young African American men and boys. This Article offers to do just that: propose solutions. The second section will provide evidence that we are indeed plagued by the three racial challenges articulated above. The third section will propose solutions and actions that can be taken to address and work to reverse these distressing racial realities. In proposing solutions, this Article will focus on myriad actions that can be taken, including legislative enactments, training initiatives, advocacy programs, and, in particular, local municipal programs as exemplified by the City of Fort Wayne, Indiana as engaged by the author. While not a panacea, each of the solution proposals carries with it the promise of easing and resolving many of the racial tensions and hostility that continue to plague United States citizens of color.

## *II. Our Most Vexing and Persistent Racial Challenges*

State sponsored killing of African American citizens has plagued the nation from its inception.<sup>10</sup> The warehousing of African American men in our nation's prisons has a long history dating back to the abolition of slavery up through the current era of mass incarceration.<sup>11</sup> Violent homicides in the black community

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10. See Donald F. Tibbs, *From Black Power to Hip Hop: Discussing Race, Policing, and the Fourth Amendment Through the "War On" Paradigm*, 15 IOWA J. OF GENDER, RACE, AND JUST. 47, 52 (2012) (describing the over 1,000 deaths of black people at the hands of government agencies over a three-year period in the FBI's COINTELPRO era); see also Robert A. Gibson, *The Negro Holocaust: Lynching and Race Riots in the United States, 1880-1950*, YALE-NEW HAVEN TEACHERS INST. (2016), <http://teachersinstitute.yale.edu/curriculum/units/1979/2/79.02.04.x.html> (describing the history of lynching) (on file with the Washington and Lee Journal of Civil Rights and Social Justice); Shawn Lay, *Ku Klux Klan in the Twentieth Century*, NEW GA. ENCYCLOPEDIA (July 18, 2016), <http://www.georgiaencyclopedia.org/articles/history-archaeology/ku-klux-klan-twentieth-century> (describing the Ku Klux Klan) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

11. See Devon Douglas-Bowers, *Slavery by a Different Name: The Convict Lease System*, CTR. FOR RES. ON GLOBALIZATION (June 1, 2012),

increased dramatically in the latter part of the twentieth and early part of the twenty-first century, due in large part to a massive increase in wealth inequality in the country,<sup>12</sup> as well as the declaration of a War on Drugs and War on Crime that have played out primarily in our urban city centers across the nation.<sup>13</sup> While many issues of inequality and discrimination continue to afflict our nation, none appear more pressing or deadly than the police killing of unarmed black men, continuing mass incarceration, and the extreme homicide statistics in the black community.<sup>14</sup>

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<http://www.globalresearch.ca/slavery-by-a-different-name-the-convict-lease-system/31176> (explaining the Convict Lease System as a means of slavery after the Thirteenth and Fourteenth Amendments) (on file with the Washington and Lee Journal of Civil Rights and Social Justice); *see also* John F. Pfaff, *Symposium: Drug Policy Reality And Reform: The War On Drugs And Prison Growth: Limited Importance, Limited Legislative Options*, 52 HARV. J. ON LEGIS. 173, 176 (2015) (describing the War on Drugs); *The Drug War, Mass Incarceration and Race*, DRUG POL’Y ALLIANCE (Feb. 10, 2016), <http://www.drugpolicy.org/resource/drug-war-mass-incarceration-and-race> (“Although rates of drug use and selling are comparable across racial and ethnic lines, blacks and Latinos are far more likely to be criminalized for drug law violations than whites”) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

12. *See* Drew Desilver, *U.S. income inequality, on rise for decades, is now highest since 1928*, PEW RES. CTR. (Dec. 5, 2013), <http://www.pewresearch.org/fact-tank/2013/12/05/u-s-income-inequality-on-rise-for-decades-is-now-highest-since-1928/> (describing income inequality) (on file with the Washington and Lee Journal of Civil Rights and Social Justice); *see also* *On Views of Race and Inequality, Blacks and Whites Are Worlds Apart*, PEW RES. CTR. (June 27, 2016), <http://www.pewsocialtrends.org/2016/06/27/on-views-of-race-and-inequality-blacks-and-whites-are-worlds-apart/> (describing racial inequality since President Obama’s election) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

13. *See* ALEXANDER, *supra* note 8, at 121 (describing how the War on Drugs has been deliberately waged in urban city centers in the United States rather than on college campuses, suburbia or beach cities).

14. *See generally* Devin Foley, *Chicago: 75% of Murdered are Black, 71% of Murderers Are Black*, INTELL. TAKEOUT (July 27, 2016), <http://www.intellectuالتakeout.org/blog/chicago-75-murdered-are-black-71-murderers-are-black>; Jeremy Gerner, Peter Nickeas & Elvia Malagon, *August most violent month in Chicago in nearly 20 years*, CHI. TRIB. (Aug. 29, 2016, 8:25 PM), <http://www.chicagotribune.com/news/local/breaking/ct-august-most-violent-shootings-chicago-20160829-story.html> (on file with the Washington and Lee Journal of Civil Rights and Social Justice).



*A. Police Killing of Unarmed Black Men*

In the past several years, due in part to the advent and implementation of recording technology, including cell phone video and police vehicle dash cams and body cams,<sup>15</sup> the United States has witnessed first-hand law enforcement killing of unarmed black men in staggering numbers. The police killings of Tamir Rice, Walter Scott, Eric Garner, Michael Brown, Freddy Gray, Samuel DuBose, Philando Castile, Terence Crutcher, and Keith Scott,<sup>16</sup> amongst many others, is particularly significant when one recounts the reason that law enforcement encountered these mostly unarmed black men in the first place. Each death was precipitated by a minor legal infraction including 12-year-old Tamir Rice playing with a plastic toy gun,<sup>17</sup> Walter Scott driving with a broken taillight,<sup>18</sup> Eric Garner selling loose cigarettes,<sup>19</sup>

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15. See *Filming the Police*, ACLU OF SAN DIEGO & IMPERIAL COUNTIES, <https://www.aclusandiego.org/wp-content/uploads/2014/11/KYR-filming-police.pdf> (last visited Oct. 2, 2016) (explaining the use of citizen cell phone footage to protect against police abuse has become so prominent in recent years that the ACLU has released to the public a document that provides directions on how to safely and legally film the police).

16. Peralta & Chappell, *supra* note 1; see also generally Jason Morris & Max Blau, *Tulsa Police Shooting: 5 Discrepancies from Terence Crutcher's Death*, CNN (Sept. 22, 2016, 8:11 AM), <http://www.cnn.com/2016/09/21/us/terence-crutcher-police-shooting-point-counterpoint/>; see also Wesley Lowery, *Charlotte Officer Did Not Activate Body Camera Until After Keith Scott Had Been Shot*, WASH. POST (Sept. 26, 2016), [https://www.washingtonpost.com/news/post-nation/wp/2016/09/26/charlotte-officer-did-not-activate-body-camera-until-after-keith-scott-had-been-shot-2/?utm\\_term=.94676fa02526](https://www.washingtonpost.com/news/post-nation/wp/2016/09/26/charlotte-officer-did-not-activate-body-camera-until-after-keith-scott-had-been-shot-2/?utm_term=.94676fa02526) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

17. *Hear the 911 Call About Tamir Rice: Gun is 'Probably Fake,' Caller Says*, L.A. TIMES (Nov. 26, 2014), <http://www.latimes.com/nation/nationnow/la-na-nn-tamir-rice-911-call-20141126-htmstory.html>. (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

18. Krishnadev Calamur, *S.C. Dashcam Video: A Broken Tail Light, A Routine Traffic Stop, A Fleeing Man*, NPR (Apr. 9, 2015, 5:55 PM), <http://www.npr.org/sections/thetwo-way/2015/04/09/398615265/s-c-dash-cam-video-a-broken-tail-light-a-routine-traffic-stop-a-fleeing-man> (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

19. Tommy Christopher, *By the Way, It's Not Clear Eric Garner Even Had Illegal Cigarettes When He Was Killed*, DAILY BANTER (Dec. 4, 2014), <http://thedailybanter.com/2014/12/eric-garner-killed-illegally-selling-loose-cigarettes/> (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

Michael Brown jaywalking,<sup>20</sup> Freddy Gray “looking crazy” at the police,<sup>21</sup> Samuel Dubose driving with no front license plate,<sup>22</sup> Philando Castile “resembling” a suspect in a robbery,<sup>23</sup> Terence Crutcher pacing outside his broken down vehicle,<sup>24</sup> and Keith Scott reading a book while sitting in his car.<sup>25</sup> Even the most casual observer would conclude that none of these initial “crimes” required a response that would include deadly force. That unarmed black men ended up dead based on such initial minor misdeeds signals that it is time to reexamine our law enforcement deadly force policy and the individual training that most officers receive.<sup>26</sup>

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20. Trymaine Lee & Michele Richinick, *Police: Michael Brown Stopped Because He Blocked Traffic*, MSNBC (Sept. 19, 2014, 4:15 PM), <http://www.msnbc.com/msnbc/ferguson-police-name-michael-brown> (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

21. Stacia L. Brown, *Looking While Black: When Eye Contact with Police is Considered a Crime*, NEW REPUBLIC (Apr. 30, 2015), <https://newrepublic.com/article/121682/freddie-grays-eye-contact-police-led-chase-death> (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

22. Justin Carissimo, *Samuel Dubose Shooting: Cincinnati Police Officer Kills Unarmed Black Man During Traffic Stop*, INDEP. (July 21, 2015), <http://www.independent.co.uk/news/world/americas/cincinnati-police-officer-fatally-shoots-unarmed-black-man-during-traffic-stop-10406110.html> (on file with Washington and Lee Journal of Civil Rights and Social Justice).

23. Jon Schuppe, *Officer Mistook Philando Castile for a Robbery Suspect, Tapes Show*, NBC (July 12, 2016, 5:18 PM), <http://www.nbcnews.com/news/us-news/officer-thought-philando-castile-was-robbery-suspect-tapes-show-n607856> (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

24. Max Blau, Jason Morris & Catherine E. Shoichet, *Tulsa police shooting investigated by Justice Department*, CNN (Sept. 21, 2016, 12:21 AM), <http://www.cnn.com/2016/09/20/us/oklahoma-tulsa-police-shooting/> (on file with Washington and Lee Journal of Civil Rights and Social Justice).

25. Snejana Farberov, *‘Heartbroken’ mother of Keith Scott Claims Book he was Reading When he was Shot by Police was the Koran*, DAILY MAIL (Sept. 23, 2016), <http://www.dailymail.co.uk/news/article-3804430/Heartbroken-mother-Keith-Scott-claims-book-reading-shot-police-Koran.html> (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

26. Seth Stoughton, *How Police Training Contributes to Avoidable Deaths*, ATLANTIC (Dec. 12, 2014), <http://www.theatlantic.com/national/archive/2014/12/police-gun-shooting-training-ferguson/383681/> (on file with the Washington and Lee Journal of Civil Rights and Social Justice); Phillip Swarts, *Police Need Better Training and Community Relations, Presidential Task Force is Told*, WASH. TIMES (Jan. 13, 2015), <http://www.washingtontimes.com/news/2015/jan/13/police-brutality-solutions-are-training-community/> (on file with the Washington and Lee Journal of Civil Rights and Social Justice); Michael Daly, *Did Baltimore Cops’ Indifference Kill Freddie Gray?*, DAILY BEAST (Apr. 25, 2015), <http://www.thedailybeast.com/articles/2015/04/25/baltimore-cops-should-have->

While state-sponsored killing of black bodies has never truly subsided in the United States from slavery through today,<sup>27</sup> that it continues at such regularity is perhaps the nation's greatest racial tragedy.<sup>28</sup>

Newfound attention is being directed by popular sports figures and celebrities to the most recent incidences of law enforcement killing of unarmed black men,<sup>29</sup> but a national solution has so far mostly eluded our policymakers and law enforcement leaders.<sup>30</sup>

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listened-to-the-first-cries-of-pain.html. (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

27. See generally Tryon Woods, "Sexual Poetic Justice": *Hip Hop Antiracist Desire, and Legal Narratives*, HIP HOP AND THE LAW 125 (Pamela Bridgewater, andre douglas pond cummings, & Donald F. Tibbs eds, 2015); see also generally Donald F. Tibbs, *supra* note 10, at 47–79; Phillip Atiba Goff, Jennifer L. Eberhardt, Melissa J. Williams, & Matthew Christian Jackson, *Not Yet Human: Implicit Knowledge, Historical Dehumanization, and Contemporary Consequences*, 94 J. OF PERSONALITY AND SOC. PSYCHOL. 292 (2008); Teresa J. Guess, *The Social Construction of Whiteness: Racism by Intent, Racism by Consequence*, 32 CRITICAL SOC. 649 (2006); Robert R. Dykstra, *White Men, Black Laws*, 46 ANNALS OF IOWA 403 (1982).

28. See Claudia Rankine, *The Condition of Black Life Is One of Mourning*, N.Y. TIMES (June 22, 2015), <http://www.nytimes.com/2015/06/22/magazine/the-condition-of-black-life-is-one-of-mourning.html> ("The murder of three men and six women at a church in Charleston is a national tragedy, but in America, the killing of black people is an unending spectacle") (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

29. See generally Morgan Jerkins, *What Colin Kaepernick's National Anthem Protest Tells Us About America*, ROLLING STONE (Aug. 29, 2016), <http://www.rollingstone.com/sports/colin-kaepernicks-national-anthem-protest-w436704> (on file with the Washington and Lee Journal of Civil Rights and Social Justice); J.A. Adande, *Purpose of "I Can't Breathe" T-shirts*, ESPN (Dec. 10, 2014), [http://www.espn.com/nba/story/\\_/id/12010612/nba-stars-making-statement-wearing-breathe-shirts](http://www.espn.com/nba/story/_/id/12010612/nba-stars-making-statement-wearing-breathe-shirts) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

30. See Joseph P. Williams, *Why Aren't the Police Prosecuted?*, U.S. NEWS & WORLD REP. (July 16, 2016, 1:31 PM), <http://www.usnews.com/news/articles/2016-07-13/why-arent-police-held-accountable-for-shooting-black-men> ("When a cop shoots a civilian in the line of duty, odds are he won't be punished for it—even if Washington gets involved") (on file with the Washington and Lee Journal of Civil Rights and Social Justice); see also Abdulai Jalloh, *The Silence of African Leaders to the Oppression Of Black People*, HUFFINGTON POST (July 16, 2016, 11:04 AM), [http://www.huffingtonpost.com/entry/the-silence-of-african-leaders-to-the-oppression-of\\_us\\_578a422ae4b0e7c873502468](http://www.huffingtonpost.com/entry/the-silence-of-african-leaders-to-the-oppression-of_us_578a422ae4b0e7c873502468) ("African leaders are completely silent to plight of black people and their silence is contributing to the suffering of the entire black race") (on file with the Washington and Lee Journal of Civil Rights and Social Justice); see generally Judy Woodruff, *Why the U.S. Has Done Almost Nothing to Stop Mass Shootings*, PBS NEWSHOUR (Oct. 2,

Recent examples of law enforcement departments run amok in Ferguson, Missouri, and Baltimore, Maryland indicate that deep and enduring discrimination and racism continue to permeate law enforcement offices throughout our country.<sup>31</sup> A solution to this national tragedy must be aggressively pursued and implemented.

### *B. Racially Disparate Mass Incarceration*

As I’ve written previously,<sup>32</sup> since 1980, the rate of incarcerated Americans has skyrocketed.<sup>33</sup> The number of people in United States prisons is now “nearly 5 times what it was 30 years ago.”<sup>34</sup> The United States now imprisons more of its citizens

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2015, 6:40 PM), <http://www.pbs.org/newshour/bb/u-s-done-almost-nothing-stop-mass-shootings/> (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

31. See *Investigation of the Ferguson Police Department*, U.S. DEPT OF JUST. C.R. DIV. 74 (Mar. 4, 2015), [https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson\\_police\\_department\\_report.pdf](https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf) (“Our investigation revealed African Americans making extraordinary efforts to pay off expensive tickets for minor, often unfairly charged, violations, despite systemic obstacles to resolving those tickets”); see also *Investigation of the Baltimore City Police Department*, U.S. DEPT OF JUST. C.R. DIV. 79 (Aug. 16, 2016), <https://www.justice.gov/opa/file/883366/download> (“BPD’s trainings fuel an ‘us vs. them’ mentality we saw some officers display toward community members, alienating the civilians they are meant to serve”) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

32. Much of this section appeared originally in andré douglas pond cummings, *All Eyez On Me: America’s War on Drugs and the Prison-Industrial Complex*, 15 IOWA J. OF GENDER, RACE & JUST. 417 (2012). Content and footnotes have been updated to reflect changes since its publication in 2012.

33. See ALEXANDER, *supra* note 8, at 6 (“In less than thirty years the U.S. penal population exploded from around 300,000 to more than 2 million . . . . The United States now has the highest rate of incarceration in the world”); see generally Schiraldi & Ziedenberg, *supra* note 2; see also Adam M. Gershowitz, *An Informational Approach to the Mass Imprisonment Problem*, 40 ARIZ. ST. L.J. 47, 53 (2008) (highlighting that, in 2005, the rate of incarceration was 160 inmates per 100,000 people, more than doubling the 313 inmates per 100,000 in 1985); Vicki Waye & Paul Marcus, *Australia and the United States: Two Common Criminal Justice Systems Uncommonly at Odds, Part 2*, 18 TUL. J. INT’L & COMP. L. 335, 373 (2010) (noting that the incarceration rate has increased nearly sevenfold from 1970 to mid-2008, and drug offense incarcerations have increased 1200% from 1980 to 2007).

34. *Pruning Prisons: How Cutting Corrections Can Save Money and Protect Public Safety*, JUST. POL’Y INST. 3 (2009), [http://www.justicepolicy.org/uploads/justicepolicy/documents/09\\_05\\_rep\\_pruningprisons\\_ac\\_ps.pdf](http://www.justicepolicy.org/uploads/justicepolicy/documents/09_05_rep_pruningprisons_ac_ps.pdf).

than any other nation on Earth.<sup>35</sup> Despite its relatively small population, compared to other nations across the world, United States citizens are imprisoned at rates that far exceed any other country.<sup>36</sup> “The United States has less than 5 percent of the world’s population. But it has almost a quarter of the world’s prisoners.”<sup>37</sup>

Over the past thirty years, the vast majority of the prisoner increase in the United States has come from drug arrests of citizen minorities.<sup>38</sup> “The United States imprisons a larger percentage of its black population than South Africa did at the height of apartheid.”<sup>39</sup> Given this dramatic increase in incarceration rates,

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35. See Walmsley, *supra* note 2, at 3–4 (emphasizing that the United States, with 2,293,751 prisoners, ranks first in the world above China’s 1,640,000 sentenced prisoners); see also *Facts About Prisons and People in Prison*, SENT’G PROJECT, <http://www.sentencingproject.org/wp-content/uploads/2015/12/Facts-About-Prisons.pdf> (last modified Jan. 2014) (showing that the United States, in 2011, with 716 inmates per 100,000, has the highest incarceration rate in the world); cf. Robert D. Crutchfield & David Pettinicchio, “Cultures of Inequality”: *Ethnicity, Immigration, Social Welfare, and Imprisonment*, 623 ANNALS AM. ACAD. POL. & SOC. SCI. 134, 141 (2009) (showing that in a limited study of fifteen nations, the United States incarcerates almost 60% more minorities than any other nation); see also Fareed Zakaria, *Incarceration Nation*, CNN (Mar. 30, 2012), [http://globalpublicsquare.blogs.cnn.com/2012/03/30/zakaria-incarceration-nation-2/?hpt=hp\\_c1](http://globalpublicsquare.blogs.cnn.com/2012/03/30/zakaria-incarceration-nation-2/?hpt=hp_c1) (“The total number of Americans under correctional supervision (prison, parole, etc.) is 7.1 million, more than the entire state of Massachusetts . . . . No other country comes even close to our rates of incarceration”) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

36. Somewhat surprisingly, China, Russia, and Iran—nations with highly repressive governments—imprison their citizens at rates that are significantly lower than the United States, while other Western countries imprison at rates dramatically lower than the United States. See ALEXANDER, *supra* note 8, at 6–7 (“Although crime rates in the United States have not been markedly higher than those of other Western countries, the rate of incarceration has soared in the United States while it has remained stable or declined in other countries.”).

37. Adam Liptak, *U.S. Prison Population Dwarfs That of Other Nations*, N.Y. TIMES (Apr. 23, 2008), <http://www.nytimes.com/2008/04/23/world/americas/23iht-23prison.12253738.html> (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

38. See ALEXANDER, *supra* note 8, at 5–6; see also Gwen Sharp, *Black/White Disparities in Prison Sentences*, SOC’Y PAGES (Aug. 2, 2008), <http://thesocietypages.org/socimages/2008/08/02/blackwhite-disparities-in-prison-sentences/> (“While blacks are more likely to be sentenced for all the offenses shown, clearly drug offenses stand out as the area with the biggest racial disparity in prison sentences”) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

39. ALEXANDER, *supra* note 8, at 6.

one might believe that a simultaneous upsurge in violent crime rates must have also occurred, particularly in urban communities, but this is not so. While the United States prison population has increased remarkably in the last three decades, the violent crime rates in the United States over approximately the same period have decreased, and in some cases dramatically.<sup>40</sup>

One must examine America’s ongoing tradition of subordinating its black and brown citizens to truly understand the mass incarceration epidemic over the past three to four decades.<sup>41</sup> This new subordination began with the “Southern Strategy” of the President Richard Nixon Era, continued through the racial coding of the President Ronald Reagan and President George H. W. Bush Era,<sup>42</sup> on through President Bill Clinton’s “New Democrat” Era, and imposed upon the nation divisive racial politics and “tough on crime” rhetoric that led to a new era of subordination just as nefarious as slavery and Jim Crow.<sup>43</sup> The War on Drugs allows for

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40. See Fox Butterfield, *Decline of Violent Crimes Is Linked to Crack Market*, N.Y. TIMES (Dec. 28, 1998), <http://www.nytimes.com/1998/12/28/us/decline-of-violent-crimes-is-linked-to-crack-market.html> (explaining that after an explosion of violent crime in the 1980s, violent crimes rates began to drop in the 1990s, including a 17% decrease in robberies in 1997) (on file with the Washington and Lee Journal of Civil Rights and Social Justice); see also Mona Charen, *Poverty Is Up, Crime Is Down. Is That Possible?*, BISMARCK TRIB. (Sept. 29, 2010), [http://bismarcktribune.com/news/columnists/article\\_2ff6008c-cb28-11df-bfbc-001cc4c03286.html](http://bismarcktribune.com/news/columnists/article_2ff6008c-cb28-11df-bfbc-001cc4c03286.html) (remarking that from 1991 to 2004 violent crime in New York City plummeted 75%) (on file with the Washington and Lee Journal of Civil Rights and Social Justice); Michelle Mittelstadt, *Jackson Lee Says Strict Sentencing Costs Society*, HOUS. CHRON. (Feb. 3, 2008, 6:30 AM), <http://www.chron.com/news/nation-world/article/Jackson-Lee-says-strict-sentencing-costs-society-1776537.php> (underscoring that violent crime rates decreased dramatically from 1990 to 2005, going from 729 crimes per 100,000 people to 469 crimes per 100,000 during this period) (on file with the Washington and Lee Journal of Civil Rights and Social Justice); Eric Holder, Attorney General, U.S. DEPT OF JUST., Address to New York Police Department Black History Month Celebration (Feb. 24, 2011), <https://www.justice.gov/opa/speech/attorney-general-eric-holder-speaks-new-york-police-department-black-history-month> (drawing attention to the declining violent crime rates not only across the United States, but also a remarkable 40% drop in New York City in the preceding decade) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

41. See generally ALEXANDER, *supra* note 8, at 11–15 (“A human rights nightmare is occurring on our watch.”).

42. andré douglas pond cummings, *Racial Coding and the Financial Market Crisis*, 2011 UTAH L. REV. 141, 217–19 (2011).

43. ALEXANDER, *supra* note 8, at 40–56.

racial subordination without explicitly naming race.<sup>44</sup> Mass incarceration of African-Americans and Latinos, based almost entirely upon drug crimes, allows the United States to deprive these men of their constitutional and human rights, while appearing race neutral.<sup>45</sup>

President Reagan successfully federalized drug crimes through incentivizing local and state pursuit of the War on Drugs with federal funding and military-style weaponry made available to local law enforcement.<sup>46</sup> The strategy caused a genuine “war” to be unleashed upon the public, in particular upon the United States inner cities.<sup>47</sup> Professor Michelle Alexander explains:

From the outset, the drug war could have been waged primarily in overwhelmingly white suburbs or on college campuses. SWAT teams could have rappelled from helicopters in gated suburban communities and raided the homes of high school lacrosse players known for hosting coke and ecstasy parties after their games. The police could have seized televisions, furniture, and cash from fraternity houses based on an anonymous tip that a few joints or a stash of cocaine could be found hidden in someone’s dresser drawer. Suburban homemakers could have been placed under surveillance and subjected to undercover operations designed to catch them violating laws regulating the use and sale of prescription “uppers.” All of this could have happened as a matter of routine in white communities, but it did not.

Instead, when police go looking for drugs, they look in the ‘hood. Tactics that would be political suicide in an upscale, white suburb are not even newsworthy in poor black and brown communities.<sup>48</sup>

Local urban law enforcement evolved into paramilitary style units that began using battering rams, tank-like vehicles, and Special Weapons and Tactics (SWAT) teams in our inner-city

44. *Id.*

45. *See id.* at 56–59 (“Ninety percent of those admitted to prison for drug offenses in many states were black or Latino, yet the mass incarceration of communities of color was explained in race-neutral terms, an adaptation to the needs and demands of the current political climate.”).

46. *Id.* at 48–49, 71–77.

47. *See id.* at 103–05, 120–24 (describing how the War on Drugs was explicitly declared in and on urban communities).

48. *Id.* at 121.

communities, while adopting a military mentality toward drug users and sellers.<sup>49</sup> Thus, the underrecognized connection between politicians tasked with establishing prison-sentencing policy entering into tacit partnerships with newly militarized local police became a War on Drugs that was to be waged in urban communities and against poor people of color.

To wit, the Massachusetts Supreme Court recognized in 2016 that African American males are targeted for police encounters at unacceptably disproportionate rates, often leading to incarceration.<sup>50</sup> In a September 2016 decision, the Massachusetts Supreme Judicial Court held that a black male fleeing the police is not enough alone to constitute reasonable suspicion for an investigatory police stop. The court reasoned that black men have reason to flee the police other than guilt for committing a crime: that of “avoid[ing] the recurring indignity of being racially profiled.”<sup>51</sup> Justice Hines writing for the majority held:

According to the study, based on FIO [Field Interrogation Observation] data collected by the department, black men in the city of Boston were more likely to be targeted for police-civilian encounters such as stops, frisks, searches, observations and interrogations. Black men were also disproportionately targeted for repeat police encounters. We do not eliminate flight as a factor in the reasonable suspicion analysis whenever a black male is the subject of an investigatory stop. However, in such circumstances, flight is not necessarily probative of a suspect’s state of mind or consciousness of guilt. Rather, the finding that black males in Boston are disproportionately and repeatedly targeted for FIO encounters suggests a reason for flight unrelated to consciousness of guilt. Such an individual, when approached by the police, might just as easily be motivated by the desire to avoid the recurring indignity of being racially profiled as by the desire to hide criminal activity. Given this reality for black males in the city of Boston, a judge should, in

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49. *Id.* at 73–77.

50. Zeninor Enwemeka, *Mass. High Court Says Black Men May Have Legitimate Reason to Flee Police*, WBUR (Sept. 20, 2016), <http://www.wbur.org/news/2016/09/20/mass-high-court-black-men-may-have-legitimate-reason-to-flee-police> (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

51. *Commonwealth v. Warren*, 58 N.E.3d 333 (Mass. 2016).



appropriate cases, consider the report's finding in weighing flight as a factor in the reasonable suspicion calculus.<sup>52</sup>

That Boston's own data recognizes that African American males are disproportionately targeted by the police and that young black men have a reason, other than guilt, to flee, seems an indictment of the nationwide policing that takes place in most urban city centers, as a result of the War on Drugs.<sup>53</sup>

Mass incarceration continues to vex the United States as nearly all now agree that the War on Drugs has been an epic failure that has resulted in millions of African American and Latino men locked up and their communities devastated.<sup>54</sup>

### C. Violent Homicide of African American Young Men and Boys

The number one cause of death for African American men between the ages of 18 and 34 is homicide.<sup>55</sup> One would expect automobile accidents or diseases to be the number one killer of young black men and boys, as it is for young men of other races,<sup>56</sup> but homicide is the real killer of young black men in today's America.<sup>57</sup> African American citizens are killed at twelve times the

52. *Id.* at 342 (internal citations omitted).

53. *Id.*

54. Kristin Zimmerman, *The Unfair Sentencing Act: Racial Disparities and Fiscal Consequences of America's Drug Laws*, 2 THEMIS: RES. J. OF JUST. STUD. AND FORENSIC SCI. 160 (2014); Kenneth B. Nunn, *Race, Crime and the Pool of Surplus Criminality: Or Why the "War on Drugs" Was a "War on Blacks,"* 6 J. GENDER RACE & JUST. 381 (2002); Yolanda Vazquez, *Constructing Crimmigration: Latino Subordination in a "Post-Racial" World*, 76 OHIO ST. L.J. 599 (2015).

55. Wolfers, Leohardt & Quealy, *supra* note 7; *see also* Charles H. Hennekens, Joanna Drowos & Robert S. Levine, *Mortality From Homicide Among Young Black Men: A New American Tragedy*, THE AM. J. OF MED. (Apr. 2013), [http://www.amjmed.com/article/S0002-9343\(12\)00638-9/fulltext](http://www.amjmed.com/article/S0002-9343(12)00638-9/fulltext) ("Homicide is, far and away, the leading cause of death of young black men. In stark contrast, accidents are, far and away, the leading cause of death among young nonblack men and women of all races and ethnicities") (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

56. *See* Hennekens, Drowos & Levine, *supra* note 55; *see also* Bruce Feiler, *Teenage Drivers? Be Very Afraid*, N.Y. TIMES (Mar. 19, 2016), <http://www.nytimes.com/2016/03/20/fashion/teenagers-driving-parents.html> (discussing the leading cause of death among nonblack teenagers as automobile accidents) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

57. *Compare Leading Causes of Death by Age Group, White Males-United*

rate of individuals in other developed countries in the world.<sup>58</sup> According to Nate Silver,

[T]here’s no other highly industrialized country with a homicide death rate similar to the one black Americans experience. Their homicide death rate, 19.4 per 100,000 persons, is about 12 times higher than the average rate among all people in other developed countries.

Instead, you’d have to look toward developing countries such as Mexico (22.0), Brazil (23.6), Nigeria (20.0), Rwanda (23.1) or Myanmar (15.2) to find a comparable rate. The Charleston killings were unusual in that it was a mass shooting—and also in that the suspect is of a different race than the victims (both black and white homicide victims are much more likely to be killed by someone of their own race.) *But that doesn’t negate that the threat black Americans face from homicide is radically different from the one whites do.*<sup>59</sup>

African American citizens, particularly young black men and boys face a daily threat of homicide death that is real and “radically different from the one whites [face].”<sup>60</sup> This threat of homicide is

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*States*, CTR. FOR DISEASE CONTROL AND PREVENTION (2013), <http://www.cdc.gov/men/lcod/2013/whitemen2013.pdf> (describing leading causes of death of White males in the United States by age group), *with Leading Causes of Death by Age Group, Black Males-United States*, CTR. FOR DISEASE CONTROL AND PREVENTION (2013), [http://www.cdc.gov/men/lcod/2013/blackmales\\_2013.pdf](http://www.cdc.gov/men/lcod/2013/blackmales_2013.pdf) (describing leading causes of death of Black males in the United States by age group) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

58. See Silver, *supra* note 9 (describing how more likely African-American citizens are killed in a number of developed countries in the world).

59. *Id.* (emphasis added).

60. *Id.*; see also Gene Demby, *The Fear Of Black Men In America: How It Feels To Be A Problem*, NPR (Apr. 1, 2015, 4:29 PM), <http://www.npr.org/sections/codeswitch/2015/04/01/396792223/the-fear-of-black-men-in-america-how-it-feels-to-be-a-problem> (“The notion that black men are dangerous is one of our country’s foundational, organizing principles. The omnipresence of those notions makes them invisible, sanctioned and cosigned by people who don’t know better and a whole lot of people who should”) (on file with the Washington and Lee Journal of Civil Rights and Social Justice); Nikole Hannah-Jones, *Yes, Black America Fears The Police. Here’s Why*, HUFFINGTON POST (Mar. 5, 2015, 10:46 AM), [http://www.huffingtonpost.com/2015/03/05/black-america-police\\_n\\_6808506.html](http://www.huffingtonpost.com/2015/03/05/black-america-police_n_6808506.html) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

06.html (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

For those of you reading this who may not be black, or perhaps Latino, this is my chance to tell you that a substantial portion of your fellow citizens in the United States of America have little expectation of being

most often at the hands of perpetrators that look like them—other young black men.<sup>61</sup> Young African American men and boys are killing each other far more often than police officers or disturbed killers like Dylan Roof.<sup>62</sup> While the targeting and killing of African American males is intolerable by law enforcement officers and racist sociopaths, that most homicides against African American males are perpetrated by African American males is a fairly recent historical development.<sup>63</sup>

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treated fairly by the law or receiving justice. It's possible this will come as a surprise to you. But to a very real extent, you have grown up in a different country than I have.

*Id.*

61. See Lydia O'Neal, *White On Black Crime vs. Black On White Crime: New Statistics Show More Killings Between Races*, INT'L BUS. TIMES (Sept. 30, 2016, 11:45 AM), <http://www.ibtimes.com/white-black-crime-vs-black-white-crime-new-statistics-show-more-killings-between-2424598> (describing a year in which a record number of young black men were killed by police officers in the U.S., according to a study by the *Guardian*) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

62. See Nick Corasaniti, Richard P  nrez-Pe  a & Lizette Alvarez, *Church Massacre Suspect Held as Charleston Grieves*, N.Y. TIMES (June 18, 2015), [http://www.nytimes.com/2015/06/19/us/charleston-church-shooting.html?hp&action=click&pgtype=Homepage&module=span-ab-top-region&region=top-news&WT.nav=top-news&\\_r=0](http://www.nytimes.com/2015/06/19/us/charleston-church-shooting.html?hp&action=click&pgtype=Homepage&module=span-ab-top-region&region=top-news&WT.nav=top-news&_r=0) (detailing an incidence of the mass murder of nine people who gathered for Bible study at a landmark black church) (on file with the Washington and Lee Journal of Civil Rights and Social Justice); see also Dahleen Glanton, *With 500 homicides in Chicago, time for African-Americans to get tough on crime*, CHI. TRIB. (Sept. 7, 2016, 2:35 PM), <http://www.chicagotribune.com/news/columnists/ct-violence-african-americans-glanton-20160907-column.html> (describing a number of homicide cases in Chicago) (on file with the Washington and Lee Journal of Civil Rights and Social Justice); Jeffery Goldberg, *A Matter of Black Lives*, ATLANTIC (Sept., 2015), <http://www.theatlantic.com/magazine/archive/2015/09/a-matter-of-black-lives/399386/> (noting that since 1980, more than 260,000 Black men have been killed in America) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

63. Matthew Cella & Alan Neuhauser, *Race and Homicide in America, by the Numbers*, U.S. NEWS (Sept. 29, 2016, 6:42 PM), <http://www.usnews.com/news/articles/2016-09-29/race-and-homicide-in-america-by-the-numbers> (on file with the Washington and Lee Journal of Civil Rights and Social Justice); see also Richard V. Reeves & Sarah Holmes, *Guns and race: The different worlds of black and white Americans*, BROOKINGS (Dec. 15, 2015), <https://www.brookings.edu/blog/social-mobility-memos/2015/12/15/guns-and-race-the-different-worlds-of-black-and-white-americans/> (showing the statistics of U.S. gun deaths by race and gender between 2011 and 2013) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

Homicide statistics by city and race, reveal that African American male homicides are dramatically overrepresented in comparison to their population percentage in nearly all major cities.<sup>64</sup> In Baltimore, Boston, Chicago, Columbus, Indianapolis, Minneapolis, Oakland, St. Louis, and many others, the African American male homicide rate is 60% to 80% of all homicides on an annual basis in those cities.<sup>65</sup> Meanwhile, the population percentage of African American males in those cities is a mere fraction of the homicide rate (often less than 15% of the population).<sup>66</sup> Of those African American male homicide victims, the perpetrator is overwhelmingly African American.

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64. See *supra* notes 3–4 (describing differences in homicide statistics by city and race).

65. See Appendix A; see also *supra* note 4 (describing a disproportionately high rate of homicides of African-American males in major metropolitan areas in the U.S.).

66. For example, in Boston, MA where the African American male population is just 11% of the total city population, black males make up more than 62% of total homicide victims in the city. *Compare Population Demographics for Boston, MA in 2016 and 2015*, U.S. CENSUS BUREAU, <https://suburbanstats.org/population/massachusetts/how-many-people-live-in-boston> (stating the total population percentages of Boston), with *REAL: Race, Equity, and Leadership*, NAT'L LEAGUE OF CITIES (Nov. 2015), <http://mbc-leo.org/pdf/2015-11-14-REAL-Presentation.pdf> (stating black male homicide percentage in Boston). For another example, in Baltimore, MD where the black male population is 29% of the total population, black males make up more than 80% of total homicides victims in the city. *Compare Population Demographics for Baltimore, Maryland in 2016 and 2015*, U.S. CENSUS BUREAU, <https://suburbanstats.org/population/maryland/how-many-people-live-in-baltimore> (stating the total population percentages of Baltimore) (on file with the Washington and Lee Journal of Civil Rights and Social Justice), with *REAL: Race, Equity, and Leadership*, NAT'L LEAGUE OF CITIES (Nov. 2015), <http://mbc-leo.org/pdf/2015-11-14-REAL-Presentation.pdf> (stating the Black male homicide percentage in Baltimore). Further, in Minneapolis, MN, where the African American male population is just 9% of the total city population, black males make up more than 65% of total homicide victims in the city. *Compare Population Demographics for Minneapolis, Minnesota in 2016 and 2015*, U.S. CENSUS BUREAU, <https://suburbanstats.org/population/minnesota/how-many-people-live-in-minneapolis> (stating the total population percentages in Minneapolis), with *REAL: Race, Equity, and Leadership*, NAT'L LEAGUE OF CITIES (Nov. 2015), <http://mbc-leo.org/pdf/2015-11-14-REAL-Presentation.pdf> (describing the Black male homicide percentage in Minneapolis). See generally Justin Wolfers, *Areas with Large Black Populations Have the Smallest Shares of Black Men*, N.Y. TIMES (Apr. 21, 2015), <http://www.nytimes.com/2015/04/22/upshot/areas-with-large-black-populations-have-the-smallest-shares-of-black-men.html> (on file with the Washington and Lee Journal of Civil Rights and Social Justice); Sonya Rastogi, Tallese D. Johnson, Elizabeth M. Hoeffel & Malcolm P. Drewery, Jr., *The Black*

While it may be tempting for some to simply point to individual failures of the African American male himself and the black community at large for these alarming homicide and violence statistics,<sup>67</sup> this Article posits that the fault lies in large measure at the feet of systemic inequality and historical policy choices.<sup>68</sup> Therefore, if the War on Drugs, economic inequality, institutional racism, and systemic discrimination are in large part to blame for such disquieting homicide and violence trends and statistics, rather than simply individual failings, then solutions can be found in changing systems, making better policy choices and restructuring institutions rather than continuing to punish and incarcerate individuals seeking to change only individual behavior. Further, if we have arrived at this place of mass incarceration, law enforcement violence, and unacceptable homicide statistics nationally because of policy decisions, institutional racism, and economic inequality, then we as a nation have a responsibility to

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*Population: 2010*, U.S. CENSUS BUREAU (Sept. 2010), <http://www.census.gov/prod/cen2010/briefs/c2010br-06.pdf> (providing a portrait of the Black population in the U.S. and discussing its distribution at the national level and at lower levels of geography).

67. See *The O'Reilly Factor: How Is That The White Man's Problem?*, Fox (April 8, 2016), <https://www.bing.com/videos/search?q=the+o+reilly+factor+how+is+that+the+white+man%27s+problem&view=detail&mid=54D45D570017887FCA3B54D45D570017887FCA3B&FORM=VIRE> (discussing a high rate of African-Americans killing other African-Americans).

68. See Spencer Overton, *What Black Americans Say About 'Black-on-Black' Gun Violence*, NATION (June 1, 2016), <https://www.thenation.com/article/what-black-americans-say-about-black-on-black-gun-violence/> (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

The problem of gun violence stems not just from petty grievances among impulsive youth of color, however, but from larger structural issues such as credibility of law enforcement, easy access to guns, and a lack of job skills and opportunities. Communities of color care about both gun violence and police violence. Further, communities of color are not simply sources of problems—they also provide important solutions.

*Id.* See also generally Evan F. Moore, *Black Lives Matter In Georgia Says It Has A Solution To Chicago Violence*, DNAINFO.COM (Sept. 22, 2016, 6:13 AM), <https://www.dnainfo.com/chicago/20160922/auburn-gresham/black-lives-matter-georgia-says-it-has-solution-chicago-violence> (on file with the Washington and Lee Journal of Civil Rights and Social Justice); A.B. Chase, *Beyond Rage, It's Time for Solutions and Leadership from Black America*, OCCUPY.COM (Dec. 12, 2014), <http://www.occupy.com/article/beyond-rage-its-time-solutions-and-leadership-black-america#sthash.FM9Sy25E.dpuf> (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

propose and pursue solutions. Individual citizens together with local, state and national leaders have the ability to reshape policies and restructure institutions in a way that can save lives.

To say “this is not my problem” ignores the national implications of African American male homicide rates, both at the hands of law enforcement officers and other young black men, and the impact that these deaths have on our nation writ large and black communities across the country. These are complex issues that require careful and thoughtful solutions. Society pays when human lives are abandoned, cast away, or taken with impunity, not just in taxpayer dollars, but also in the lost talent and potential of those slain or imprisoned. This is, after all, not just an African American problem, but a human problem that begs aggressive policy changes and creative solutions.

### *III. Proposing Solutions to our Most Vexing and Persistent Racial Challenges*

The statistics above highlight the breadth of the problem. Police killings of unarmed black men is a national problem and violent homicide rates in the nation are disturbing. While mass incarceration has flown under the radar as far as national attention is concerned in recent decades, more and more, the nation and its leaders are beginning to acknowledge that locking up millions of African American men is both a policy failure and economically unsustainable.<sup>69</sup> The difficulty, as always, is

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69. Farris Peale, *Could Republicans Help End Mass Incarceration?*, HARV. POL. REV. (Nov. 4, 2014), <http://harvardpolitics.com/hprgument-posts/repblicans-help-end-mass-incarceration/> (on file with the Washington and Lee Journal of Civil Rights and Social Justice); David Frum, *The Precarious New Republican Orthodoxy on Crime*, ATLANTIC (July 19, 2016), <http://www.theatlantic.com/politics/archive/2016/07/the-precarius-position-of-the-new-gop-orthodoxy-on-crime/491735/>; *Economic Perspectives on Incarceration and the Criminal Justice System*, EXECUTIVE OFF. OF THE PRESIDENT OF THE U.S. (Apr. 2016), [https://www.whitehouse.gov/sites/default/files/page/files/20160423\\_cea-incarceration\\_criminal\\_justice.pdf](https://www.whitehouse.gov/sites/default/files/page/files/20160423_cea-incarceration_criminal_justice.pdf); see also Gary Fields, *Criminal Justice in Clinton vs. Trump: Where They Stand on Social Issues*, WSJ (2016), <http://www.wsj.com/graphics/elections/2016/donald-trump-hillary-clinton-on-social-issues/> (quoting Mr. Trump as saying prisons are a “complete disaster” and that more privatization and private prisons should be considered while quoting Secretary Clinton as saying “We need to deliver real reforms that can be felt on our streets, in our courthouses, in our jails and prisons, in our communities too

proposing answers and offering sustainable and economically realistic solutions to these vexing racial challenges. This Article attempts to do that in the pages that follow, specifically in offering potential solutions and realistic expected outcomes if such proposals are adopted and pursued. Both policy changes and advocacy programs are highlighted below detailing the numerous institutional and individual strategies that can be implemented in seeking to redress the difficult circumstances described above.

### *A. Ending the Police Killing of Unarmed Black Men*

United States' citizens would be hard-pressed to name a more divisive and challenging racial issue facing America today than the police killing of unarmed black men. With the recent deaths of Terence Crutcher (Tulsa) and Keith Scott (Charlotte), protests, riots, and civil unrest have followed these easily avoidable police killings.<sup>70</sup> As this Article goes to press, the killing of Terence Crutcher by Officer Betty Shelby and the killing of Keith Scott by Officer Brentley Vinson are just the two most recent examples in a spate of tragic decisions made by law enforcement professionals.<sup>71</sup>

Critically, there are several steps that should be taken in order to eliminate the police killing of unarmed black men. First, the law on the use of deadly force in the United States must be replaced. Next, there must be a change in the culture and training of law enforcement officers across the country. Finally, and most importantly, there must be a new norm adopted in policing that values life and preserves life above all else.

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long neglected.”).

70. Max Blau & Elliott C. McLaughlin, *Backlash to Police Shootings Resonates Beyond Charlotte, Tulsa*, CNN (Sept. 22, 2016), <http://www.cnn.com/2016/09/22/us/police-shootings-charlotte-tulsa-boston-st-louis-baltimore/> (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

71. Susanna Capelouto, *Tulsa Police Officer Charged With Manslaughter*, CNN (Sept. 23, 2016, 3:45 AM), <http://www.cnn.com/2016/09/22/us/tulsa-officer-charged/>; Chris Sommerfeldt, *North Carolina Officer Who Allegedly Shot and Killed Keith Scott Known as a 'Mad' College Football Player*, NY DAILY NEWS (Sept. 26, 2016, 11:31 PM), <http://www.nydailynews.com/news/national/officer-fatally-shot-keith-scott-mad-footballer-article-1.2807642> (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

*1. Change the Law on Use of Deadly Force*

The United States Supreme Court has held and most state laws have adopted the standard that law enforcement officers are justified in using deadly force if the officers that use deadly force find themselves in a situation where they are in fear for their life or serious physical injury.<sup>72</sup> Evidence suggests that this standard has proven, since its adoption, to be ineffectual and has led to many of the tragic police killings that we have witnessed in the past several years. For example, when Officer Michael Slager shot Walter Scott in the back and killed him, as Mr. Scott was running slowly away from Slager, the first thing that Officer Slager did to attempt to justify the killing, was to claim over police radio that Mr. Scott had wrestled his taser away from him (thereby beginning the justification that Slager was in fear for his life). Following this claim over the radio, Slager thereafter took his taser and walked it more than fifteen feet to the lifeless body of Scott and dropped it

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72. See *Tennessee v. Garner*, 471 U.S. 1, 22 (1985) (holding that under the Fourth Amendment, when a law enforcement officer is pursuing a suspect that is fleeing, the officer may not use deadly force to prevent the suspect from escaping unless “the officer has probable cause to believe that the suspect poses a significant threat of death or seriously physical injury to the officer or others.”); *Graham v. Connor*, 490 U.S. 386, 396 (1989) (“Because the test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application, however, its proper application requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight”) (internal quotation marks omitted); *Rose v. State*, 431 N.E.2d 521, 523 (Ind. 1982) (“The justified deadly force is to prevent injury, the imminent danger of injury or force, or the threat of force, not to effect an arrest or prevent escape” referring to IND. CODE ANN. § 35-41-3-3 applying IND. CODE ANN. § 35-41-3-2); *Julian v. Randazzo*, 380 Mass. 391, 396 (1980) (“The person attempting a valid arrest has the right to use the force that is reasonably necessary to overcome physical resistance by the person sought to be arrested. In cases of arrest by a private person, the trial court shall limit the justification for the use of deadly force to prevent escape in accordance with Model Penal Code § 3.07.”); *Kortum v. Alkire*, 69 Cal. App. 3d 325, 333 (1977) (“CAL. PENAL CODE §§ 196, 197, and 837 (1872) and CAL. PENAL CODE § 835a (1957), as construed by the courts of California, prohibit the use of deadly force by anyone, including a police officer, against a fleeing felony suspect unless the felony is of the violent variety, i.e., a forcible and atrocious one which threatens death or serious bodily harm, or there are other circumstances which reasonably create a fear of death or serious bodily harm to the officer or to another.”).



directly next to Scott's lifeless body.<sup>73</sup> Had a passerby not recorded the killing on a cell phone which was later released to the public showing Slager planting his taser, it is very likely that Officer Slager would have successfully justified the killing of Mr. Scott by Slager describing how Scott's possession of his taser caused him to fear for his life. This scenario highlights how the deadly force standard fails to provide concrete guidance to law enforcement officers but instead has become a defensive tool used by officers to kill first and then justify next.

When Officer Darren Wilson shot and killed the unarmed Michael Brown in Ferguson, Missouri, the first thing that Officer Wilson did when interviewed after the killing, was to begin justifying the shooting of the unarmed man by describing how he was in fear for his life when the large black man allegedly reached into his police vehicle and grabbed for his gun.<sup>74</sup> Officer Wilson's narrative at grand-jury proceedings described a maniacal, wild-eyed Michael Brown and proceeded to follow Missouri's deadly force standard chapter and verse inculcating the necessary fear for life facts and describing how Mr. Brown potentially endangered Wilson's life or could inflict serious injury.<sup>75</sup> Mr. Brown was never in possession of a weapon and was fleeing, both facts undermining Wilson's narrative that he was in "fear for his life" and that Mr. Brown was "inflicting serious injury." Instead, Officer Wilson described Mr. Brown as a "demon" and "Hulk Hogan-like" in order to justify the "fear" that he felt justified the kill shots.<sup>76</sup> Meanwhile a counter-narrative offered by Mr. Brown's friend and an eyewitness, which was ignored and challenged by prosecutors at the grand-jury proceeding, alleged that it was Officer Wilson who

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73. Michael S. Schmidt & Matt Apuzzo, *South Carolina Officer Is Charged with Murder of Walter Scott*, N.Y. TIMES (Apr. 7, 2015), <http://www.nytimes.com/2015/04/08/us/south-carolina-officer-is-charged-with-murder-in-black-mans-death.html> (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

74. David Dante Troutt, *Is Racial Justice Possible in America?*, NATION (Dec. 10, 2014), <https://www.thenation.com/article/racial-justice-possible-america/> (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

75. *Id.*

76. Josh Sanburn, *All the Ways Darren Wilson Described Being Afraid of Michael Brown*, TIME (Nov. 25, 2014), <http://time.com/3605346/darren-wilson-michael-brown-demon/> (on file with the Washington and Lee Journal of Civil Rights and Social Justice); Troutt, *supra* note 74.

was out-of-control in the confrontation and that Wilson initiated the scrum at the door of the police vehicle.<sup>77</sup> This case reveals again that the deadly force standard has become less of a guiding standard for police response but rather an after-the-fact justification for the use of deadly force allowing officers to kill first then justify next.

When Officer Betty Shelby shot and killed the unarmed Terence Crutcher in Tulsa, Oklahoma, the first thing that Officer Shelby did thereafter was claim that she witnessed Crutcher reach into the open window of his vehicle for what she presumed was a gun, thereby placing her in fear for her life.<sup>78</sup> In fact, Crutcher did not have a gun, and based on early evidence, did not reach into his car at all as video appears to show that Crutcher’s car window was rolled up the entire time, based on police dash cam video of the event.<sup>79</sup> Officer Shelby’s immediate reaction upon unjustifiably shooting to kill was to concoct a narrative that could begin to

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77. See Troutt, *supra* note 74. According to Professor Troutt:

And then there is the counternarrative offered by Dorian Johnson, the only other eyewitness to the entire encounter, who can provide important context, yet whose version has been overshadowed by Wilson’s. Johnson’s story supports another stereotype, that of the outsider policeman who demands complete surrender to his authority and gets mad—violently mad—when it doesn’t follow.

According to Johnson, Wilson tells them to “Get the fuck on the sidewalk” (again, nothing about cigarillos or the convenience store). When they don’t immediately comply, he whips his truck dangerously backward, almost bumping them, opening the door so violently it bounces against both young men and closes again. “What did you say?” Wilson says, obviously angry. From the window, he then grabs Brown around the neck and the scuffle ensues.

*Id.*

78. Julia Jacobo, *Tulsa Police Officer Shares Her Side of the Story in Terence Crutcher’s Shooting*, ABC NEWS (Sept. 21, 2016, 4:26 PM), <http://abcnews.go.com/US/tulsa-police-officer-shares-side-story-terence-crutcher/story?id=42243843> (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

79. Max Blau, Jason Morris & Catherine E. Shoichet, *Tulsa Police Shooting Investigated by Justice Department*, CNN (Sept. 21, 2016, 12:21 AM), <http://www.cnn.com/2016/09/20/us/oklahoma-tulsa-police-shooting/> (quoting Terence Crutcher family attorney Benjamin Crump asking “How could he be reaching into the car if the window is up and there’s blood on the glass?” Crump asked, pointing to the photo on the easel. “The window is up. There’s a streak of blood on the window. It’s coming down the car door.”).

support some type of “fear for life” justification.<sup>80</sup> As this situation illustrates, the “fear for life” standard is defective. The standard is not sufficient as a guiding principle under which police officers will be held accountable but rather has become a defensive tool for avoiding liability. Under “fear for life,” recalcitrant police officers kill first and then justify next.

When Officer Ray Tensing shot and killed the unarmed Samuel DuBose at a routine traffic stop in Cincinnati, Ohio,<sup>81</sup> the first thing Officer Tensing did thereafter was claim over police radio that the car DuBose was driving had begun to speed away and that Tensing was being “dragged” by the car and thus was in fear for his life.<sup>82</sup> Officer Tensing, aware that the University of Cincinnati Police Department regulations mandate that campus officers “should not discharge a firearm at or from a moving vehicle except as the ultimate measure of self-defense or defense of another when the suspect is using deadly force,”<sup>83</sup> immediately began crafting his “fear for life” narrative by falsely claiming that the car was being driven at a high speed and that he thought he

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80. See *id.* (explaining that Officer Shelby said “she was yelling at him to stop, for probably at least 10 to 15 seconds. He gets to the window of the SUV, and has his hands in the air, looks at them . . . and his left hand goes into the window.”).

81. See Ralph Ellis, Don Melvin & David Shortell, *Investigation Finished in Police Shooting in Cincinnati Traffic Stop*, CNN (July 29, 2015), <http://www.cnn.com/2015/07/21/us/cincinnati-police-shooting/> (describing the circumstances of the shooting) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

82. See Maureen Hagrman, *Prosecutor: Officer Ray Tensing Indicted on Murder Charge in Death of Sam DuBose*, WLWT NEWS (July 29, 2015, 7:54 PM), <http://www.wlwt.com/article/prosecutor-officer-ray-tenzing-indicted-on-murder-charge-in-death-of-sam-dubose/3556532> (“Tensing claimed in the incident report that he was dragged by the car DuBose was driving and he was forced to fire the shot that hit DuBose in the head, killing him”) (on file with the Washington and Lee Journal of Civil Rights and Social Justice); Adrienne Kelly, *Incident Report: UC Officer Dragged Before Fatal Shooting*, WLLT NEWS (July 29, 2015, 12:00 AM), <http://www.wlwt.com/article/incident-report-uc-officer-dragged-before-fatal-shooting/3556445> (describing that over the police dispatch radio Tensing claimed “I am not injured. I almost got run over by the car. He took off on me. I discharged one round. [S]truck the male in the head”) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

83. *Public Safety Police Operations Policies and Procedures*, UNIV. OF CIN., 3 (Oct. 14, 2014), <https://www.uc.edu/content/dam/uc/ucomm/docs/firearms-and-deadly-force-rev101414.pdf>.

was going to be run down.<sup>84</sup> In fact, Officer Tensing’s body cam shows that both of these claims were untrue, in that Mr. DuBose began driving away at a very slow speed and that when Tensing shot DuBose in the head, Tensing was clear of the car and in no immediate danger.<sup>85</sup> Had this incident not been recorded by Officer Tensing’s body cam which showed Tensing free from any immediate danger, it is very likely that Officer Tensing would have successfully justified the killing of Mr. DuBose. Tensing crafted his false narrative by describing how DuBose’s car was a deadly weapon aimed at running Tensing down causing him to fear for his life.<sup>86</sup> The deadly force standard at play in this case once again failed to stay the officer’s hand in the use of deadly force. Instead, it became a justification tool used by law enforcement to attempt to avoid liability, killing first and then justifying next.

When current national and state deadly force law incentivizes law enforcement officers to justify a killing by creating a narrative that matches the law, then we must work to change the law. The foregoing cases illustrate that deadly force standards fail to provide meaningful guidance to law enforcement officers in tense real-life situations. Specifically, these statutes need to be re-crafted to offer concrete guidance that seeks as the ultimate guidepost to preserve human life.

Imagine if deadly force standards across the country included a provision that required first using all available alternative measures of force before using deadly force, i.e., requiring use of de-escalation tactics, tasers, or night sticks before using the deadly weapon. Requiring that law enforcement officers use all other available measures first will reduce the ability of officers to create after-the-fact justification of “fear for life.” Applying this revised “all other available measures first” standard could have meant

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84. See generally sources cited *supra* note 82 and accompanying text.

85. See Hagrman, *supra* note 82. District Attorney Teters, in charging Officer Tensing for murder stated:

Tensing was never dragged, according to Deters and the video evidence. Deters said the officer fell backwards as he fired the fatal shot. “Mr. DuBose simply did not follow simple, non-violent commands. He was subdued, the cop had his license plate number. I mean, it was so unnecessary for this to have occurred,” Deters said.

*Id.*

86. See generally sources cited *supra* note 82 and accompanying text.

dramatically different outcomes in each case described above. For example, Walter Scott would most likely not have been killed, but instead tased. Terence Crutcher may not have been killed, but instead talked-down or tased. Michael Brown would potentially not have been killed, but instead allowed to flee (and picked up later) or alternatively tased. Samuel DuBose could have been allowed to drive slowly away (and picked up and arrested later). Each man would potentially be alive and answerable to the courts for blocking traffic with a broken-down car (Crutcher), driving with a broken taillight and fleeing the police thereafter (Scott), jaywalking and then allegedly fighting a police officer (Brown), and driving without a front license plate and potentially driving under the influence (DuBose). As discussed below, adopting a standard that requires law enforcement officers to preserve life above all else, allowing judges and juries to allocate guilt and punishment, seems to be one part of the answer to the problem of law enforcement killing of unarmed African American citizens.

A standard that allows for after-the-fact justification, only to be refuted by cell phone or dash cam video evidence later is a law that must be seriously reconsidered and rewritten as described above. In the next section, I will describe how this changed standard not only offers a new set of guidelines for law enforcement officers in the field, but is also a significant step toward re-defining the culture of the acceptable use of force.

## *2. Change the Culture*

I have written previously about the “siege mentality” that infuses the culture of most large police departments across the country.<sup>87</sup>

The traditional form of police operations is known as the ‘professional’ model. The purpose of this model is to develop a paramilitary team of officers able to respond with speed and force to quell criminal disturbances in the community. The

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87. The theme of the next few sentences originally appeared in andré douglas pond cummings, *Just Another Gang: “When the Cops are Crooks Who Can You Trust?”* 41 How. L.J. 383 (1998).

philosophy behind this type of policing is simply to put away the bad guys.<sup>88</sup>

This “traditional” type of policing model, which is employed in Los Angeles, Philadelphia, and many other cities nationwide, including Baltimore as found by the Department of Justice report castigating the racist police culture there,<sup>89</sup> develops a “siege mentality” in its officers.<sup>90</sup> This “siege mentality” exists on an “us versus them”<sup>91</sup> plane and incubates a dehumanizing idea toward criminals or “the enemy.”<sup>92</sup> It is far easier to violate an individual when he or she is dehumanized in the mind of the violator. This “siege” model focuses an officer’s attention on crime control rather than crime prevention, and it isolates the police from the people and the communities in which they serve.<sup>93</sup>

In addition, many police departments are filled with former military personnel, and many still do not require a college degree

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88. Thomas M. Riordan, *Copping an Attitude: Rule of Law Lessons from the Rodney King Incident*, 27 LOY. L.A. L. REV. 675, 726 (1994) (citations omitted).

89. See *Investigation of the Baltimore Police Department*, *supra* note 31, at 67 (“BPD misclassifies and fails to investigate complaints of racial slurs and racial bias, allowing a culture of bias against African Americans to persist.”).

90. See Riordan, *supra* note 88, at 727.

91. See David Crump, *The Social Psychology of Evil: Can the Law Prevent Groups from Making Good People Go Bad?*, 2008 B.Y.U. L. REV. 1441, 1442 (2008) (highlighting former LAPD officer Rafael Perez’s comments at his sentencing for stealing cocaine). Perez said tearfully, “The lines between right and wrong became fuzzy and indistinct. . . . The “us against them” ethos of the overzealous cop began to consume me. . . . My job became an intoxicant that I lusted after. I can only say I succumbed to the seductress of power.” *Id.* See also Andrew E. Taslitz, *Expressive Fourth Amendment: Rethinking the Good Faith Exception to the Exclusionary Rule*, 76 MISS. L.J. 483, 555 (2006) (explaining that the police personality is “[t]he culture . . . with its own set of rules and expectations distinct from those of the broader society.”). Taslitz further describes the demarcation between police culture and the community: “It is the culture of ‘us’—the brave warriors—against ‘them’—the rabble of the street.” *Id.* (citing MICHAEL L. MIDDLETON, *COP: A TRUE STORY* 67–105 (rev. ed. 2000) (detailing a former officer’s account of siege mentality)). “It was ‘us against them’ . . . . *Them* not only encompassed the criminal element, but also included law-abiding citizens who wanted equality and justice.” *Id.* at 555 n.256 (quoting MIDDLETON, *supra* note 91, at 85).

92. See Riordan, *supra* note 88, at 727 (noting that one of the drawbacks to the professional policing model is that “the police consider residents living in high crime areas as potential criminals, instead of possible victims.”).

93. *Id.*

in order to be hired.<sup>94</sup> In order to change the siege mentality culture and inspire a community policing model, at least three changes need to be implemented. First, law enforcement officers should receive training in eradicating explicit bias, second, law enforcement professionals should receive training in implicit bias, and third, cultural and appropriate force training must be implemented particularly for officers that serve minority communities.

*a. Ending Explicit Bias*

While it is tempting to assume that explicit bias no longer motivates professional law enforcement officers in America, contemporary evidence does not support this assumption. Explicit bias is defined as “attitudes and beliefs we have about a person or group on a conscious level. Much of the time, these biases and their expression arise as the direct result of a perceived threat.”<sup>95</sup> Explicit bias motivates our behavior and leads to discriminatory treatment based on biases and perceptions about a group that we are conscious of and motivates our behavior.<sup>96</sup> Evidence that law enforcement agencies and departments still engage in outright explicit bias suggests that we are still failing in our efforts to recruit, train, and prepare many of our law enforcement officers’ across the nation.

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94. See Matthew J. Hickman & Brian A. Reaves, *Local Police Departments 2000*, DEPT. OF JUSTICE 6 (Jan. 2003), <http://www.bjs.gov/content/pub/pdf/lpd00.pdf> (noting that as of the year 2000, “[f]ifteen percent of departments had some type of college requirement, usually a 2-year degree (8%)” and that “[j]ust 1% required new recruits to have a 4-year college degree”) (on file with the Washington and Lee Journal of Civil Rights and Social Justice); see also Mark Clark, *Military Vets Joining Law Enforcement*, POLICE (Jan. 30, 2014), <http://www.policemag.com/channel/careers-training/articles/2014/01/military-vets-joining-law-enforcement.aspx> (noting that Military Veterans are applying for law enforcement positions “in numbers unseen since the closing days of the Vietnam War”) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

95. *Explicit Bias*, PERCEPTION INST., <http://perception.org/research/explicit-bias/> (last visited Oct. 3, 2016) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

96. See *id.* (“When people perceive their biases to be valid, they are more likely to justify unfair treatment or even violence.”).

For example, in 2016 explicit racial bias continues to motivate the decision to charge an individual with a federal crime.<sup>97</sup> A rich body of literature describes the powerful discretion that our criminal justice system has endowed in prosecutors, on both the state and federal level.<sup>98</sup> Given this massive discretion, a nation that genuinely cares about all of its citizens would seemingly ensure that this incredible discretion is exercised with fairness and absent explicit bias. This is simply not the case. In the federal system, 70% of all defendants are non-white, with the overwhelming majority of that 70% being African American and Latino.<sup>99</sup> Approximately two-thirds of all federal crimes are drug related or are reentry violations (about one-third apiece).<sup>100</sup> Eighty percent of all federal criminal defendants are indigent or too poor to hire a lawyer.<sup>101</sup> Therefore, a snapshot of the modern federal criminal justice system is made up largely of poor people of color charged mostly with drug and immigration offenses.<sup>102</sup> The explicit bias is encountered when discovering how these defendants come into the federal system in the first place.

Two examples of federal explicit bias: First, federal prosecutors use their vast discretion to “cherry pick” the defendants that they wish to prosecute for federal crimes from the state and municipality arrest records kept by local law enforcement.<sup>103</sup> Federal prosecutors selectively choose already-in-custody defendants on the state level in order to “stack” state charges with additional federal charges for violating federal drug

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97. Remarks of David E. Patton, *Racial Bias in the Federal Criminal Justice System*, SALT Conference–Plenary Panel, Addressing Racialized Violence: The Role of the Legal Academy, Chicago, Ill. (Sept. 20, 2016) (notes on file with author).

98. See David E. Patton, *Federal Public Defense in an Age of Inquisition*, 122 *YALE L.J.* 2578, 2588–90 (2013) (“Whatever the reasons for our current state of affairs, there is one feature of the federal system about which nearly all observers agree: power has shifted from judges and juries to prosecutors.”). See generally ANGELA J. DAVIS, *ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR* (2007); BRYAN STEVENSON, *JUST MERCY: A STORY OF JUSTICE AND REDEMPTION* (2015).

99. Patton, *supra* note 98, at 2587, 2590.

100. *Id.* at 2600.

101. *Id.*

102. *Id.*

103. *Id.*



crimes.<sup>104</sup> Essentially then, federal prosecutors are “choosing” who to add additional charges to from individuals already in state custody and these “cherry-picked” defendants are overwhelmingly African American.<sup>105</sup> To be clear, the decision to charge an already-in-state-custody defendant with federal crimes is not to ensure that the defendant does some time—he already will based on the state crimes charged—but the primary motivation by federal prosecutors in stacking federal crimes upon state charges is to see that defendant’s do *more* time, as federal sentencing is often harsher than state sentencing.<sup>106</sup> Those defendants selected to do *more* time are overwhelmingly poor and black. With vast discretion to stack charges against any state defendant regardless of race, federal prosecutors overwhelmingly select African American defendants to stack charges against.<sup>107</sup>

Second, even more routine than the taking and stacking of federal charges onto state cases, federal law enforcement agencies like the Drug Enforcement Administration (DEA), the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF), and Immigration and Customs Enforcement (ICE) *create* their own cases through joint task forces with local police.<sup>108</sup> These popular “sting” operations are orchestrated by federal law enforcement agencies by targeting potential defendants and then creating the circumstances under which federal crimes can be prosecuted.<sup>109</sup> One popular sting operation currently underway is the so-called “stash house” sting in Chicago and other large metropolitan areas. Here, undercover federal agents approach unwitting street criminals and propose that they together “take down” a local crack house or drug dispensary that supposedly has hundreds of thousands of dollars stashed there. The unwitting targets are promised several hundred thousand dollars if they agree to rob the stash house together with the federal undercover agents.<sup>110</sup> Of course, no stash house exists, and the moment that the common

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104. Patton, *supra* note 98, at 2600.

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.*

thief agrees to take down the stash house with the federal agents, they are arrested for conspiracy and are charged with federal crimes that carry enormous penalties.<sup>111</sup> In these stash house stings, the targeted defendants are overwhelmingly African American and poor (91% of targeted defendants were minorities).<sup>112</sup> With drug stash houses available across the country and in numberless communities regardless of race, federal agencies overwhelmingly conduct these stings against poor African American defendants in major urban centers.<sup>113</sup>

In these illustrations above, federal prosecutors, who are mostly white and male, are selectively targeting poor people of color to bring the full weight of the federal drug laws down upon. This represents the penultimate example of explicit bias, i.e., black men being stereotyped as dangerous drug dealers that must be imprisoned.

Imagine that prosecutors, both state and federal, together with law enforcement agency leadership, together with the rank and file officers, are required to undergo explicit bias and race sensitivity training. Imagine how the equation for stacking charges may change if prosecutors are made aware of and trained on their potential equal protection violations in charging decisions. Imagine how the “stash house” sting operations and other efforts to create federal crimes against defendants of color by law enforcement agencies may change when leadership and officers are educated on potential equal protection constitutional violations of their practices and on drug use and drug sale statistics across the nation.<sup>114</sup> Imagine if DEA, ICE, ATF and Attorney General

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111. *Id.*

112. *Id.*; see also Brad Heath, *ATF Drug Stings Targeted Minorities, Report Finds*, USA TODAY (Sept. 24, 2016), <http://www.usatoday.com/story/news/2016/09/23/atf-stash-house-stings-minorities/90950474/> (“An investigation by USA TODAY in 2014 found that the stings overwhelmingly targeted minorities. At least 91% of the people agents charged nationwide were racial or ethnic minorities. The ATF stings are particularly sensitive because they seek to enlist suspected criminals in new crimes, rather than merely solving old ones, giving agents unusually wide latitude to select who will be targeted.”).

113. See Heath, *supra* note 112 (citing to a report from Columbia Law Professor Jeffrey Fagan, where Professor Fagan finds that 56 of 57 potential recruits into the stash house sting program were African American or Latino—only one white defendant was ever recruited as a potential defendant).

114. See ALEXANDER, *supra* note 8, at 6–8 (indicating that all races use and distribute drugs at essentially equal percentages, making targeting of African

leadership are charged with ensuring that explicit racial bias is rooted out of all targeting and charging in federal law enforcement and criminal justice. If federal agencies are required to provide explicit bias training, conducted by talented professionals, then the racially discriminatory stacking of federal crime charges could be eliminated or at the very least fairly distributed across races. If explicit bias training was required of all federal law enforcement agents, then the targeting of poor black and brown men for federal crime creation through “sting” operations could be eliminated or at least spread out fairly across all communities that engage in the illegal drug trade.

*b. Implicit Bias Training*

All human beings possess a set of implicit biases that inform our thinking and the ways that we react to those we encounter. Implicit bias is defined as “the attitudes or stereotypes that affect our understanding, actions, and decisions in an unconscious manner. These biases, which encompass both favorable and unfavorable assessments, are activated involuntarily and without an individual’s awareness or intentional control.”<sup>115</sup> Terrific recent research has begun to unpack the implicit biases that we all hold

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Americans explicitly discriminatory); *see also id.* at 7 (“[P]eople of all colors use and sell illegal drugs at remarkably similar rates.”).

115. *Implicit Bias*, KIRWAN INST. FOR THE STUDY OF RACE & ETHNICITY, <http://kirwaninstitute.osu.edu/research/understanding-implicit-bias/> (last visited Oct. 3, 2016) (on file with the Washington and Lee Journal of Civil Rights and Social Justice). The Kirwan Institute goes on to further detail Implicit Bias as follows:

Residing deep in the subconscious, these biases are different from known biases that individuals may choose to conceal for the purposes of social and/or political correctness. Rather, implicit biases are not accessible through introspection.

The implicit associations we harbor in our subconscious cause us to have feelings and attitudes about other people based on characteristics such as race, ethnicity, age, and appearance. These associations develop over the course of a lifetime beginning at a very early age through exposure to direct and indirect messages. In addition to early life experiences, the media and news programming are often-cited origins of implicit associations.

*Id.*

close, particularly in the context of racial and gender biases.<sup>116</sup> The Harvard Implicit Bias website provides an opportunity for laypersons and interested parties to take an implicit bias test and learn the types of biases that infuse our thinking and behavior.<sup>117</sup>

One example of implicit bias that impacts law enforcement behaviors toward African American males is the well-known “Shooter Bias” study.<sup>118</sup> Developed by social cognitionist Joshua Correll, a video game was created that situated photographs of white or African American individuals holding either a gun or some other object, like a wallet, cell phone or soda can into diverse photographic backgrounds.<sup>119</sup> Study participants were directed to determine as quickly as possible whether to shoot the target individual in the photograph, of course, depending on whether the individual held a gun or a wallet in his hand.<sup>120</sup> Extreme time pressure was intentionally designed into the game to force judgment errors.<sup>121</sup> “Consistent with earlier findings, ‘participants were more likely to mistake a Black target as armed when he in fact was unarmed (false alarms); conversely, they were more likely to mistake a White target as unarmed when he in fact was armed (misses).’ Even more striking is that Black participants showed similar amounts of ‘shooter bias’ as Whites.”<sup>122</sup>

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116. See generally Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489 (2005) (describing the emerging implicit bias research in the context of race and gender).

117. See *Harvard Implicit Bias Project*, PROJECT IMPLICIT, <https://implicit.harvard.edu/implicit/takeatest.html> (last visited Oct. 2, 2016) (offering a range of implicit bias tests) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

118. See Kang, *supra* note 116, at 1525–27 (describing the implicit bias findings of Correll’s “Shooter Bias” study).

119. See *id.* at 1493 (summarizing Correll’s “Shooter Bias” study); see also Joshua Correll et al., *The Police Officer’s Dilemma: Using Ethnicity to Disambiguate Potentially Threatening Individuals*, 83 J. PERSONALITY & SOC PSYCHOL. 1314, 1315–17 (2002) (describing experimental setup); B. Keith Payne, *Prejudice and Perception: The Role of Automatic and Controlled Processes in Misperceiving a Weapon*, 81 J. PERSONALITY & SOC PSYCHOL. 181, 184–87 (2001) (explaining experiment’s structure and results).

120. See Kang, *supra* note 116, at 1493 (“Participants were instructed to decide as quickly as possible whether to shoot the target.”).

121. See *id.* (“Severe time pressure designed into the game forced errors.”).

122. *Id.*

The gravity of this fairly simple experiment above is unmistakable. If law enforcement officers are influenced by Shooter Bias, then African American males are surely “endangered” in the United States. As characterized by Professor Jerry Kang:

Recall Amadou Diallo, the young West African immigrant standing in the doorway to his apartment, who was shot at forty-one times by New York police who “saw” a gun that did not exist. It should haunt us to read social science that suggests that if Diallo were White, he may still be alive. For those who doubt race played any such role, the Shooter Bias studies cannot be pooh-poohed as another tiresome play of the “race card.” For those who always knew race mattered, here is cold quantification. And more chilling is the fact that Whites and Blacks both exhibited shooter bias—a contention that would be hard to make politically without the test results.<sup>123</sup>

How important then, must it be that those charged with safeguarding our society and do so with deadly weapons, are trained in implicit bias awareness and recognition? Imagine if law enforcement officers were trained on implicit bias by skilled professionals who enable the officers to recognize their own biases.<sup>124</sup> Training in implicit bias would allow officers a greater understanding of their own actions and reactions. When white police officers patrol African American or Latino communities, officers that were trained in and made aware of their closely held biases would be able to react smartly to difficult situations critically analyzing whether their actions, inactions or behaviors were motivated by deeply held bias or by true instinct.

*c. Better Training: Cultural and Appropriate Use of Force*

An additional way in which American law enforcement officers could better police African American communities, including black young men and boys, is by adhering to a community policing model complete with cultural training and understanding. Different groups, particularly minority groups, adhere to

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123. *Id.* at 1528 (internal citations omitted).

124. See Stoughton, *supra* note 26 (describing how use-of-force training should be changed to account for officer bias).

cultural norms which are in many cases much different than those experienced by the typical law enforcement officer, white male and former military.<sup>125</sup> Because of a long and tortured history between African American citizens and law enforcement officers,<sup>126</sup> a deep-seated distrust continues to exist between black citizens and the police.<sup>127</sup> The first lesson to be learned and understood by law enforcement officers patrolling black neighborhoods is this fundamental understanding of rational distrust.<sup>128</sup> As described by author Khalil Gibran Muhammad, “White people, by and large, do not know what it is like to be occupied by a police force. They don’t understand it because it is not the type of policing they experience. Because they are treated like individuals, they believe that if ‘I am not breaking the law, I will never be abused.’”<sup>129</sup> Journalist Nikole Hannah-Jones writes “We are not criminals because we are black. Nor are we somehow the only people in America who don’t want to live in

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125. See Hickman & Reaves, *supra* note 94, at 6 (explaining police education and training requirements); see also Clark, *supra* note 94 (“[M]any military veterans seek employment in police ranks when they rejoin the civilian workforce.”).

126. See generally Atiba et al., *supra* note 27 (mentioning a history of dehumanization of Black Americans and detailing studies that demonstrate the harmful impact of this history of dehumanization in today’s society); Dykstra, *supra* note 27 (recounting the history of racist “black laws” in Iowa); see also Rankine, *supra* note 28 (describing a history of systematic anti-black racism in the United States).

127. See Hannah-Jones, *supra* note 60 (“[Black and Latino] citizens in the United States of America have little expectation of being treated fairly by the law or receiving justice.”); see also Fields, *supra* note 69 (quoting Secretary Hillary Clinton speaking before an NAACP convention stating “[t]here is, as you know so well, another hard truth at the heart of this complex matter: many African-Americans fear the police.”).

128. See Stoughton, *supra* note 26. Former police officer Stoughton states:

Police reform requires more than changes to training, of course. The policing mission needs to be focused on keeping communities safe and free from fear—including from fear of officers themselves. There are deep racial tensions in law enforcement that will only be healed through a long-term, sustained commitment to cooperative policing and community engagement. We need to rethink the many legal, structural, and social impediments to investigating officer-involved violence and the institutional reluctance to accept independent oversight, particularly civilian review.

*Id.*

129. See Hannah-Jones, *supra* note 60 (quoting Khalil Gibran Muhammad).

safe neighborhoods. Yet many of us cannot fundamentally trust the people who are charged with keeping us and our communities safe.”<sup>130</sup> These statements illustrate what any police officer protecting African American communities should clearly understand: You are not trusted. This is a cultural lesson that is often difficult for young non-black law enforcement officers to comprehend.<sup>131</sup> Imbued with a badge and a gun and sent forth from the police academy to protect citizens and fight crime, most law enforcement rookies simply do not understand that their presence in the black community is viewed suspiciously, if not with disdain and distrust.<sup>132</sup>

The following narrative would most likely be instructive to any police officer charged with policing a black community, particularly if the officer is white. The author, a professional

130. *Id.*

131. See John McWhorter, *What O.J. Simpson Taught Me About Being Black*, N.Y. TIMES (Feb. 3, 2016), [http://www.nytimes.com/2016/02/04/opinion/what-oj-simpson-taught-me-about-being-black.html?\\_r=0](http://www.nytimes.com/2016/02/04/opinion/what-oj-simpson-taught-me-about-being-black.html?_r=0) (describing his awakening as a conservative African American writer to the reality of police brutality exhibited by the police toward black citizens) (on file with the Washington and Lee Journal of Civil Rights and Social Justice). Professor McWhorter describes:

What I found when I spoke with people after the Simpson verdict, though, and have found since with numbing regularity, is that what prevents real racial conciliation and understanding in America is the poisonous relations between blacks and the police. . . .

Racism is experienced in many ways, but as Ellis Cose has put it, “Rage does not flow from dry numerical analyses of discrimination or from professional prospects projected on a statistician’s screen.” Talk to most black people about racism and you need only count the seconds before the cops come up.

*Id.*; LZ Granderson, *Why Black People Don’t Trust the Police*, CNN (Mar. 23, 2012), <http://www.cnn.com/2012/03/22/opinion/granderson-florida-shootings/> (explaining to White America and law enforcement officers why African American citizens do not trust the police) (on file with the Washington and Lee Journal of Civil Rights and Social Justice). Granderson explains:

I don’t trust cops and I don’t know many black people who do. I respect them. I sympathize with them. I am appreciative of the work they do. But when you’ve been pulled over for no good reason as many times as I have; when you’ve been in handcuffs for no good reason as many times as I have; when you run out to buy some allergy medication and upon returning home, find yourself surrounded by four squad cars with flashing lights and all you can think about is how not to get shot, you learn not to trust cops.

*Id.*

132. Stoughton, *supra* note 26; Hannah-Jones, *supra* note 60.

African American female, while with a group of friends witnessed a random shooting in a very public place. After calming her daughter, checking on her husband, and noting that no one had been shot or injured, she found herself startled when her intern who was walking with them was on the telephone with the police:

My friends and I locked eyes in stunned silence. Between the four adults, we hold six degrees. Three of us are journalists. And not one of us had thought to call the police. We had not even considered it.

We also are all black. And without realizing it, in that moment, each of us had made a set of calculations, an instantaneous weighing of the pros and cons.

As far as we could tell, no one had been hurt. The shooter was long gone, and we had seen the back of him for only a second or two. On the other hand, calling the police posed considerable risks. It carried the very real possibility of inviting disrespect, even physical harm. We had seen witnesses treated like suspects, and knew how quickly black people calling the police for help could wind up cuffed in the back of a squad car. Some of us knew of black professionals who'd had guns drawn on them for no reason. . . .

We feared what could happen if police came rushing into a group of people who, by virtue of our skin color, might be mistaken for suspects.<sup>133</sup>

Simply reading and comprehending the above would help law enforcement officers begin to see and feel the manifest distrust that is present in many minority citizens. Further, many additional cultural norms are misunderstood by traditional law enforcement officers when they police black or Latino communities. Familial norms are different, attitudes regarding crime are different, incentives and motivations for engaging with law enforcement are different, and historical patterns of discrimination are different.<sup>134</sup> Cultural and sensitivity training

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133. *Id.*

134. See generally Mike Maciag, *Where Police Don't Mirror Communities and Why It Matters*, GOVERNING (Aug. 28, 2015), <http://www.governing.com/topics/public-justice-safety/gov-police-department-diversity.html> (on file with the Washington and Lee Journal of Civil Rights). Maciag wrote:

So how much does a deficiency in the racial or ethnic diversity of a police department contribute to an agency's woes? Peralta, who also serves as a lieutenant with the Las Vegas Metropolitan Police



seems crucial for all law enforcement professionals and yet few receive any substantive training of the sort.

Imagine if law enforcement agencies across the United States began training all officers in cultural sensitivity and required officers to *hear* and try to understand the communities in which they serve. Imagine if trained professionals spent hours of quality time with new police officers assigning readings and roll playing scenarios in which the officers would undoubtedly find themselves when patrolling minority neighborhoods. Community policing and greater compassion could flow from such efforts as officers may potentially begin to comprehend the divide that generally exists between minority communities and law enforcement.

While on the subject of training, it appears that much greater training is necessary on the appropriate use of force in most police departments. In so many of the police killings of unarmed black men, the officer began with his or her deadliest weapon drawn, rather than a non-deadly tool. This is instructive as in each encounter described above the black man approached by the police was unarmed. In addition, recent evidence seems to indicate that significantly more emphasis should be placed on de-escalation tactics and techniques in the police academy and thereafter.<sup>135</sup>

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Department, said it plays out in day-to-day interactions, with some citizens less likely to trust police. “Once trust is eroded,” he said, “everything deteriorates from there.” It also puts departments at a recruiting disadvantage, he said, because officers are an agency’s best recruiters. Irving’s Mitchell said language barriers also arise when police are called to a scene and can’t wait for translators to arrive. John Jay College’s Jones-Brown added that some black officers react differently than their white counterparts to certain situations. They may be able to better differentiate, for example, between behavior that is and is not suspicious, she said.

*Id.*; see also Kate Abbey-Lambertz, *The Simple Strategies That Could Fundamentally Change How Communities View Their Police*, HUFFINGTON POST (Feb. 17, 2015, 7:35 AM), [http://www.huffingtonpost.com/2015/02/17/community-policing-police-trust\\_n\\_6607766.html](http://www.huffingtonpost.com/2015/02/17/community-policing-police-trust_n_6607766.html) (“The public remains outraged over the deaths of Michael Brown and Eric Garner and the subsequent failure to indict the police officers who killed them. [There is one thing] nearly everyone agrees on after the months of protests those killings inspired: The relationships between American police and the communities they protect, particularly minority communities, are in need of serious repair.”); Carlos Fields, *Award-Winning Community Policing Strategies*, INT’L ASS’N OF CHIEFS OF POLICES (Sept. 2007), <https://ric-zaiinc.com/Publications/cops-w0451-pub.pdf>.

135. Stoughton, *supra* note 26.

Many police academies teach their new officers that “double tap to center mass” is the always appropriate shot to take when danger is present in civilian encounters.<sup>136</sup> Why must this be the standard? Police academy training includes an exhaustive dose of preserve your life, protect each other, and do not hesitate in dangerous situations.<sup>137</sup> Why must this be the singular focus,

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136. *San Francisco PD Being Trained to Fire Twice and Assess During Shootings*, POLICE (Feb. 19, 2016), <http://www.policemag.com/channel/patrol/news/2016/02/19/san-francisco-pd-being-trained-to-fire-twice-and-assess-during-shootings.aspx> (on file with the Washington and Lee Journal of Civil Rights and Social Justice); see also Julia Jacobo, *Experts on Why Police Aren't Trained to Shoot to Wound*, ABC NEWS (July 7, 2016, 7:46 PM), <http://abcnews.go.com/US/police-trained-shoot-wound-experts/story?id=40402933> (on file with the Washington and Lee Journal of Civil Rights and Social Justice). Jacobo explains:

Because of the potential risks, it would be ‘very difficult’ to train officers to shoot to wound instead, Kelly said. If someone’s life is in jeopardy, shooting to maim or injure will have little effect on the actions of the individual who is trying to kill, Klinger added. Additionally, if an officer aims at anything other than the torso area, the odds that he or she will miss increase greatly, Klinger said. But aiming for the chest means that the type of wounds suspects usually sustain are likely to be fatal, he added.

*Id.*

137. See Stoughton, *supra* note 26 (describing that a common police academy mantra is “Better to be judged by twelve than carried by six.”). Former Officer Stoughton argues:

American police officers are among the best-trained in the world, but what they’re trained to do is part of the problem. Police training starts in the academy, where the concept of officer safety is so heavily emphasized that it takes on almost religious significance. Rookie officers are taught what is widely known as the “first rule of law enforcement”: An officer’s overriding goal every day is to go home at the end of their shift. But cops live in a hostile world. They learn that every encounter, every individual is a potential threat. They always have to be on their guard because, as cops often say, “complacency kills.”

Officers aren’t just told about the risks they face. They are shown painfully vivid, heart-wrenching dash-cam footage of officers being beaten, disarmed or gunned down after a moment of inattention or hesitation. They are told that the primary culprit isn’t the felon on the video, it is the officer’s lack of vigilance. And as they listen to the fallen officer’s last, desperate radio calls for help, every cop in the room is thinking exactly the same thing: “I won’t *ever* let that happen to me.” That’s the point of the training.

In most police shootings, officers don’t shoot out of anger or frustration or hatred. They shoot because they are afraid. And they are afraid because they are constantly barraged with the message that that they

rather than valuable time spent on the consequences of acting rashly in dangerous situations?<sup>138</sup>

While improved training and changing the culture of law enforcement agencies holds significant promise, recent scholarship suggests that this alone may not be enough to eliminate the bias that exists against minority offenders throughout the criminal justice system, particularly in the charging decisions made by prosecutors as described above.<sup>139</sup> A suggested alternative is “blinding cases” wherein “the race of the suspect” is removed “from the information provided to the prosecutor” whereby implicit and explicit bias can be placed beyond reach of all prosecutorial decisions.<sup>140</sup> Blinding cases may involve additional administrative

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should be afraid, that their survival depends on it. Not only do officers hear it in formal training, they also hear it informally from supervisors and older officers. They talk about it with their peers. They see it on police forums and law enforcement publications. For example, three of the four stories mentioned on the cover of this month’s Police Magazine are about dealing with threats to officer safety. Officers’ actions are grounded in their expectations, and they are taught to expect the worst.

*Id.*

138. *See id.* (“Police training needs to go beyond emphasizing the severity of the risks that officers face by taking into account the likelihood of those risks materializing.”). Stoughton goes on to propose:

Training also needs to compensate for the unconscious racial biases that lead officers to perceive a greater threat from black men than from others. Officers are not unique in that regard; implicit racial animus is depressingly common in society. But it is of special concern in the context of policing. Because officers use more force when they perceive a greater threat, unconscious bias can lead officers to react more aggressively when confronting black men than they would when confronting others in otherwise identical situations. As we’ve seen too many times, the results are beyond tragic.

*Id.*

139. Shima Baughman, Christopher Robertson & Sunita Sah, *Training Police is Not Enough to Eliminate Racial Bias*, PBS NEWHOUR (Oct. 24, 2016), <http://www.pbs.org/newshour/rundown/column-training-police-not-enough-eliminate-racial-bias/>.

140. *See id.* (“Blinding to prevent unconscious bias –racial or otherwise– is standard procedure in several fields. Medical research requires that most drug trials use double-blinding of patients and physicians, whenever possible. In a study on symphony orchestras, blinding of musician auditions increased the probability that a woman would advance by 50 percent. One media company recently announced it would use blind auditions to hire tech journalists.”).

effort and cost, but the implementation could be painless and yield hopeful results:

Prosecutors typically make charging decision based on police files, rather than direct contact with the suspect. Although a suspect’s race and mugshots are now included in their file, those are intended for police identification purposes. This information is almost never relevant to the merits of the prosecution.

Even with plea bargaining, in many jurisdictions, prosecutors usually work with defense attorneys, rather than being exposed to the defendant. In most cases, the only way prosecutors learn the person’s race is through police reports, and these can be blinded.<sup>141</sup>

To motivate a bias-free law enforcement regime, all available methods should be considered, including training, cultural change and blinding cases. An oft-heard refrain is that law enforcement officers simply want to return home safely each day or night after work. There is no reason that this could not be accomplished each day while respecting and dignifying human life as the most important principle that motivates police officers.

### *3. Value and Preserve Life Above All Else*

If our laws promoted valuing and preserving human life above all else, how would policing change in the United States? I argue that policing would change radically if preservation of life at all costs became the new standard, rather than justifying deadly force by a “fear for life” standard.<sup>142</sup> Professor David Dante Troutt agrees: “And when the local politics are insurmountable, we need an amended federal statute with a legal standard that cherishes the protection of life—the greatest civil right. These reforms would bring a lot less shooting and a lot more accountability. That would bring us closer to justice.”<sup>143</sup>

Unfortunately, the law appears to be moving in the opposite direction. Beginning with the incredibly low hurdle necessary for

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141. *Id.*

142. Troutt, *supra* note 74.

143. *Id.*

law enforcement to use deadly force in this country and continuing with the slow evisceration of Fourth Amendment protections by the United States Supreme Court, the law itself does not appear to value human life and dignity above all else.<sup>144</sup> When referencing the laws of Missouri in light of the killing of Michael Brown by Officer Darren Wilson, Professor Troutt describes how the law could change to value the life of Michael Brown rather than allow justification for the taking of his life:

The law in Missouri doesn't have to make indictment so difficult. It could say "may use force only in rare circumstances," which would guide a police officer's judgment toward the value of preserving life at all costs. It could emphasize life over death with adjectives that emphasize the suspect must be a "verifiable" or "demonstrable" threat. It could single out unarmed suspects for mercy. As it is, the law does not imagine innocence or urge de-escalation. Instead, it's a vague and malleable standard that privileges police justification and promotes narratives that render even the innocent justifiably dead.<sup>145</sup>

In each scenario described above, where police officers have cut short the life of an unarmed African American man, the officer has acted as prosecutor and judge, finding guilt and exacting a sentence of death, in each case unnecessarily and unjustifiably. The law and our peace officers must adopt a standard baseline where preserving and valuing human life is the most important principle and is adhered to scrupulously, even if the offender is black or a "thug."

### *B. Reversing Racially Disparate Mass Incarceration*

Mass incarceration and the disproportionate jailing of African American male citizens has plagued the United States for decades

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144. *Supra* Section III.A.1; *see also generally* Michelle Alexander, *The New Jim Crow*, AM. PROSPECT (Dec. 6, 2010), <http://prospect.org/article/new-jim-crow-0> (on file with the Washington and Lee Journal of Civil Rights and Social Justice); Tibbs, *From Black Power to Hip Hop*, *supra* note 27; W. Kip Viscusi, *The Devaluation of Life*, 3 REG. & GOVERNANCE 103 (2009); Marion Fourcade, *The Political Valuation of Life*, 3 REG. & GOVERNANCE 291 (2009).

145. Troutt, *supra* note 74.

and most now agree has simply failed as a policy.<sup>146</sup> As policymakers and judges try to disentangle the failure of mass incarceration, several avenues forward seem clear. First, the law must continue to change including formally ending the War on Drugs and overhauling the drug sentencing policies that grew up under the drug war.<sup>147</sup> Second, we must reconsider our crime priorities and reorder our focus casting national gaze to the top rather than the bottom. White collar crime should be prosecuted with at least the same vigor that the nation’s cops prosecuted low level drug offenders for more than thirty years.<sup>148</sup> Third, the scourge of private, for-profit prisons must be eradicated in this country as unconstitutional and inhumane.<sup>149</sup> The perverse incentives that have motivated the private prison industry and lobby for more than thirty years must be eliminated.<sup>150</sup> Finally,

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146. See Richard Branson, *War on Drugs a Trillion-Dollar Failure*, CNN (Dec. 7, 2012, 6:05 PM), <http://www.cnn.com/2012/12/06/opinion/branson-end-war-on-drugs> (last visited Oct. 14, 2016) (concluding that prohibition on drugs has only led to resources being poorly allocated that could be better spent on treatment resulting in the “war” failing) (on file with the Washington and Lee Journal of Civil Rights and Social Justice); see also Brian Clark Howard, *The War on Drugs is a “Miserable Failure”*, NAT’L GEOGRAPHIC (Jan. 22, 2013), <http://newswatch.nationalgeographic.com/2013/01/22/the-war-on-drugs-is-a-miserable-failure> (last visited Oct. 14, 2016) (explaining that the “war on drugs” has created more problems than it has solved) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

147. See andré cummings, *Professor Calls War on Drugs an ‘Abomination’*, CORP. JUST. BLOG (July 15, 2013), <http://corporatejusticeblog.blogspot.com/2013/07/professor-calls-war-on-drugs-abomination.html> (last visited Oct. 14, 2016) (explaining that the government’s current drug policies have not been successful and have been conducted in a discriminatory fashion) (on file with the Washington and Lee Journal of Civil Rights and Social Justice); see also andré cummings, *Mass Incarceration and the Clintons*, CORP. JUST. BLOG (Apr. 25, 2016), <http://corporatejusticeblog.blogspot.com/2016/04/mass-incarceration-and-clintons.html> (last visited Oct. 14, 2016) (advocating for an end to current government policies on drugs to help solve the mass incarceration crisis) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

148. See generally MARY KREINER RAMIREZ & STEVEN A. RAMIREZ, *THE CASE FOR THE CORPORATE DEATH PENALTY* (2017) (detailing the failure of the federal government to bring criminal charges against any of the perpetrators of the financial market crisis of 2008).

149. See andré douglas pond cummings & Adam Lamparello, *Private Prisons and the New Marketplace for Crime*, 6 WAKE FOREST J.L. & POL’Y 407, 433 (2016) (explaining that the way private prisons are run as a whole results in an unconstitutional restriction on rights).

150. See *id.* at 429–32 (listing the resulting lobbying actions that result from perverse incentives such as lobbying for harsher sentences, lobbying for the

United States prison policy should be overhauled from an economic and human perspective. We should imprison citizens far less frequently and with much greater humanity.<sup>151</sup>

### 1. *Change the Law*

Federal and state drug law must continue to change and evolve in the face of the failure of the ill-conceived and discriminatorily enforced War on Drugs. Change is in the air in the United States as many states and the federal government have begun to walk back the irrational and harsh drug policies of the past.<sup>152</sup> Many agree today that the War on Drugs must be dismantled and that national law enforcement must completely reprioritize their objectives.<sup>153</sup> In addition, rather than focusing almost singularly on incarcerating the poor and disenfranchised in our country, our law must also punish those that destroy economies and defraud investors, i.e. prosecuting those guilty of violating criminal securities fraud and other laws.<sup>154</sup>

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creation of new crimes, lobbying for minimum incarceration limits, among others).

151. See PAUL BUTLER, *LET'S GET FREE: A HIP-HOP THEORY OF JUSTICE* 40 (2010) (explaining that “practical” reasons exist for creating a system that employs more discretion in incarceration with more humane methods).

152. See andré cummings, *Momentum Shift in the Failed War on Drugs*, CORP. JUST. BLOG (Sept. 7, 2013, 10:11 AM), <http://corporatejusticeblog.blogspot.com/2013/09/momentum-shift-in-failed-war-on-drugs.html> (last visited Oct. 14, 2016) (concluding that by not challenging Colorado and Washington’s marijuana the federal government is signaling a relaxation on the War on Drugs) (on file with the Washington and Lee Journal of Civil Rights and Social Justice); see also andré cummings, *Closer to Getting it Right on Drugs*, CORP. JUST. BLOG (Aug. 12, 2013, 3:00 PM), <http://corporatejusticeblog.blogspot.com/2013/08/closer-to-getting-it-right-on-drugs.html> (last visited Oct. 14, 2016) (indicating that the announcement concerning the federal government’s position that it will not prosecute low level drug offenders represents a step away from the War on Drugs) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

153. See ALEXANDER, *supra* note 8, at 11 (indicating that anyone who has cared about social justice has an interest in reforming the government’s drug policy).

154. RAMIREZ & RAMIREZ, *supra* note 148.

*a. End the War on Drugs*

The War on Drugs has sucked the oxygen and life out of fair and impartial policing in the United States.<sup>155</sup> The entire law enforcement regime in America has bent its will toward waging a drug war upon the urban city streets of our country for the past three decades.<sup>156</sup> With drug use known to be consistent across races,<sup>157</sup> a specific decision was made to wage this war upon poor communities of color.<sup>158</sup> Put another way, rather than wage this war against drugs on college campuses, fraternities and sororities, rather than wage this war against drugs in suburban communities and beach cities, rather than wage this war in the countries that send huge amounts of drugs into the United States, our politicians and law enforcement officers made a deliberate decision to eviscerate black communities and urban city centers in prosecuting the drug war.<sup>159</sup> As described by Professor Alexander

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155. See cummings & Lamparello, *supra* note 149, at 408–09. Because the War on Drugs has been waged in poor urban communities, it has unilaterally cast disproportionate racial consequences upon minority citizens.

Hundreds of thousands of young men of color are currently incarcerated in United States prisons for “no truly good law enforcement reason.” Our nation’s streets are not safer, despite more than two million American citizens behind bars. This is so because United States carceral policy has completely lost its way. For example, law enforcement departments have spent the past three decades narrowly focusing incredible resources, time, and policymaking on prosecuting a War on Drugs, which most now agree is an epic failure.

*Id.* at 409 (internal citations omitted).

156. See *id.* at 409 (explaining that the law enforcement policy put into place by President Ronald Reagan has had a disproportionate impact in urban environments towards persons of color).

157. See ALEXANDER, *supra* note 8, at 7 (explaining that both the sale and use of drugs is statistically similar across races); see also *Who are America’s Drug Users?*, PBS, <http://www.pbs.org/wgbh/pages/frontline/shows/drugs/buyers/whoare.html> (last visited Oct. 14, 2016) (“Of the major racial/ethnic groups, the rate of drug use is highest among the American Indian/Native American population (10.6%) and those reporting mixed race (11.2%), followed by African Americans (7.7%), Hispanics (6.8%), whites (6.6%). The lowest rates are found among the Asian population. (3.2%)”) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

158. See ALEXANDER, *supra* note 8, at 123 (illustrating that by tacitly condoning racial profiling, the courts have allowed police to target persons of color a disproportionate amount in the War on Drugs).

159. See *id.* at 124 (indicating that with similar drug use across the races, the war on drugs’ disproportionate impact on lower income persons of color can only



above, a policy decision was made to wage the War on Drugs not in “overwhelmingly white suburbs or on college campuses” but instead “in the ‘hood’ where “[t]actics that would be political suicide in an upscale, white suburb are not even newsworthy in poor black and brown communities.”<sup>160</sup>

Each of the tactics described above, SWAT teams, helicopters, surveillance, and seizures, have all been employed in black and brown communities and the urban city centers of the United States. Narratives describing paramilitary takedowns of homes and apartments in black neighborhoods are common and not unusual.<sup>161</sup> Battering rams, tanks, and SWAT assaults became commonplace in enforcing the War on Drugs in minority communities and often the display of force by law enforcement far outweighed the amount of drugs allegedly present or seized.<sup>162</sup> Why, for thirty years, has the drug war been enforced almost exclusively in poor and minority communities? The answer has something to do with power and politics, but it is also yet another example of law enforcement subordinating black and brown citizens.<sup>163</sup>

To successfully combat and heal communities battered by the War on Drugs, we must legislatively end the drug war. The law enforcement dogs must be called off as federal and local police must stand down in their discriminatory enforcement of the nation’s

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be recognized as a conscious choice to police lower income areas at higher rates than higher income areas).

160. *Id.* at 121.

161. See cummings, *Just Another Gang*, *supra* note 87, at 383–84 (“Nearly 80 officers carrying guns, sledgehammers and crowbars stormed the [dwelling]. Rushing through [one woman’s] door, police began kicking her, while a visiting male friend was knocked to the floor, handcuffed, and then thrown like a cord of wood through the open door and onto [the] parched front lawn.”).

162. *Id.*; see also Dennis Romero, *The Militarization of Police Started in Los Angeles*, LA WEEKLY (Aug. 15, 2015), <http://www.laweekly.com/news/the-militarization-of-police-started-in-los-angeles-5010287> (“LAPD Chief Daryl Gates . . . [used] military-style tactics [and] would later be criticized after he took over as chief in 1978 and confronted a gang and crack epidemic in the 1980s with a heavy hand, including the use of the infamous the B-100 battering-ram armored vehicle used to force through the doors of suspected drug houses”) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

163. See generally ALEXANDER, *supra* note 8 (describing the War on Drugs as a national effort to subordinate African American citizens who had freshly won the right to vote in the 1960s).

drug laws. As described above, the recently employed federal drug “stash house sting,” utilized by ATF agents in Chicago and across the country, exclusively focused on entrapping African American men.<sup>164</sup> The very foundational DNA of national drug enforcement policy is racially discriminatory. Until our states and nation can develop a neutral and non-discriminatory illegal drug enforcement policy, we must halt for a moment our entire current illegal drug enforcement regime. Similar to Governor George Ryan in 2003 ending all death sentences and capital punishment in Illinois because of far too many DNA exonerations in that state,<sup>165</sup> governors, legislators and the President must halt the enforcement of our nation’s drug laws until they can be redrawn and law enforcement agencies can be retrained to end the debacle of racial discrimination in enforcing broken drug laws.

In addition, marijuana use and distribution must at the least be decriminalized if not legalized. Currently, several states are

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164. *Supra* notes 97–114 and accompanying text.

165. See George Ryan, Governor of Illinois, *In Ryan’s Words: ‘I Must Act’*, N.Y. TIMES (Jan. 11, 2003), <http://www.nytimes.com/2003/01/11/national/in-ryans-words-i-must-act.html> (“The death penalty in Illinois is not imposed fairly or uniformly because of the absence of standards for the 102 Illinois State Attorneys, who must decide whether to request the death sentence”) (on file with the Washington and Lee Journal of Civil Rights and Social Justice). In declaring a moratorium on the death penalty in Illinois, then Governor Ryan announced:

[B]ecause the Illinois death penalty system is arbitrary and capricious - and therefore immoral - I no longer shall tinker with the machinery of death. . . . The legislature couldn't reform it. Lawmakers won't repeal it. But I will not stand for it. I must act. Our capital system is haunted by the demon of error, error in determining guilt, and error in determining who among the guilty deserves to die. Because of all of these reasons today I am commuting the sentences of all death row inmates. This is a blanket commutation. I realize it will draw ridicule, scorn and anger from many who oppose this decision. They will say I am usurping the decisions of judges and juries and state legislators. But as I have said, the people of our state have vested in me to act in the interest of justice. Even if the exercise of my power becomes my burden I will bear it. Our constitution compels it. I sought this office, and even in my final days of holding it I cannot shrink from the obligations to justice and fairness that it demands. There have been many nights where my staff and I have been deprived of sleep in order to conduct our exhaustive review of the system. But I can tell you this: I will sleep well knowing I made the right decision. As I said when I declared the moratorium, it is time for a rational discussion on the death penalty.

*Id.*

experimenting with marijuana legalization and the jury is still out on whether this is the most effective way nationally to deal with marijuana use.<sup>166</sup> Further, more than twenty-five states have legalized marijuana for medicinal purposes and the Department of Justice has stepped down its federal enforcement of non-violent marijuana use and distribution policies.<sup>167</sup> Congress must take up the issue of marijuana use and either decriminalize it completely or legalize it allowing regulation, taxation, and monitoring across the nation.

Further, drug abuse and addiction for harder drugs must be decoupled from criminal sanction and instead placed squarely within the health and rehabilitation sectors. Drug abuse and addiction were not always criminally sanctioned in the United States, but once they became criminalized during the Reagan and Rockefeller era, our nation's jails have been filled to overflowing with individuals who are addicted to harmful and illicit drugs.<sup>168</sup> As the Land of the Free and the Home of the Brave, do we as a nation want to house those addicted to drugs in our prisons? At this moment, several Countries around the world are experimenting with treating drug addiction as a health care issue, including Portugal and Uruguay, and we must be attentive, as a nation, to the outcomes of these international experiments.<sup>169</sup>

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166. See Tom Huddleston, Jr., *How Legalized Marijuana is Sweeping the U.S.—in One Map*, FORTUNE (June 16, 2016), <http://fortune.com/2016/06/29/legal-marijuana-states-map/> (“Already, 25 states have legalized medical marijuana, while four states—Alaska, Colorado, Oregon, and Washington—have legalized recreational pot, as has Washington, D.C.”) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

167. *Id.*; see also andré cummings, *Momentum Shift in Failed War on Drugs*, CORP. JUST. BLOG, (Sept. 7, 2013, 10:11 am), <http://corporatejusticeblog.blogspot.com/2013/09/momentum-shift-in-failed-war-on-drugs.html> (“In what is no doubt bad news to the private prison industry, federal enforcement will now shift focus from scooping up low level, non-violent drug offenders and instead prioritize stopping large drug cartels and kingpin operations.”).

168. See cummings, *All Eyez on Me*, *supra* note 32, at 420–21 (speaking to the negative impact of criminalizing drug abuse and addiction, particularly on preventing rehabilitative progress).

169. See *id.* at 447–48 n.149 (describing the work of foreign nations and the potential that exists for observing the experimentation being done by other nations).

*b. Reordering Crime and Prosecution Priorities*

Professor Bernard Harcourt argues that world history teaches that when deregulation of the economy and business interests are at the forefront of the minds of government officials, a concomitant focus is placed upon imprisoning poor and minority populations.<sup>170</sup> Said another way, when enrichment of the elite is prioritized over national economic fairness, governments historically focus the gaze of their nation’s citizens upon the criminality and punishment of the minority poor.<sup>171</sup> This pattern lines up seamlessly with the financial industry deregulation hysteria<sup>172</sup> that gripped the United States from the Ronald Reagan presidency (1980s) through the Bill Clinton and George W. Bush presidencies (2000s) paralleling the massive spike in incarceration rates in America, primarily of the nation’s black and brown male citizens.<sup>173</sup> When a nation prioritizes street crime and minor drug crime enforcement over white collar crime, like fraud and embezzlement, then an unholy war is waged against poor citizens while a blind eye is turned to financial illegalities and improprieties, which precisely describes the mass incarceration era of the United States.<sup>174</sup>

No scenario better supports Harcourt’s thesis than the inaction of the Obama administration in failing to prosecute those responsible for the Financial Market Crisis of 2008. Despite examples of aggressive federal government prosecution of

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170. See BERNARD HARCOURT, *THE ILLUSION OF FREE MARKETS* 41–44, 73–77 (2011) (describing the convergence of the public economy, deregulation, and the effect on the American penal system).

171. See *id.* (focusing on the injustices that can result from particular economic policy).

172. See STEVEN RAMIREZ, *LAWLESS CAPITALISM: THE SUBPRIME CRISIS AND THE CASE FOR AN ECONOMIC RULES OF LAW* 74–104 (2013) (describing the massive deregulation leading up to the market crises in both 2001 and 2008); see also andré douglas pond cummings, *Ain’t No Glory in Pain: How the 1994 Republican Revolution and the Private Securities Litigation Reform Act Contributed to the Collapse of the United States Capital Markets*, 83 NEB. L. REV. 979, 984–89 (2005) (explaining how a deregulation “hysteria” accompanied the Republican Revolution Congress into office in 1994).

173. See cummings, *All Eyez on Me*, *supra* note 32, at 423–27 (discussing an increase in United States incarceration rates, specifically as it relates to an increase in the imprisonment of black and Latino drug offenders).

174. See HARCOURT, *supra* note 170, at 221–39 (exploring the relationship between the growth of the private prison industry and the War on Drugs).

wrongdoers in the Savings and Loan scandal in the 1980s and the Enron/WorldCom accounting scandal in the early 2000s, the federal government refused to seriously investigate or prosecute those bankers and individuals that engaged in outright fraud leading up to the mortgage industry collapse of 2007–08.<sup>175</sup> Other than the prosecution and conviction of “Fabulous” Fabrice Torré, a low level Goldman Sachs trader,<sup>176</sup> *no other* individual has been indicted or prosecuted for criminal fraud despite overwhelming evidence that dozens of bankers and corporate leaders engaged in outright fraud leading up to the market crisis.<sup>177</sup> Attorney General Holder and President Obama both complained of the reckless conduct of Wall Street leaders in the aftermath of the near global economic collapse, but both were careful to state that while the conduct was abhorrent, it was not illegal.<sup>178</sup> Subsequent evidence and bank action seems to prove those statements premature and false.

In the past two or three years, nearly every single Wall Street bank that was deeply involved in the subprime mortgage market has paid enormous fines and penalties to the Department of Justice, the Consumer, Financial Protection Bureau, the Securities and Exchange Commission and to various state Attorneys General for engaging in a range of fraudulent and abusive activity including fraud, selling toxic securities and loans, manipulating interest rates and foreign markets and foreclosure abuse.<sup>179</sup> Bank of America, J.P. Morgan Chase, Citigroup and Wells Fargo paid the most for their duplicity, with Bank of America

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175. See RAMIREZ & RAMIREZ, *supra* note 148 (“The government failed to use its most powerful law enforcement tools despite overwhelming proof of wide-ranging and large-scale fraud on Wall Street before, during, and after the crisis.”).

176. See Justin Baer, Chad Bray & Jean Eaglesham, “Fab” Trader Liable in Fraud, WSJ (Aug. 2, 2013), <http://www.wsj.com/articles/SB10001424127887323681904578641843284450004> (“A federal jury found former Goldman Sachs Group Inc. trader Fabrice Tourre liable for defrauding investors in a deal that imploded during the financial crisis, delivering a victory for a U.S. regulator out to prove its mettle inside the courtroom.”).

177. RAMIREZ & RAMIREZ, *supra* note 148.

178. *Id.*

179. *Id.*; see also Clark Mindock, *How Much Did Banks Pay for the 2008 Financial Crisis? Fines and Settlement of Over \$160 Billion in Past 8 Years*, INT’L BUS. TIMES (June 28, 2016), <http://www.ibtimes.com/political-capital/how-much-did-banks-pay-2008-financial-crisis-fines-settlements-over-160-billion> (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

answering for the egregious sins of Countrywide Financial following Bank of America’s purchase of Countrywide following the mortgage meltdown.<sup>180</sup> Despite these record breaking fines and penalties, no criminal charges were ever brought against the corporate leaders of those banks that *paid* fines and penalties for *fraud and manipulation*.<sup>181</sup> This hard-to-square outcome seems particularly astonishing when one recognizes that these enormous penalties and fines were paid by the company itself, rather than by the wrongdoing executives and leaders.<sup>182</sup> Said another way, *shareholders* paid for the fraud, not the executives that engaged in the manipulation and abuse.<sup>183</sup> With fines and penalties now totaling over \$200 billion, being paid from company coffers, corporate malfeasors skated, literally.<sup>184</sup> Meanwhile our nation’s prisons are overflowing with convicted drug users and dealers, many of them non-violent marijuana abusers. This evidence seems to indicate that a reprioritization of United States carceral policy is in desperate order.

## 2. Abolish Private Prisons

As I have written previously,<sup>185</sup> shortly after the War on Drugs was declared, federalized, and militarized in the 1970s, a private for-profit company in Tennessee sprang up called the Corrections Corporations of America (CCA). The advent of this private prison corporation ushered in an era where the traditional government function of crime, punishment, and imprisonment became

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180. See generally TODD J. CLARK & ANDRÉ DOUGLAS POND CUMMINGS, CORPORATE JUSTICE 206–07 (2016).

181. See RAMIREZ & RAMIREZ, *supra* note 148.

182. *Id.*

183. *Id.*

184. *Id.*; see also Jeff Cox, *Misbehaving Banks Have Now Paid \$204B in Fines*, CNBC (Oct. 30, 2015), <http://www.cnbc.com/2015/10/30/misbehaving-banks-have-now-paid-204b-in-fines.html> (“U.S. banks have crossed a significant post-financial crisis milestone, tallying more than \$200 billion in fines paid out regarding questionable behavior . . . In all, the fines and settlements amount to \$204 billion paid out through 175 settlements since 2009. The actual number is probably higher.”).

185. The following several paragraphs appeared originally in andré douglas pond cummings & Adam Lamparello, *Private Prisons and the New Marketplace for Crime*, 6 WAKE FOREST J. L. & P. 407 (2016).

intertwined and enmeshed with corporate principles and goals like profit maximization for shareholders, executive compensation based on profits and share price, forward looking statements that forecast larger prison populations, management's discussion and analysis focusing on a more robust prison state, and increased profits built solely on human misery and debasement.

Today, the prison industrial complex in the United States, of which CCA is a major player, has proliferated to the point that perverse incentives drive corporate managers at private prison companies.<sup>186</sup> Private prison company directors, management, and their lobbyists currently work to increase profits by (a) influencing carceral policy so that greater numbers of Americans face incarceration;<sup>187</sup> (b) exploiting those imprisoned through private prison labor contracts;<sup>188</sup> (c) lobbying government officials tirelessly to privatize entire state and federal prison systems;<sup>189</sup> (d) cutting costs at privately run facilities by reducing the quality of food and degree of safety for prisoners;<sup>190</sup> (e) drafting

186. cummings, *All Eyes on Me*, *supra* note 32, at 435–43.

187. *Id.* at 439–40.

188. See Patrice Fulcher, *Hustle and Flow: Prison Privatization Fueling the Prison Industrial Complex*, 51 WASHBURN L.J. 589 (2012) (addressing how private contracts incentivize private companies to utilize prisoners as mere property and a source of profit); see also Patrice Fulcher, *Emancipate the FLSA: Transform the Harsh Economic Reality of Working Inmates*, 27 ST. JOHN'S J. C.R. & ECON. DEV. 679, 682 (2015) (noting that prisoners are being exploited as free workers, not subject to the normal protections under the law).

189. See *Cash for Prisons? Private Corrections Company Offers to Buy Facilities From States*, WASH. POST, (Mar. 9, 2012), [http://www.washingtonpost.com/business/cash-for-prisons-private-corrections-company-offers-to-buy-facilities-from-states/2012/03/09/gIQAWK4P1R\\_story.html?wpisrc](http://www.washingtonpost.com/business/cash-for-prisons-private-corrections-company-offers-to-buy-facilities-from-states/2012/03/09/gIQAWK4P1R_story.html?wpisrc) (explaining how the CCA offered forty-eight cash-strapped states an option to purchase state-owned prison facilities from them so long as the state contractually agreed to keep the prisons occupied at 90% capacity) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

190. *Inspection and Evaluation of the Lake Erie Correctional Institution*, CORRECTIONAL INST. INSPECTION COMM. REP. (Jan. 22–23, 2013), <http://big.assets.huffingtonpost.com/lakeeriereport.pdf>; John Burnett, *Miss. Prison Operator Out; Facility Called A "Cesspool"*, NPR (Apr. 23, 2012), <http://www.npr.org/2012/04/24/151276620/firm-leaves-miss-after-its-prison-is-called-cesspool>; Julie Carr Smyth, *Audits: Prison vendor charged for unserved meals*, ASSOCIATED PRESS (July 15, 2013), <http://news.yahoo.com/audits-prison-vendor-charged-unserved-174049715.html>. But see Dr. Simon Hakim & Dr. Erwin A. Blackstone, *Cost Analysis of Public and Contract Operated Prisons*, TEMPLE UNIV. CTR. FOR COMPETITION GOV'T (Apr. 29, 2013), <http://www.fox.temple.edu/cms/wp-content/uploads/2012/09/Cost-Analysis-of->

legislation and lobbying for passage of draconian sentencing policies including mandatory minimums, three-strikes, and illegal immigration legislation;<sup>191</sup> (f) bribing judges and government officials to fill private prison facilities with children on dubious charges;<sup>192</sup> (g) requiring governments that contract for their services to maintain capacity in the private prisons at 90% or risk breach of contract and higher per diem fees;<sup>193</sup> and (h) building new prison facilities despite no government contract or ready prisoners to fill them.<sup>194</sup>

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Public-and-Contractor-Operated-Prisons-FINAL.pdf, (finding that competition was able to allow more effective prison systems as compared to systems with less competition).

191. cummings, *All Eyez on Me*, *supra* note 32, at 438–40.

192. See generally WILLIAM ECENBARGER, *KIDS FOR CASH: TWO JUDGES, THOUSANDS OF CHILDREN, AND A \$2.8 MILLION KICKBACK SCHEME* (2012) (outlining a fraudulent scheme in Pennsylvania in which judges were bribed by prison officials in exchange for increased juvenile sentencing); Stephanie Chen, *Pennsylvania Rocked by ‘Jailing Kids For Cash’ Scandal*, CNN (Feb. 23, 2009) [http://articles.cnn.com/2009-02-23/justice/pennsylvania.corrupt.judges\\_1\\_detention-judges-number-of-juvenile-offenders?\\_s=PM:CRIME](http://articles.cnn.com/2009-02-23/justice/pennsylvania.corrupt.judges_1_detention-judges-number-of-juvenile-offenders?_s=PM:CRIME) (“As scandals from Wall Street to Washington roil the public trust, the justice system in Luzerne County, in the heart of Pennsylvania’s struggling coal country, has also fallen prey to corruption. The county has been rocked by a kickback scandal involving two elected judges who essentially jailed kids for cash. Many of the children had appeared before judges without a lawyer”) (on file with the Washington and Lee Journal of Civil Rights and Social Justice); see Abbe Smith, *Undue Process*, N.Y. TIMES, Mar. 31, 2013, at BR21 (reviewing WILLIAM ECENBARGER, *KIDS FOR CASH: TWO JUDGES, THOUSANDS OF CHILDREN, AND A \$2.8 MILLION KICKBACK SCHEME* (2012)).

193. See Kevin Johnson, *Private Purchasing of Prisons Locks in Occupancy Rates*, USA TODAY (Mar. 7, 2012), <http://www.usatoday.com/news/nation/story/2012-03-01/buying-prisons-require-high-occupancy/53402894/1> (“At a time when states are struggling to reduce bloated prison populations and tight budgets, a private prison management company is offering to buy prisons in exchange for various considerations, including a controversial guarantee that the governments maintain a 90% occupancy rate for at least 20 years.”).

194. See Katie Stallcup, *Just the Beginning*, NATCHEZ DEMOCRAT (Aug. 24, 2007), [http://www.cca.com/static/assets/08-24-07\\_Just\\_the\\_beginning.pdf](http://www.cca.com/static/assets/08-24-07_Just_the_beginning.pdf) (describing why CCA constructed the prison without a contract, Louise Grant, CCA’s marketing and communications vice president, noted that the company was confident in receiving a contract because “[w]e don’t know *exactly when or what, but we know the demand is out there.*”); Matthew Mulch, *Crime and Punishment in Private Prisons*, 66 NAT’L LAW. GUILD REV. 70, 75 (2009) (remarking that private prison companies, like the CCA, are “building prisons on spec, with no contract to build and no prisoners to house.”); Press Release, *The GEO Group Reports Second Quarter 2013 Results*, GEO GROUP, (Aug. 7, 2013), <http://phx.corporate-ir.net/phoenix.zhtml?c=91331&p=irol-newsArticle>



What seems undeniable now is that private prison corporations are driven by perverse and immoral incentives where an increase in crime and an increase in the number of human beings placed in America's brutal prisons is good business news for that industry. That United States prison conditions are so dehumanizing and ghastly, and that so many prisoners are low level non-violent minor drug offenders, begs the question as to why we as a nation stand for private corporate profit in the realm of human imprisonment. The perverse incentives that frantically drive corporate executives are laid bare when corporate interests are energized by an ever increasing number of imprisoned Americans. One private prison analyst claimed that the consistent yearly increase in the prison population "from a business model perspective . . . is clearly good news."<sup>195</sup>

"Private prison profiteers seek to increase privatization of the industry by promising more efficiently run prisons at lower costs, safer prisons, and better facilities and outcomes for prisoners."<sup>196</sup> Recent studies are now showing that these claims by private prison executives and lobbyists are simply not true. Private prisons are increasingly being shown to be less safe, less efficient, and less economical.<sup>197</sup> The contractual exchange of taxpayer funds from

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&ID=1845506&highlight= ("GEO's 2013 guidance does not assume the potential reactivation of approximately 6,000 current beds in inventory which GEO is actively marketing to local, state, and federal customers") (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

195. See *Lock Up Profits—in Prison Stocks: Analyst*, CNBC (Nov. 1, 2010), [http://www.cnbc.com/id/39949086/Lock\\_Up\\_Profits\\_in\\_Prison\\_Stocks\\_Analyst](http://www.cnbc.com/id/39949086/Lock_Up_Profits_in_Prison_Stocks_Analyst) (explaining that "[y]ou've seen prison populations pretty consistently over the last three decades move up a couple percent a year . . . and from a business model perspective for the private operators, it's clearly good news.").

196. cummings & Lamparello, *supra* note 185, at 413.

197. See andré cummings, *The Economics and Immorality of a Failed Drug War*, CORP. JUST. BLOG (Aug. 16, 2013, 3:00 PM), <http://corporatejusticeblog.blogspot.com/> (last visited Nov. 13, 2016) (remarking how the nation's drug policies have resulted in a massively overcrowded prison population) (on file with the Washington and Lee Journal of Civil Rights and Social Justice); see also andré cummings, *Private Prison Industry Shenanigans in Florida*, CORP. JUST. BLOG (Oct. 26, 2012, 9:30 AM), <http://corporatejusticeblog.blogspot.com/2012/10/private-prison-industry-shenanigans-in.html>, (last visited Nov. 13, 2016) (noting that the Florida Center for Fiscal and Economic Policy (FCFEP) found that there was no evidence that supported the notion that privatization of the prison system was a less expensive alternative) (on file with the Washington and Lee Journal of Civil Rights and Social Justice); David M. Reutter, *Florida Provides Lesson in How Not to Privatize State Prisons*, PRISON LEGAL NEWS (Dec.

governments and municipalities into the hands of the private prison system is simply an unabashed transfer of taxpayer monies into the personal accounts of private prison shareholders and executives who provide no real benefit in return, no manufactured product, and no efficient services, but rather taxpayer funded corporate welfare. The private prison system makes no sense morally, and increasingly, it appears that the industry makes no sense economically.

The time has clearly come to abolish private prisons. To that end, a new 501(c)(3) has just begun the process of challenging the constitutionality of private prisons through the federal courts, appropriately named “Abolish Private Prisons, Inc.”<sup>198</sup> The express purpose of Abolish Private Prisons is to mount a Thirteenth Amendment challenge to the existence of private prisons by arguing that incarcerating human beings for profit runs afoul of the slavery prohibitions enunciated in the Thirteenth Amendment.<sup>199</sup> This grass roots campaign intends to focus the gaze of the federal courts on the literal buying and selling of bodies for profit that inculcates the private for-profit prison system.<sup>200</sup> According to the Abolish Private Prisons website:

Private prisons are fundamentally wrong. They sacrifice liberty and justice for corporate profits. They perpetuate trauma to families and societal decay through mass incarcerations. Private prison corporations make more money for their

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29, 2015), <https://www.prisonlegalnews.org/news/2012/feb/15/florida-provides-lesson-in-how-not-to-privatize-state-prisons/> (establishing that Florida’s privatization plan neither saves the state money nor furthers the overall goals of incarceration) (on file with the Washington and Lee Journal of Civil Rights and Social Justice); *Inspection and Evaluation of the Lake Erie Correctional Institution*, CORRECTIONAL INST. INSPECTION COMM. REP., (Jan. 22–23, 2013), <http://big.assets.huffingtonpost.com/lakeeriereport.pdf> (concluding that the safety and security of the prison is “In Need of Improvement.”).

198. See ABOLISH PRIVATE PRISONS, [www.abolishprivateprisons.org](http://www.abolishprivateprisons.org) (last visited Oct. 4, 2016) (promoting litigation that seeks to constitutionally challenge the use of private corporations to run prison facilities) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

199. *Id.*

200. See *id.* (explaining the practice of imprisoning human beings for profit “sponsored by [the] government, is inherently-flawed and filled with economic conflicts of interest that violate ‘life and liberty’ guarantees in the Constitution of the United States. Incarceration-for-profit is the new slavery. It is time to abolish this practice.”).

shareholders when more people are incarcerated and for longer periods of times.

This is just wrong. These incentives are perverse, and at a gut level, this is not ethical. More importantly, this circumstance violates the Constitution of the United States. We are determined to have our day before the U.S. Supreme Court to abolish for-profit incarceration.

Simply stated, because government makes it very profitable for large corporations to imprison people, these corporations will imprison more and more people not because it is necessary but because it makes their owners and shareholders wealthy.<sup>201</sup>

To end private prisons, concerned citizens must take an active role by protesting and boycotting private prison corporations and the companies that do business with them and invest in them. When private prison behemoth, the GEO Group, attempted to “name” the football stadium at Florida Atlantic University, student, faculty and local citizen sit-ins, picketing and negative media attention scuttled the deal.<sup>202</sup> Students at Columbia University and the University of California system schools protested against the University endowments that invested in private prison corporations causing the administrations at Columbia and the UC system to divest all investments in private prison corporations.<sup>203</sup> Leaders of the United Methodist Church

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201. *The Basics*, ABOLISH PRIVATE PRISONS, [www.abolishprivateprisons.org/the\\_basics](http://www.abolishprivateprisons.org/the_basics) (last visited Oct. 6, 2016) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

202. See Chris Kirkham, *GEO Group Stadium Deal Is Off; Private Prison Company Cites ‘Ongoing Distraction’ After Protests*, HUFFINGTON POST (Apr. 2, 2013), [http://www.huffingtonpost.com/2013/04/02/geo-group-stadium-private-prison\\_n\\_2999133.html](http://www.huffingtonpost.com/2013/04/02/geo-group-stadium-private-prison_n_2999133.html) (describing the repercussions of Florida Atlantic University’s attempt to name its football stadium after a private prison company) (on file with the Washington and Lee Journal of Civil Rights and Social Justice); see also andré cummings, *GEO Group Stadium Naming Deal Fails*, CORP. JUST. BLOG (Apr. 5, 2013, 10:30 AM), <http://corporatejusticeblog.blogspot.com/2013/04/geo-group-stadium-naming-deal-fails.html> (“The ‘surprising . . . distractions’ to which Zoley refers include (a) student protests challenging FAU to reject the donation . . . (b) faculty resolution calling upon President Saunders to cancel the deal . . . (c) a sit-in held . . . by students, (d) a mocking national spotlight from Stephen Colbert’s comedy . . . and (e) community outrage protesting GEO’s intimate affiliation with an institution . . .”) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

203. See CLARK & CUMMINGS, *supra* note 180, at 371 (describing the divestment of Columbia University and the University of California systems of

scoured their investment and endowment records discovering that some of their monies supported private prison corporations and they unilaterally divested all monies from private prison corporations.<sup>204</sup> The Department of Justice, after carefully researching the issue, declared the private prisons did not deliver promised efficiencies and ordered an end to all federal DOJ contracts with private prison facilities.<sup>205</sup> Homeland Security, which also uses private prisons, has ordered the same study, intimating that it too will abandon the private prison industry.<sup>206</sup> Momentum against private, for-profit incarceration seems to be mounting.

Imagine if groups of concerned students, citizens and activists crowdfunded the litigation campaign to end private prisons as unconstitutional sponsored by Abolish Private Prisons. Imagine further if protesting citizens, students, and activists boycotted and withdrew their funds from banking giants like Wells Fargo and others who continue to invest in and accept as clientele the major private prison corporations? Imagine even further if protesters discovered all of the U.S companies that use prison labor to manufacture their products at cut rate contracts that enrich shareholders of private prisons, and boycotted those companies, much like Apartheid opponents boycotted United States companies that invested in South Africa during Apartheid causing many of those corporations to withdraw their activities in South

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all investments in private prison corporations).

204. See *id.* at 368 (describing how the United Methodist Church Board of Trustees elected to sell all of their pension fund holdings “in the private prison corporations as a matter of good conscience and good fiscal responsibility.”).

205. See Sally Q. Yates, Deputy Attorney General, *Phasing Out Our Use of Private Prisons*, DEP’T OF JUST. (Aug. 18, 2016), <https://www.justice.gov/opa/blog/phasing-out-our-use-private-prisons> (“[A]s each private prison contract reaches the end of its term, the bureau should either decline to renew that contract or substantially reduce its scope in a manner consistent with law . . . [t]his is the first step in the process of reducing . . . our use of privately operated prisons”) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

206. See Chris Strohm, *Homeland Security Agency to Study Ending Use of Private Prisons*, BLOOMBERG (Aug. 29, 2016), <http://www.bloomberg.com/news/articles/2016-08-29/homeland-security-agency-to-study-ending-use-of-private-prisons> (“The Homeland Security Department will review whether to end the use of private prisons for detained immigrants, a move that caused shares of prison operators to plunge”) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

Africa until Apartheid was dismantled.<sup>207</sup> Ending private for-profit prisons seems to be the right thing to do on multiple levels.

### 3. *Imprison Less and More Humanely*

Professor Paul Butler argues that if we as a nation “look to the bottom” and implement prison policy from the perspective of those most oppressed by our broken carceral system, that we would universally use prisons much less frequently and that we would imprison our citizens much more humanely.<sup>208</sup> These laudable goals are attainable simply by virtue of looking abroad and envisioning an approach followed by many industrial nations, one more fitting of stated American values. In acknowledging that prison policy in the United States has always been imposed from the top down, Butler argues that far fewer crimes should result in jail time in the United States, beginning with the elimination of most jail time for drug crimes and more restorative justice opportunities for non-violent crimes.<sup>209</sup>

If we as a nation retained prison time for violent and sexual crimes, including crimes against children, but decriminalized most of our drug laws and instead treated drug addiction as a healthcare issue, and reversed the nonsensical “tough on crime” legislation like “three strikes and you’re out” and trending crimmigration policies,<sup>210</sup> we could begin to right-size our criminal justice system and engage the hard work of eradicating racial disparities and abusive law enforcement practices.<sup>211</sup> If brief prison bids attended

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207. See CLARK & CUMMINGS, *supra* note 180, at 366 (describing the successful consumer boycott of United States’ corporations that were doing business in South Africa during its apartheid era).

208. See PAUL BUTLER, LET’S GET FREE: A HIP HOP THEORY OF PUNISHMENT 46 (2010) (emphasizing the importance of implementing a “look to the bottom” approach to the country’s prison system, promoting attempts to understand the context at which certain groups enter the prison system).

209. See *id.* at 64 (calling for the elimination of jail time for non-violent drug crimes to promote restorative justice).

210. See generally *Crimmigration—The Integration of Criminal Law and Immigration Law*, <http://crimmigration.com/> (last visited Oct. 9, 2016) (providing information on the intersection on criminal and immigration law) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

211. See BUTLER, *supra* note 208, at 38 (discussing the effects decriminalizing drug related offenses would have on the criminal justice system’s attempt to

financial fraud and market manipulation and we used prison sparingly for most other wrongs, excepting violent crimes and crimes against children, then our carceral policy could begin to live up to the promise of our great nation.

In addition, no law requires that prison time in the United States be brutal and unforgiving. That prison rape is common in our nation’s jails,<sup>212</sup> that brutal assaults are carried out by both prisoners and guards,<sup>213</sup> that many “criminals” go in for minor infractions and come out hardened,<sup>214</sup> suggests that our prison officials have the whole incarceration thing wrong.<sup>215</sup> Prisons in

reduce racial disparities and police violence).

212. See Pamela Bridgewater, *Is Hip Hop Dead?, Is Feminism Dead?*, in *HIP HOP AND THE LAW 207* (Pamela Bridgewater, andre douglas pond cummings, & Donald F. Tibbs eds, 2015) (noting that the Prison Rape Commission found recently that prison rape was so common in America’s prisons that it should be categorized as a condition of a prison sentence).

213. See Shane Bauer, *What We Know About Violence in America’s Prisons: One Fifth of Inmates Say They’ve Been Assaulted by Another Prisoner or Guard*, *MOTHER JONES* (July/Aug. 2016), <http://www.motherjones.com/politics/2016/06/attacks-and-assaults-behind-bars-cca-private-prisons> (introducing data on physical and sexual assault and other forms of prison violence as studied in a private Louisiana Prison) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

214. See generally *Does Prison Harden Criminals? Yes*, *NATION* (Dec. 14, 2006), <https://www.thenation.com/article/does-prison-harden-criminals-yes/> (describing empirical research that finds that prison time hardens those imprisoned based on recidivism rates) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

215. See generally Adam Gopnik, *The Caging of America: Why Do We Lock Up So Many People?* (Jan. 30, 2012), *NEW YORKER*, <http://www.newyorker.com/magazine/2012/01/30/the-caging-of-america> (assessing why there are so many incarcerated, low income individuals in the prison system) (on file with the Washington and Lee Journal of Civil Rights and Social Justice). According to the *New Yorker*:

For most privileged, professional people, the experience of confinement is a mere brush, encountered after a kid’s arrest, say. For a great many poor people in America, particularly poor black men, prison is a destination that braids through an ordinary life, much as high school and college do for rich white ones. More than half of all black men without a high-school diploma go to prison at some time in their lives. Mass incarceration on a scale almost unexampled in human history is a fundamental fact of our country today—perhaps *the* fundamental fact, as slavery was the fundamental fact of 1850. In truth, there are more black men in the grip of the criminal-justice system—in prison, on probation, or on parole—than were in slavery then. Over all, there are now more people under “correctional supervision” in America—more than six million—than were in the Gulag Archipelago under

Norway and Austria are habitable and humane.<sup>216</sup> Only violent criminals are incarcerated in many European nations and depriving a prisoner of his or her freedom is deemed enough punishment; brutality and rape are not attendant punishments.<sup>217</sup>

Imagine if our nation's prisons were reserved only for those that violently harm our communities, physically and financially. Imagine if once those individuals were imprisoned, they were treated with humanity and a sense that rehabilitation could be possible. Once released, imagine if those formerly incarcerated

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Stalin at its height. That city of the confined and the controlled, Lockuptown, is now the second largest in the United States.

*Id.*

216. See Baz Dreisinger, *Norway Proves That Treating Prison Inmates as Human Beings Actually Works*, HUFFINGTON POST (Aug. 3, 2016), [http://www.huffingtonpost.com/entry/norway-prison\\_us\\_578418b6e4b0e05f05232cb7?utm\\_hp\\_ref=world](http://www.huffingtonpost.com/entry/norway-prison_us_578418b6e4b0e05f05232cb7?utm_hp_ref=world) (explaining the effectiveness of Norway's prison system) (on file with the Washington and Lee Journal of Civil Rights and Social Justice). In describing the open Bastoy Prison in Norway, the Prison Governor (warden) describes it as follows:

"I started skeptical. That changed quickly. More prisons should be open—almost all should be. We take as many as we can here, but there isn't room for everyone." Prisoners from around the country can apply to move to an open prison like Bastoy when they're within three years of release. The island is home to about 115 men overseen by over 70 staff members, and there is a waiting list of about 30.

"There's a perception that, 'Oh, this is the lightweight prison; you just take the nice guys for the summer-camp prison.' But in fact, no. Our guys are into, pardon my French, some heavy shit. Drugs and violence. And the truth is, some have been problematic in other prisons but then they come here, and we find them easy. We say, 'Is that the same guy you called difficult?' It's really very simple: Treat people like dirt, and they will be dirt. Treat them like human beings, and they will act like human beings."

*Id.*

217. See *Inside the World's Most Humane Prison*, TIME, <http://content.time.com/time/photogallery/0,29307,1989083,00.html> (last visited Oct. 9, 2016) (providing a pictorial essay of Halden Prison in Norway) (on file with the Washington and Lee Journal of Civil Rights and Social Justice). Describing a prison cell at Halden, *Time* reports:

The maximum sentence in Norway, even for murder, is 21 years. Since most inmates will eventually return to society, prisons mimic the outside world as much as possible to prepare them for freedom. At Halden, rooms include en-suite bathrooms with ceramic tiles, mini-fridges and flat-screen TVs. Officials say sleeker televisions afford inmates less space to hide drugs and other contraband.

*Id.*

persons were afforded opportunities to work, live, and contribute as meaningful citizens, without governmental restriction. Currently, these three sentences seem beyond our nation’s grasp. This simply does not have to be the case. Smart, dedicated, prescient leaders can figure out and implement a saner and safer prison policy in our United States.

*C. Reversing the Homicide Rates of African American Men and Boys*

The killing of young black men and boys has reached epidemic proportions in the United States.<sup>218</sup> The city of Chicago has seen nearly 700 homicides in 2016 through November, mostly of young black men killed by young black men.<sup>219</sup> If 700 Wall Street brokers had been gunned down by other Wall Street brokers through November of 2016, one can only imagine that aggressive emergency action would have been taken by legislators and governmental leaders.<sup>220</sup> Instead, law enforcement agencies send more officers to the violent areas and the street war simply continues. As described above,<sup>221</sup> that homicide statistics in most of our nation’s great cities are 60–75% African American male, despite the fact that black men make up less than 15% of those cities populations, indicates that our nation is dealing with an epidemic, a tragedy.<sup>222</sup> Urgent action must be undertaken to reverse this reality.

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218. See *supra* notes 5 & 67 (providing the statistics of how many young, African American men and boys are killed across the country).

219. See *Crime in Chicagoland-Chicago Homicides*, CHI. TRIB., available at <http://crime.chicagotribune.com/chicago/homicides> (last visited Nov. 21, 2016); see also Monica Davey, *Chicago has Its Deadliest Month in About Two Decades*, N.Y. TIMES (Sept. 1, 2016), <http://www.nytimes.com/2016/09/02/us/chicago-august-homicides.html> (“In a city wrestling with a rise in gun violence and turmoil in its police department, August seemed like the longest month. By midnight on Wednesday, 90 murders had occurred in August alone, making it the deadliest month in Chicago in about 20 years”) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

220. Iric Headley, director of Fort Wayne United initiative, & andré douglas pond cummings, Professor of Law, Address at Fort Wayne United L.I.V.E. Session (Sept. 24, 2016).

221. See *supra* note 66 and accompanying text (explaining the rates of homicide related African American males in cities.).

222. See *id.* (describing the connection between African American males and



Individual advocacy and concerted community action must be undertaken to reverse the epidemic of young black male death in the United States throughout its major cities. Above, this Article has proposed federal and national legislative action to combat the racial conundrums that continue to challenge the nation. Below, this Article contemplates and proposes actions that can be undertaken to save the lives of the young men that fall prey to violence and hopelessness daily in our country. Broadening the scope from macro-level policy and legislative changes to micro-level advocacy and community organizing as described below seems a natural and central place to begin when proposing urgent action.

### *1. Cities United–My Brother’s Keeper*

Cities United and My Brother’s Keeper are two national White House initiatives aimed explicitly at protecting the future of minority youth. The Cities United initiative is purposefully and pointedly meant to value and preserve the lives of African American young men and boys in the United States.<sup>223</sup> Cities United is explicit in its mission:

**Cities United** is a national movement focused on eliminating the violence in American cities related to African American men and boys. The 86 mayors (and counting) participating in Cities United intend to reduce homicides in their cities by 50%, by the year 2025. Moreover, they are committed to restoring hope to their communities and building pathways to justice, employment, education, and increased opportunities for residents. . . .

The members of Cities United hold each other accountable for achieving results, calling on Federal support while asking members of the community to get involved as well.

From the outset, Cities United was based on the simple but fundamental premise that African American men and boys matter and are assets to our nation.

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homicide rates in cities that have a small African American population); *see also supra* note 219 (assessing homicide rates and race in cities such as Chicago).

223. CITIES UNITED, <http://citiesunited.org> (last visited Oct. 9, 2016) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

Cities United has grown to support a national network of mayors committed to working in partnership with community leaders, families, youth, philanthropic organizations, government officials, and other stakeholders to reduce the epidemic of homicide-related deaths and injuries plaguing African American men and boys.<sup>224</sup>

My Brother’s Keeper is an organization that seeks to promote opportunities for all minority male youth.<sup>225</sup> Like Cities United, the My Brother’s Keeper initiative seeks to promote value, identity and future potential in minority young men:

President Obama launched the My Brother’s Keeper initiative to address persistent opportunity gaps faced by boys and young men of color and ensure that all young people can reach their full potential.

Through this initiative, the Administration is joining with cities and towns, businesses, and foundations who are taking important steps to connect young people to mentoring, support networks, and the skills they need to find a good job or go to college and work their way into the middle class.<sup>226</sup>

With Cities United and My Brother’s Keeper, the White House is recognizing that opportunity gaps persist in the United States, particularly for minority young men, and perhaps more explicitly, that violence is condemning many of our nation’s young black men to homicide and squandered potential.<sup>227</sup> In recognizing these challenges, President Obama is challenging mayors and leaders nationwide to begin to work diligently to reverse these opportunity gaps and more importantly, to stop the violence that ends the lives of so many of our nation’s young black men. Mayors and leaders

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224. See *About*, CITIES UNITED, <http://citiesunited.org/about/> (last visited Oct. 8, 2016) (describing the history of the organization and its focus “on eliminating the violence in American cities related to African American men and boys”) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

225. *My Brother’s Keeper*, WHITE HOUSE, <https://www.whitehouse.gov/my-brothers-keeper> (last visited Oct. 6, 2016) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

226. *About My Brother’s Keeper*, WHITE HOUSE, <https://www.whitehouse.gov/my-brothers-keeper#section-about-my-brothers-keeper> (last visited Oct. 7, 2016) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

227. See *supra* notes 223–226 and accompanying text (discussing the initiatives created to help stop violence and preserve lives).

nationwide are listening and hearteningly, stepping up to the President's challenge.

*a. Fort Wayne UNITED*

Fort Wayne UNITED was created as a Fort Wayne, Indiana specific mayoral initiative to pursue the combined goals of the national Cities United and My Brother's Keeper initiatives. Authorized by Fort Wayne Mayor Tom Henry and organized by Fort Wayne UNITED Executive Director Iric Headley, Fort Wayne UNITED was originally organized with a steering committee consisting of local leaders including judges, pastors, city employees, millennials, law school educators, local business leaders, university and high school educators, healthcare professionals, and law enforcement leaders and officers.<sup>228</sup> The objective of Fort Wayne UNITED is articulated by this committee in the vision and mission statements:

Vision: Every black male in Fort Wayne is respected and valued and has the opportunity to achieve his full potential.

Mission: Advocate for and implement policies, practices and procedures to ensure equity and opportunity for black fathers, brothers, and sons at home, work, school and in the community through collaborative efforts.<sup>229</sup>

With this specific vision and mission in mind, the Fort Wayne UNITED steering committee set out to establish goals and timetables for addressing these challenges, including aggressive measures intended to curtail violent homicides in the city and provide meaningful opportunities for young black males to achieve their potential and conceptualize their value. To address these challenges, Fort Wayne United created and initiated L.I.V.E.

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228. *See Our People*, FORT WAYNE UNITED, <http://www.fortwayneunited.org/copy-of-home> (last visited Oct. 8, 2016) (listing community leaders in the organization) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

229. *Fort Wayne United*, CITY OF FORT WAYNE, <http://www.fwcommunitydevelopment.org/fwunited> (last visited Sept. 26, 2016) (on file with the Washington and Lee Journal of Civil Rights and Social Justice); *see also Home*, FORT WAYNE UNITED, <http://www.fortwayneunited.org> (last visited Sept. 26, 2016) (describing the initiative's mission statement) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

Sessions, L.I.V.E. Forums, the CSI Initiative, and plans to implement Violence Interrupter programming as well as Restorative Justice principles citywide.

*i. L.I.V.E. Sessions*

Conceived by Executive Director Headley, Fort Wayne UNITED L.I.V.E. Sessions have the potential to impact and improve the lives of young black men who may succumb to the violence that permeates our nation’s major city centers. L.I.V.E. Sessions, or Listening to Input and Voices through Engagement Sessions, situate small groups of young black men, usually twenty to twenty-five in number, in intimate settings with city leaders and local law enforcement leadership.<sup>230</sup> Rather than the typical speeches and preaching that city and black leaders often use in these type of settings, L.I.V.E. Sessions allow potentially vulnerable young black men to speak, offer opinions, and challenge city leaders, as city leaders listen to the young men opine on hard issues such as racial profiling, police killing of unarmed black men, unemployment, and other topics.<sup>231</sup> These issues are addressed through a variety of methods including anonymous polling, open discussion, video presentation, and true engagement.<sup>232</sup> According to Headley:

Simply put, we want to really lift the voices of the African-American male, helping them share their perspective, giving them the opportunity to share their experiences on law enforcement, whether bad, whether good. It’s really about just giving them the opportunity to have a voice in front of people who are really change agents, which are the police chief, deputy chief. We have a law professor in the room, so we talk a lot about law, we talk a lot about cases around the country, we go over

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230. See Keiara Carr, *Black Men, City Police Sit-and Listen*, FORT WAYNE J. GAZETTE (Sept. 25, 2016), <http://www.journalgazette.net/news/local/Black-men-city-police-sit-and-listen-15432746> (last visited Oct. 16, 2016) (reporting on one of Fort Wayne’s L.I.V.E. Sessions hosted in September 2016 by Fort Wayne United) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

231. See *id.* (describing how the arrangement of L.I.V.E. sessions allows for input from community members).

232. See *id.* (presenting issues in a variety of ways to develop community input).

statistics . . . . We're here to educate them, we're to empower them, we're to encourage them and really, just put the two together and create some positive relationships between law enforcement and black males.<sup>233</sup>

The young black men are *listened* to and many are courageous enough to speak up to city leaders including one young black man who looked directly at the Fort Wayne police chief and stated "I am honestly terrified whenever I see a local Fort Wayne police officer. I am afraid for my life."<sup>234</sup> The police chief was then given an opportunity to respond to this young black man, with understanding and caring, rather than with intimidation and query as to why the young man was terrified and what to do to avoid feeling terror when confronting local police.<sup>235</sup>

These sessions not only allow young black men, usually aged fourteen to twenty-four years to speak and be *heard*, but city leaders and law enforcement leadership are able to honestly discuss the realities of policing urban city centers and connect with the young black men by empathizing and stating that they too feel nerves and fear as they police the streets these young men occupy.<sup>236</sup> One African-American Deputy Chief of Police shared with the young men during a L.I.V.E. Session that "I too, know what it is like to be profiled and to go through what you go through. When I am out of uniform, I am a large black man, and when I wear a hoodie, I am often viewed as a 'thug' or someone who has just 'gotten out.' The key guys, is to keep your head about you, obey instructions, and if you are mistreated, to report that harassment to the supervisors of these officers."<sup>237</sup>

Not only are these young black men able to see and feel the reality of policing in Fort Wayne's streets straight from the mouths of police leadership, including black police officers, but perhaps,

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233. *Id.*

234. *Young black male*, statement at Fort Wayne United L.I.V.E. Session, SUMMIT (Oct. 2015).

235. Former Chief of Police Garry Hamilton, Fort Wayne Police Dep't., Address at Fort Wayne United L.I.V.E. Session, SUMMIT (Oct. 2015).

236. Chief of Police Stephen Reed, Fort Wayne Police Dep't., Address at Fort Wayne United L.I.V.E. Session, IND. TECH LAW SCH. (Sept. 24, 2016).

237. Deputy Chief of Police Derrick Westfield, Fort Wayne Police Dep't., Address at Fort Wayne United L.I.V.E. Session, IND. TECH LAW SCH. (Sept. 24, 2016).

more importantly, police leadership and city leaders listen to hard truths spoken by the young men who share tales of being racially profiled, harassed by local law enforcement officers (one young man related that he had been stopped on twenty-one consecutive days by the same white police officer that “knew he was dirty” so the officer stated it was just a matter of time before he would catch the young man),<sup>238</sup> and deeply disrespected by the officers that patrol their neighborhoods. The exchange is frank and at times tense, but the exchange is real and for both the young black men and the law enforcement leaders, truthful and meaningful. To the young black man who had been harassed for nearly a month straight, the Chief of Police gave the young man his direct dial telephone number and stated that the young man should call him and report any future harassment by local law enforcement. Thereafter, in a momentous moment, the Police Chief shared the following with the young black men at the L.I.V.E. Session: “In the future, when you are pulled over by our police officers, take your cell phone out and record the encounter. You have the right to record your interaction with the police and if you are mistreated, bring that recording to me. I will deal with any harassment.”<sup>239</sup>

That a sitting Police Chief would meet with dozens of young African American men on multiples occasions and tell them directly that he cares about them and cares about their welfare including whether they are being profiled and harassed and further that he would take steps to end this harassment if recorded and reported is truly an astounding occurrence. Imagine if Police Chiefs the nation over would regularly meet with vulnerable young black male populations and express genuine concern and provide legitimate advice to them.

Because of this truth-telling on both sides, by the young black males and by law enforcement leadership, minds and perceptions are changed at Fort Wayne UNITED L.I.V.E. Sessions.

Fort Wayne UNITED will continue to hold L.I.V.E. Sessions for young black men and law enforcement into the future and will

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238. *Young black male*, statement at Fort Wayne United L.I.V.E. Session, SUMMIT (Oct. 2015).

239. Former Chief of Police Garry Hamilton, Fort Wayne Police Dep’t., Address at Fort Wayne L.I.V.E. Session, SUMMIT (Oct. 2015).

expand the speak-out topic ranges to include employment, education, fatherhood, and soft skills, amongst others.

*ii. L.I.V.E. Forums*

Fort Wayne UNITED hosts forums which present the insights and findings of L.I.V.E. Sessions to large groups of spectators. Fort Wayne police officers, together with young black males (and sometimes females) are set up in a panel formation with police and young black civilians sitting with each other facing an invited community audience. Often the audience size is several hundred spectators who witness very hard questions being asked of the panelists and honest answers being delivered by the police and the young black men. The audience is anonymously polled on various questions and then listen as the panelists respond to questions about the “no snitching” code that exists on many city streets as well as police officers responding to questions regarding the “blue code” of silence present in many police departments.<sup>240</sup> The responses of both police and young black men are illuminating and often educate the primarily white audience on the divide that exists between law enforcement and the black community.

The L.I.V.E. Forum, different from the L.I.V.E. Session, provides an educational tool for the Fort Wayne community and allows young men who have participated in the L.I.V.E. Sessions to speak to a large community audience on the challenges and realities of being policed in the black community. Meanwhile, law enforcement officers are provided the opportunity to address city concerns and myths, particularly about the background and mind-set of an officer approaching a citizen at a traffic stop. The backgrounds of the police officers are discussed and the goals of the police are reviewed. Meanwhile, the audience is educated by various city officials/speakers on national crime statistics, police violence and homicide rates by city.<sup>241</sup> Not only is the audience educated, and many of their eyes opened, but near the conclusion of the L.I.V.E. Forum, the audience is given an opportunity to brainstorm and collaborate on what solutions might be available

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240. See Fort Wayne United L.I.V.E. Session, Address at Indiana Tech University (Apr. 2016) (presenting questions to panelists).

241. See *id.* (presenting issues and topics by city officials and speakers).

to community members to contribute toward a safer and fairer city for all community members.

While educating the community on challenging issues facing young black males is an important piece of Fort Wayne UNITED, the ultimate goal is to value and preserve the lives of all young black men in Fort Wayne. To that end, the approach must and does include both macro efforts (like organizing L.I.V.E. Forums and discussing policy changes with the Mayor and city leaders) and micro efforts (like engaging one-on-one with as many young black males as Fort Wayne UNITED can reach). Of the goals of Fort Wayne UNITED, perhaps the most important is reaching out and touching (interacting with) 50% of young black males in Fort Wayne by December 2017 with specific outreach programming.<sup>242</sup> The L.I.V.E. Sessions, Choose Success Initiative (discussed below), and neighborhood block parties are a few of the examples of this specific outreach programming. An example of the critically important micro-efforts in reaching young black males one-on-one, occurred when one young twenty-year-old black male participated as a panelist in April 2016’s L.I.V.E. Forum. Following the Forum, based on this young man’s impressive ability to speak honestly and forthrightly about his experience with law enforcement in the black community, several members of the Fort Wayne UNITED steering committee queried what the goals and dreams were of this young man. When this young black male explained that he dreamed one day of becoming an entertainment lawyer, he was asked what he was currently doing to achieve this dream. When told that he had not yet begun college (he earned a G.E.D. after dropping out of high school as a teenager), but was working diligently at a job to provide support for his young daughter, the steering committee members immediately set out to assist this young man in enrolling in college to begin pursuing his dream. After a lunch meeting with college admissions officers and several meetings with community college officials, this young man enrolled in college. Today, as this Article goes to press, this young man is a freshman student in a local Fort Wayne community college and is excitedly working on his general education requirements moving

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242. Fort Wayne UNITED Steering Committee Mission Statement and Goals document, July 2016 (on file with author).



toward his ultimate dream of attending law school and working in the entertainment industry.<sup>243</sup>

Communities like Fort Wayne that affirmatively engage with Cities United and My Brother's Keeper to value and preserve the lives of African American young men and boys must keep top-of-mind the importance of not just orchestrating macro programming but always remembering that the one-on-one micro work, engaging individually with the young black men in their communities, is of penultimate importance.

As for the macro efforts including L.I.V.E. Forums, Fort Wayne UNITED will continue to organize and hold L.I.V.E. Forums for community audiences to be educated on the issues that face young black men in Fort Wayne and the United States into the future. The L.I.V.E. Forums will expand the community educational topics to include the black male homicide epidemic, disparities in employment and wages, and the educational opportunities available to young black men across Fort Wayne and the nation.

### *iii. Choose Success Initiative*

The Fort Wayne UNITED Choose Success Initiative (CSI) provides several dozen black male youth the chance to experience first-hand potential future opportunities and observe the consequences of poor decisions. A CSI day is generally planned around three priorities: first to take black youth to a local University to learn what is required to enroll in college, second to visit one or two trade employers for the youth to see what is required to find and work a forty hour per week job following high school, and third, taking the black youth to the city's criminal courts to witness sentencing hearings. These three priorities are meant to provide young black males the chance to witness a range of options that would allow them to make plans for a future with purpose. A typical CSI day begins with young black men visiting a criminal courtroom where sentencing is taking place. The youth are exposed to the consequences of poor decisions as they watch primarily black defendants being sentenced for crimes to which

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243. Experience with one young African American male who is now enrolled at Ivy Tech Community College in Fort Wayne, IN as of August 2016 (Apr. 2016).

they have been convicted. Thereafter, the group of young men is taken to a local university where they are able to speak to admissions counselors and tour classrooms and sit in on a University class. There, the students are able to juxtapose the criminal courtroom against the university classroom and begin imagining the future that they choose. Finally, the young black men are taken by a trade vocation like the local bricklayers or the local metal manufacturer. Here, the youth are exposed to trade employment and listen to employers discuss what it takes to become a trade employee at their shops.<sup>244</sup>

CSI’s primary intent is to expose young black men to the options and opportunities that are within their grasp while also witnessing the consequences that attend poor decision-making.<sup>245</sup>

Fort Wayne UNITED will continue to organize and hold at least quarterly CSI days where groups of young black men and women are able to experience first-hand both future opportunities including college and trade work as well as witness the consequences that lie ahead for those that break the law and make weak decisions. The obvious goal of the CSI is to allow young black students the opportunity to envision their future, one full of possibilities and opportunities.

#### *iv. Additional Outreach*

Midnight basketball has been successfully initiated in major urban cities across the country as a program that provides opportunities for minority youth on weekends during the hours where crime statistics are the highest.<sup>246</sup> Fort Wayne UNITED now sponsors midnight basketball programming in concert with

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244. See Choose Success Initiative (July 21, 2016) [hereinafter CSI] (creating and running a day-long program where youths visited Judge Wendy Davis’s criminal courtroom, Indiana Tech University, the local Bricklayers union, and Fort Wayne Metals).

245. See *supra* note 240 (describing a conversation with a young black male).

246. See generally Elizabeth Shogren, *Midnight Basketball is Winner on Street: Crime: Players, Coaches, Police Officers Say the Prevention Programs Have Proved Their Worth. But Some Lawmakers Aren’t Convinced*, L.A. TIMES (Aug. 19, 1994), [http://articles.latimes.com/1994-08-19/news/mn-28886\\_1\\_mid\\_night-basketball](http://articles.latimes.com/1994-08-19/news/mn-28886_1_mid_night-basketball) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

the local YMCA. Additionally, while still in the planning stages at the time this Article goes to press, the Fort Wayne UNITED steering committee is exploring instituting a Violence Interrupters program<sup>247</sup> as well as a system of Restorative Justice options.<sup>248</sup> Both Violence Interrupters and Restorative Justice have been successfully implemented in Cities United sister cities across the country and implementation plans are underway in Fort Wayne.

## 2. Provide Opportunity and Optimism

While Cities United and My Brother's Keeper are important and relatively new initiatives, there are many organizations nationwide that focus on the goal of providing opportunity to at-

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247. See Cure Violence, <http://cureviolence.org/resources/the-interrupters/> (last visited Oct. 10, 2016) (sponsoring a 2011 documentary entitled "The Interrupters." [which is a] "is a critically acclaimed 2011 documentary telling the story of three Cure Violence workers who try to protect their Chicago communities from the violence they once employed. It examines a year in which Chicago drew national headlines for violence and murder that plagued the city") (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

248. See RESTORATIVE JUSTICE – LOUISVILLE, <http://rjlou.org/about-us/> (last visited Oct. 10, 2016) (describing the restorative justice process) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

The restorative justice process is dramatically different from the traditional criminal justice system. The traditional criminal justice system asks what laws have been broken and what punishment is deserved by the offender. Restorative justice asks what harm has been done, who is responsible for repairing that harm, and how can that harm be repaired?

RJL uses the Family Group Conference model, as adapted from *The Little Book of Family Group Conferences: New Zealand Style* by Allen MacRae and Howard Zehr. The Family Group Conference is a decision-making meeting led by trained facilitators involving a face-to-face meeting for victims (or a victim representative) and offenders along with supporters from both sides.

Participation in restorative justice programs is voluntary for victims, as well as offenders. The offender must be willing to accept responsibility for their actions and the harm caused. The victim and their support group must be willing to meet with the offender and their support group to discuss how the offense impacted them and what needs to be done to repair the harm. This facilitated process is centered on making things right for all parties involved while enabling creative solutions not used within the traditional justice system.

*Id.*

risk youth. Partnering with the organizations already in place can assist mightily toward the goal of valuing and preserving the lives of African American men and boys. Local organizations like The Boys and Girls Club,<sup>249</sup> Big Brothers Big Sisters,<sup>250</sup> charter schools like the Smith Academy for Excellence,<sup>251</sup> and city organizations and foundations like the United Way<sup>252</sup> and the Brandon Foundation<sup>253</sup> can all provide tools, resources, and critical mentoring for young men and women in need. Historic and traditional organizations such as the Urban League<sup>254</sup> and the NAACP<sup>255</sup> can also be tapped to strengthen specific efforts toward valuing and preserving the lives of young black men and boys.

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249. See BOYS AND GIRLS CLUB OF FORT WAYNE, <http://bgcfw.org/> (last visited Oct. 8, 2016) (providing activities and developmental skills training to local children in order to foster growth in the community) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

250. See BIG BROTHERS BIG SISTERS OF NORTHEAST INDIANA, [http://www.bbbsnei.org/site/c.ckLRI4NOIhJ2G/b.7498045/k.EF66/Home\\_Page.htm](http://www.bbbsnei.org/site/c.ckLRI4NOIhJ2G/b.7498045/k.EF66/Home_Page.htm) (last visited Oct. 7, 2016) (creating mentoring relationships between children and adult volunteers in order to help children succeed in life) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

251. See SMITH ACADEMY FOR EXCELLENCE, <http://www.fwsafe.com/> (last visited Oct. 9, 2016) (creating an educational program designed to help prepare inner city students succeed in the classroom) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

252. See UNITED WAY OF ALLEN COUNTY, <https://www.unitedwayallencounty.org/> (last visited Oct. 10, 2016) (“The mission of United Way of Allen County is to unite our community’s time, talent, and treasure to cultivate and advance community solutions that address the most critical issues around basic needs, education, financial stability and healthy lives”) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

253. See THE BRANDON FOUND., <http://thebrandonfoundation.blogspot.com/> (last visited Oct. 6, 2016) (“The Brandon Foundation is a mentoring and tutoring program where students are shown the power of their potential while supporting them academically and socially”) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

254. See URBAN LEAGUE FORT WAYNE, <http://ul-fw.iamempowered.com/> (last visited Oct. 10, 2016) (“The Fort Wayne Urban League empowers individuals to move toward greater independence and self-sufficiency by providing mentoring education, support, and advocacy as well as securing civil rights”) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

255. See NAACP FORT WAYNE, <http://fortwaynenaacp.org/> (last visited Oct. 10, 2016) (working to implement the goals of the national NAACP organization in ensuring the political, educational, social, and economic equality of rights of all persons and to eliminate race-based discrimination) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

Marshalling all of these resources and putting together a comprehensive plan will be the challenge for mayors and city leaders across the country. An organization like Fort Wayne UNITED can be tasked with the responsibility of organizing and marshalling efforts of philanthropic and charitable organizations so that programming is not duplicative and so that organizations are not competing fiercely for the same charitable dollars. Nevertheless, the goal and objective must always remain focused on saving and preserving the lives of young black men and boys. The combined efforts of these organizations must be in providing opportunities and optimism for the young men and women that encounter their programming.

#### *IV. Conclusion*

The nationwide epidemic of violent homicide amongst African American males is a reality that can no longer be left unaddressed nationally. Appendix A illustrates the depth and breadth of this epidemic. Section II.C above provides ideas and solution oriented suggestions that could be adopted by cities and states that are ready to begin addressing this national tragedy on a local level, including implementing Cities United and My Brother's Keeper initiatives similar to Fort Wayne UNITED. At bottom, the overwhelming nature of the death statistics cannot dampen efforts to address violent death one day and one young black male at a time. Further, police killings of unarmed African American males must be forthrightly confronted in our nation, particularly now. Body cams, dash cams, and independent citizen cell phone video will continue to capture poorly trained law enforcement officers acting as judge, jury and executioner in our city streets unless urgent action is taken. Section II.A above suggests several possibilities, including changing deadly force law and re-training law enforcement officers with the goal being to end explicit and implicit bias in United States policing. Finally, racially disproportionate mass incarceration continues to plague our nation. Much must be done to effectively reverse the damage that has been done by three-plus decades of laser-like focus by law enforcement on an illegitimate War on Drugs. Prison policy in the United States has lost its way, based in part on the failed drug war,

and we as a citizenry must work to find a soul in the laws and culture of imprisonment befitting our great nation. Section II.B offers some very aggressive reforms including officially ending the drug war and changing the brutal nature of our current prison culture.

When confronted with the stark statistics and realities of the vexing racial challenges that continue in America, it may be tempting for some readers to simply decide the challenges are too heavy, the discriminations too deeply entrenched to take aggressive action. To this I would direct the overwhelmed, yet concerned citizen to the words of Angela Davis in her book *“Are Prisons Obsolete?”*<sup>256</sup> Therein, Davis reminds us that at three times in our nation’s history the racial and gender challenges seemed insurmountable: (1) the era of slavery; (2) the Jim Crow period; and (3) the suffrage movement. Davis reminds that when the challenges appeared unconquerable, we, the citizens of the United States took the uncompromising action necessary to end slavery in the United States, to end the Jim Crow period both legally and culturally, and to win the right to vote for women and citizens of all races in America.<sup>257</sup>

The truth remains that the power of individual will to right wrongs and change history is one of the great hallmarks of United States citizenship. The racial challenges that continue to vex our nation can be addressed and overcome.

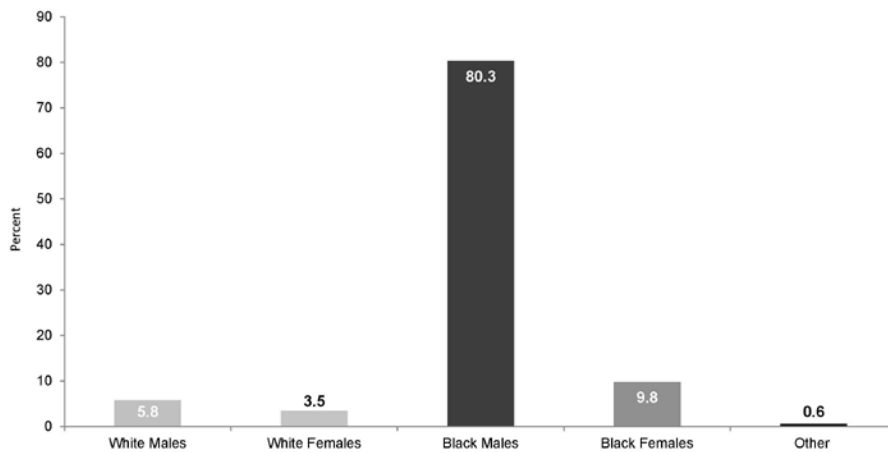
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256. ANGELA Y. DAVIS, *ARE PRISONS OBSOLETE?* 84–87 (2003).

257. *Id.* at 87.

*Appendix A: Homicide Rates by Race of Most Major Cities in the United States*<sup>258</sup>

**Homicide Victims by Race and Gender:  
BALTIMORE**

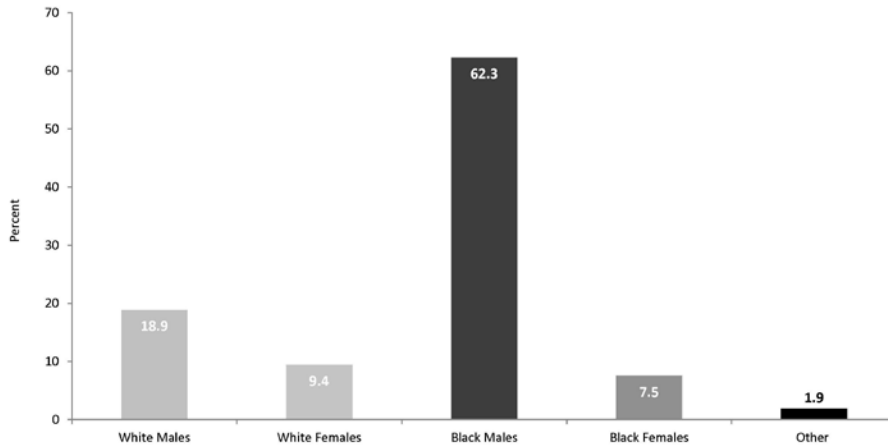


Source: Authors analysis of data from Bureau of Justice Statistics, United States Department of Justice (2009 Homicide Data) and U.S. Census Bureau

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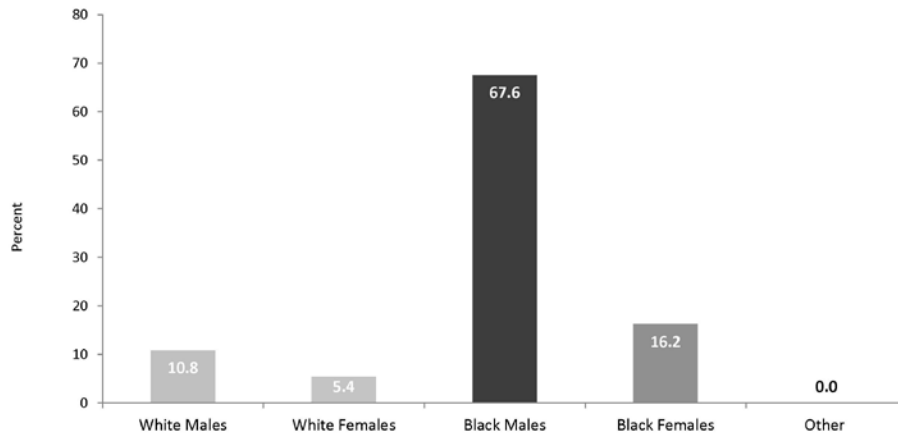
258. Homicide Charts taken from the National League of Cities report *REAL: Race, Equity and Leadership*, <http://mbc-leo.org/pdf/2015-11-14-REAL-Presentation.pdf> (last visited Oct. 10, 2016) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

### Homicide Victims by Race and Gender: BOSTON



Source: Authors analysis of data from Bureau of Justice Statistics, United States Department of Justice and Census Bureau, 2009

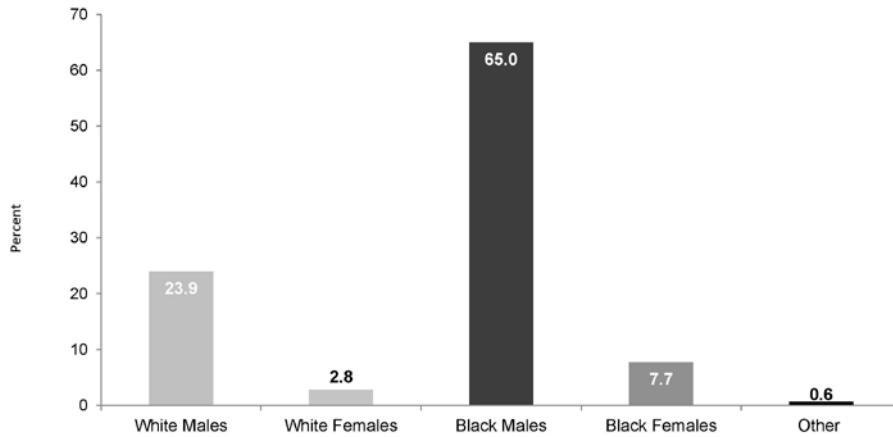
### Homicide Victims by Race and Gender: BUFFALO



Source: Authors analysis of data from Bureau of Justice Statistics, United States Department of Justice (2009 Homicide Data) and U.S. Census Bureau

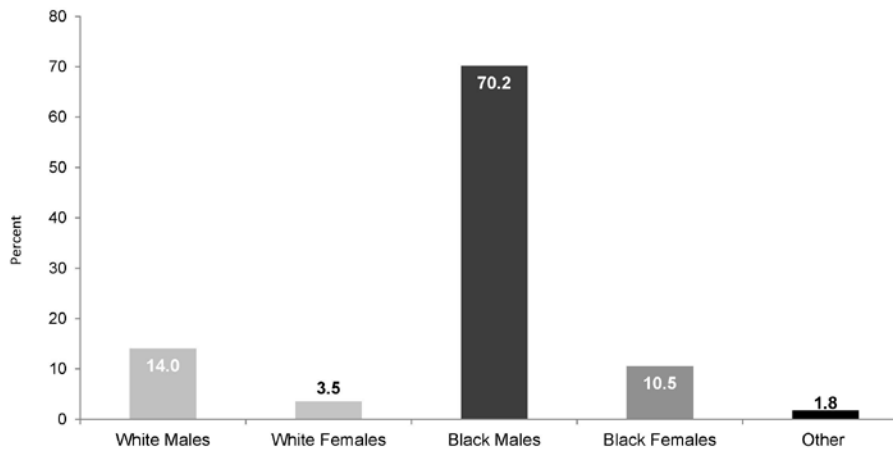


### Homicide Victims by Race and Gender: CHICAGO



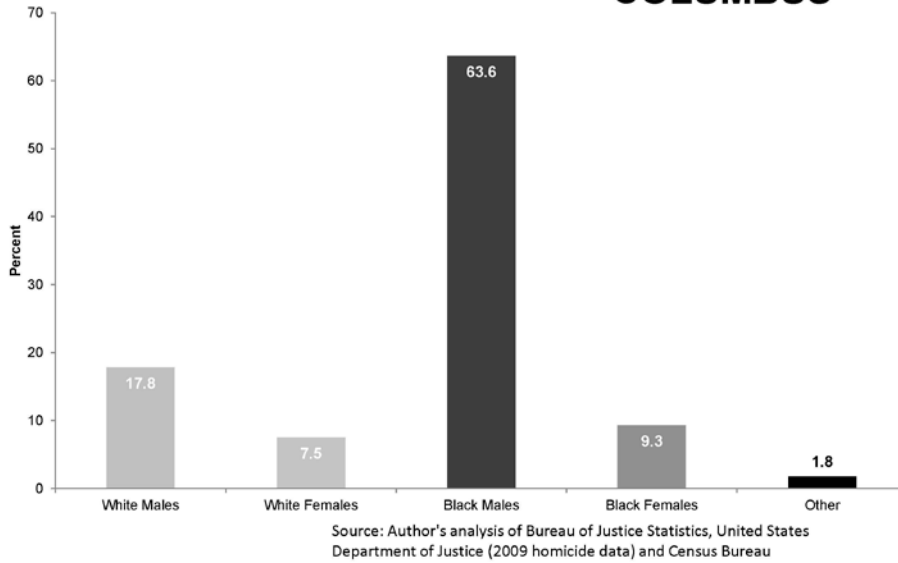
Source: Authors analysis of data from Bureau of Justice Statistics, United States Department of Justice (2009 Homicide Data) and U.S. Census Bureau

### Homicide Victims by Race and Gender: CLEVELAND

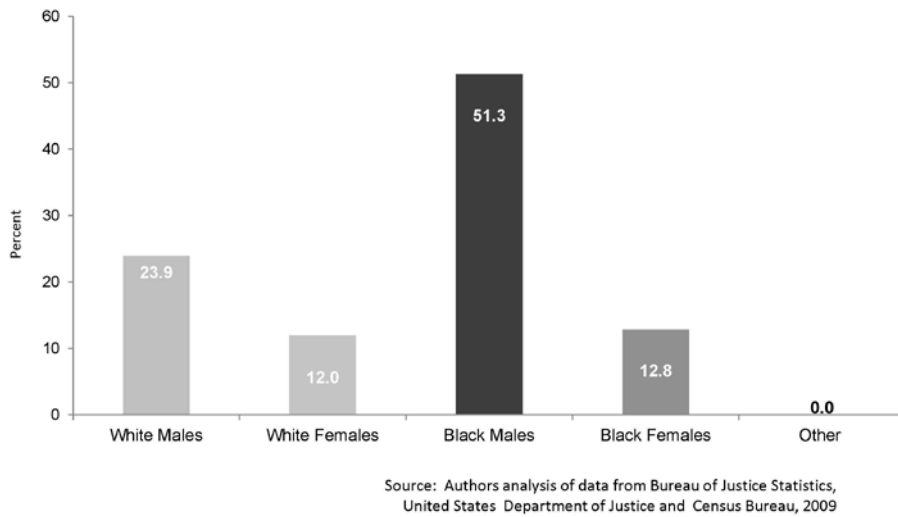


Source: Authors analysis of data from Bureau of Justice Statistics, United States Department of Justice (2009 Homicide Data) and U.S. Census Bureau

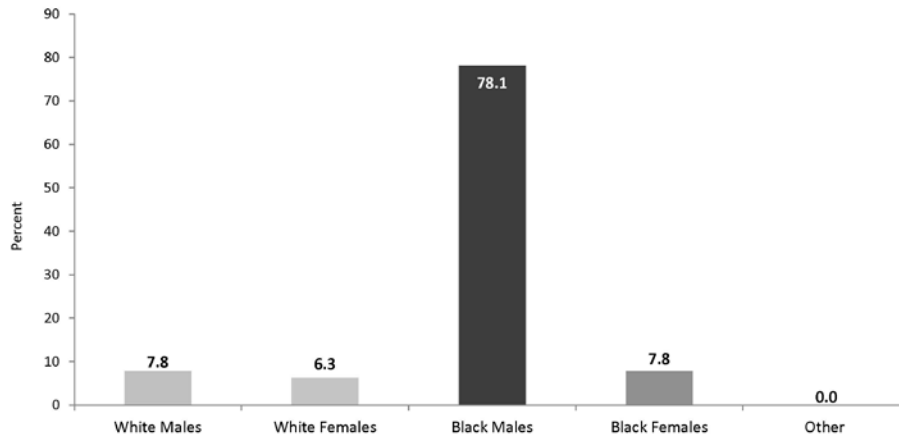
### Homicide Victims by Race and Gender: COLUMBUS



### Homicide Victims by Race and Gender: INDIANAPOLIS

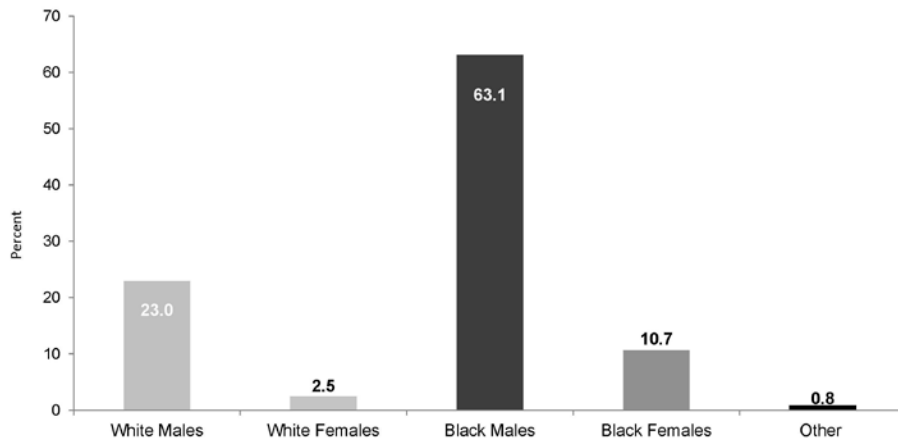


### Homicide Victims by Race and Gender: JACKSON, MS



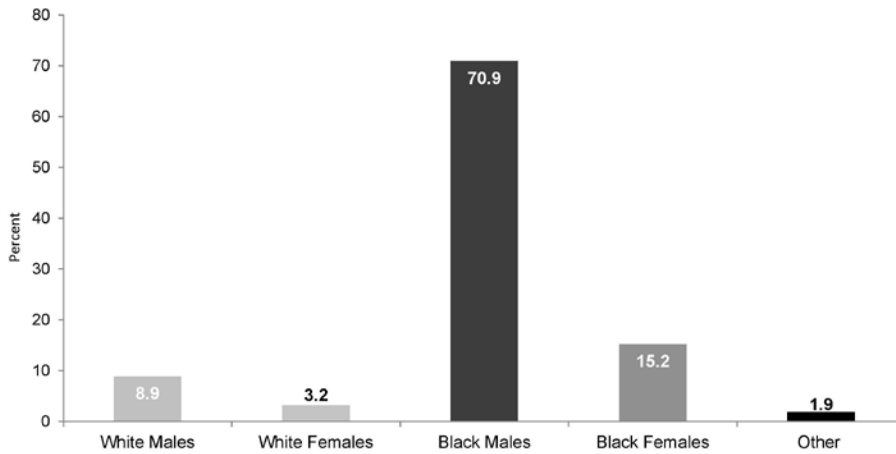
Source: Authors analysis of data from Bureau of Justice Statistics, United States Department of Justice (2009 Homicide Data) and U.S. Census Bureau

### Homicide Victims by Race and Gender: KANSAS CITY



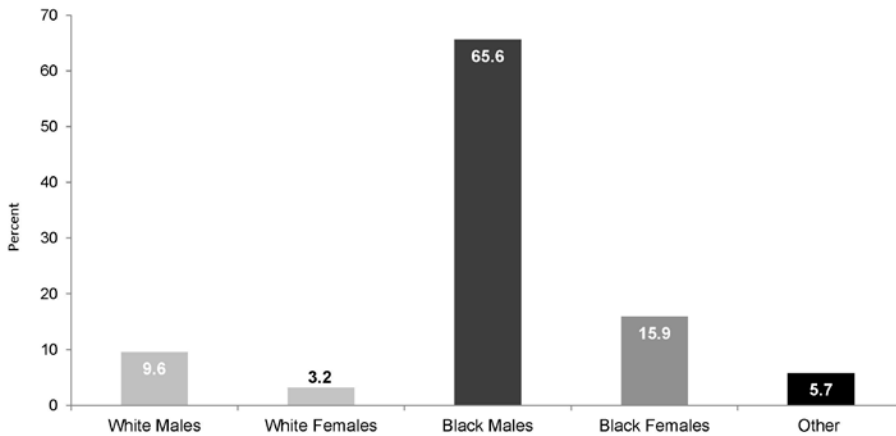
Source: Authors analysis of data from Bureau of Justice Statistics, United States Department of Justice (2009 Homicide Data) and U.S. Census Bureau

### Homicide Victims by Race and Gender: MEMPHIS



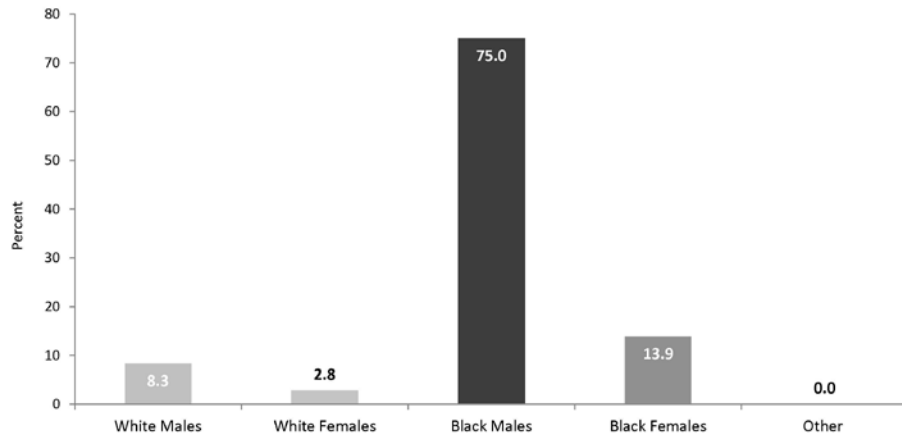
Source: Authors analysis of data from Bureau of Justice Statistics, United States Department of Justice (2009 Homicide Data) and U.S. Census Bureau

### Homicide Victims by Race and Gender: MINNEAPOLIS



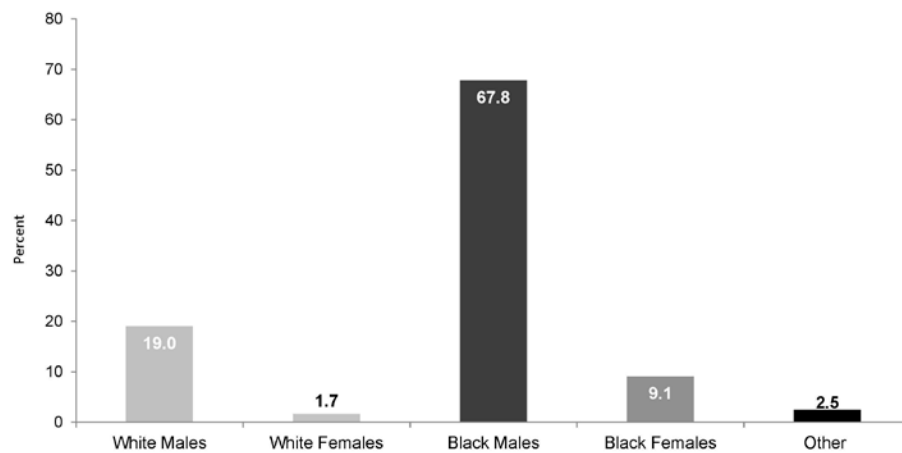
Source: Authors analysis of data from Bureau of Justice Statistics, United States Department of Justice (2009 Homicide Data) and U.S. Census Bureau

### Homicide Victims by Race and Gender: NEWARK, NJ



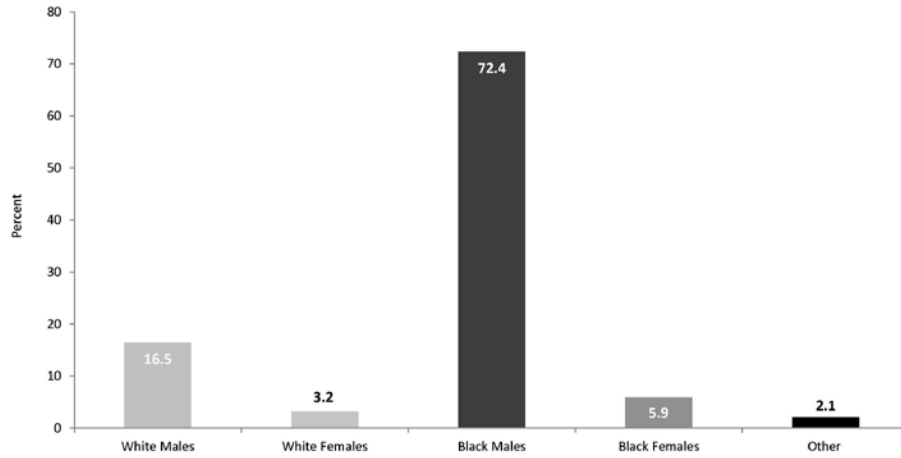
Source: Authors analysis of data from Bureau of Justice Statistics, United States Department of Justice (2009 Homicide Data) and U.S. Census Bureau

### Homicide Victims by Race and Gender: OAKLAND



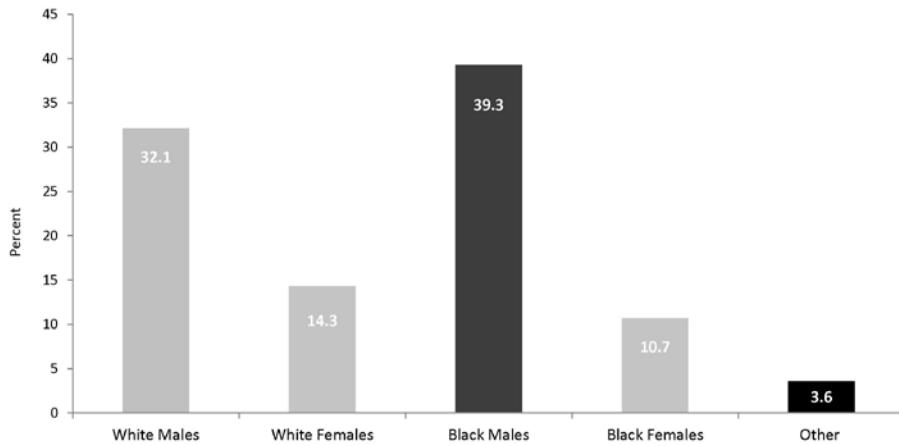
Source: Authors analysis of data from Bureau of Justice Statistics, United States Department of Justice (2009 Homicide Data) and U.S. Census Bureau

### Homicide Victims by Race and Gender: PHILADELPHIA



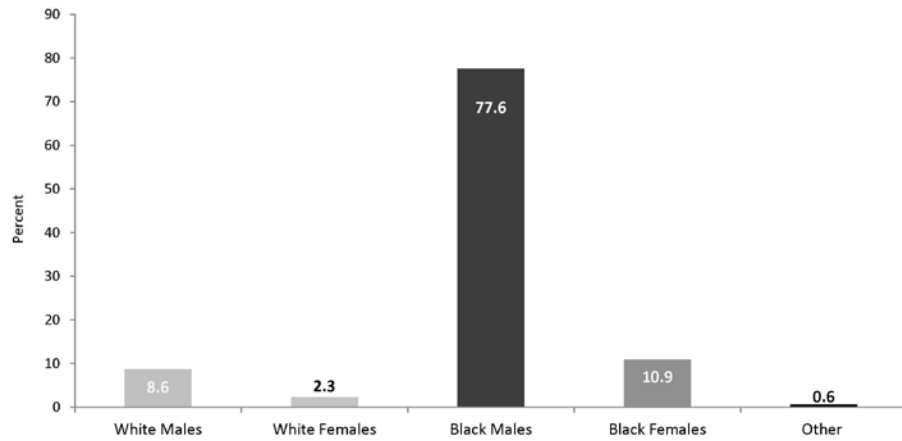
Source: Authors analysis of data from Bureau of Justice Statistics, United States Department of Justice (2009 Homicide Data) and U.S. Census Bureau

### Homicide Victims by Race and Gender: SEATTLE



Source: Authors analysis of data from Bureau of Justice Statistics, United States Department of Justice (2009 Homicide Data) and U.S. Census Bureau

### Homicide Victims by Race and Gender: ST. LOUIS



Source: Authors analysis of data from Bureau of Justice Statistics, United States Department of Justice (2009 Homicide Data) and U.S. Census Bureau