

## No Equal Justice

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*The mood and temper of the public in regard to the treatment of crime and criminals is one of the most unfailing tests of the civilization of any country. A calm dispassionate recognition of the rights of the accused, and even of the convicted criminal, against the State—a constant heart-searching by all charged with the duty of punishment—a desire and eagerness to rehabilitate in the world of industry those who have paid their due in the hard coinage of punishment: tireless efforts towards discovery of curative and regenerative processes: unfailing faith that there is a treasure, if you can only find it, in the heart of every man. These are the symbols, which, in the treatment of crime and criminal, mark and measure the stored-up strength of a nation, and are sign and proof of the living virtue in it.*

--Winston Churchill<sup>1</sup>

The most telling image from the most widely and closely watched criminal trial of our lifetime is itself an image of people watching television. On one half of the screen black law students at Howard Law School cheer as they watch the live coverage of a Los Angeles jury acquitting O.J. Simpson of the double murder of his ex-wife and her friend. On the other half of the screen, white students at George Washington University Law School sit shocked in silence as they watch the same scene. The split-screen image captures in a moment the division between white and black Americans on the question of O.J. Simpson's guilt. And that division in turn reflects an even deeper divide on the issue of the fairness and legitimacy of American criminal justice.

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<sup>1</sup> WINSTON CHURCHILL, ADDRESS TO PARLIAMENT (JULY 20, 1910), in 2 WINSTON S. CHURCHILL: HIS COMPLETE SPEECHES, 1897-1963, at 1598 (Robert Rhodes James ed., Chelsea House Publishers 1974).

Before, during, and after the trial, about three-quarters of black citizens maintained that Simpson was not guilty, while an equal fraction of white citizens deemed him guilty. More people paid attention to this trial than any other in world history, but neither the DNA evidence nor the dubious reliability of Los Angeles detective Mark Fuhrman altered either group's views on guilt or innocence.

In some respects, the racially divided response to the verdict was understandable. For many black citizens, the acquittal was a sign of hope, or at least payback. For much of our history, the mere allegation that a black man had murdered two white people would have been sufficient grounds for his lynching. Until very recently, the jury rendering judgment on O.J. Simpson would likely have been all white; Simpson's jury, by contrast, consisted of nine blacks, two whites, and an Hispanic. And the prosecution was poisoned by the racism of the central witness, Detective Mark Fuhrman, who had, among other things, called blacks "niggers" on tape and then lied about it on the stand. To many blacks, the jury's "not guilty" verdict demonstrated that the system is not always rigged against the black defendant, and that was worth cheering.

The white law students' shock was also understandable. The evidence against Simpson was overwhelming. Simpson's blood had been found at the scene of the murders. The victim's blood had been found in Simpson's white Bronco and on a sock in Simpson's bedroom. And a glove found at Simpson's home had, as prosecutor Marcia Clark put it in her closing argument to the jury, "all of the evidence on it: Ron Goldman, fibers from his shirt; Ron Goldman's hair; Nicole's hair; the defendant's blood; Ron Goldman's blood; Nicole's blood; and the Bronco fibre [sic]."<sup>2</sup> The defense's suggestion that the Los Angeles Police Department somehow planted all of this evidence ran directly contrary to their simultaneous (and quite effective) demonstration of the LAPD's "keystone cops" incompetence. To many whites, it appeared that a predominately black jury had voted for one of their own, and had simply ignored the overwhelming evidence that Simpson was a brutal double murderer.

But there is a deep irony in these reactions. Simpson, of course, was atypical in every way. The very factors that played to his advantage at trial generally work to the disadvantage of the vast majority of black defendants. Simpson had virtually unlimited resources, a jury that identified with him along racial grounds, and celebrity status. Most black defendants, by contrast, cannot afford any attorney, much less a "dream team." Their fate is usually decided by predominantly or

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<sup>2</sup> Jeffrey Toobin, *A Horrible Human Event*, THE NEW YORKER, Oct. 23, 1995, at 40, 46.

exclusively white juries. And most black defendants find that their image is linked in America's mind not with celebrity, but with criminality.

At the same time, the features that worked to Simpson's advantage, and that occasioned such outrage among whites, generally benefit whites. Whites have a disproportionate share of the wealth in our society, and are more likely to be able to buy a good defense; white defendants generally face juries composed of members of their own race; and a white person's face is not stereotypically associated with crime. Thus, what dismayed whites in Simpson's case is precisely what generally works to their advantage, while what blacks cheered is what most often works to their disadvantage.

Had Simpson been poor and unknown, as most black (and white) criminal defendants are, everything would have been different. The case would have garnered no national attention. Simpson would have been represented by an overworked and underpaid public defender who would not have been able to afford experts to examine and challenge the government's evidence. No one would have conducted polls on the case, and the trial would not have been televised. In all likelihood, Simpson would have been convicted in short order, without serious testing of the evidence against him or the methods by which it was obtained. Whites would have expressed no outrage that a poor black defendant had been convicted, and blacks would have had nothing to cheer about. That, not *California v. O.J. Simpson*, is the reality in American courtrooms across the country today.

In other words, it took an atypical case, one in which minority race and lower socioeconomic class did *not* coincide, in which the defense outperformed the prosecution, and in which the jury was predominantly black, for white people to pay attention to the role that race and class play in criminal justice. Yet the issues of race and class are present in every criminal case, and in the vast majority of cases they play out no more fairly. Of course, they generally work in the opposite direction: the prosecution outspends and outperforms the defense, the jury is predominantly white, and the defendant is poor and a member of a racial minority. In an odd way, then, the Simpson case brought to the foreground issues that lurk beneath the entire system of criminal justice. The system's legitimacy turns on equality before the law, but the system's reality could not be further from that ideal. As Justice Hugo Black wrote over forty years ago: "There can be no equal justice where the kind of trial a man gets depends on the amount of money he has."<sup>3</sup>

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<sup>3</sup> Griffin v. Ill., 351 U.S. 12, 19 (1956).

He might well have added, “or the color of his skin.” Where race and class affect outcomes, we cannot maintain that the criminal law is just.

Equality, however is a difficult and elusive goal. In our nation, it has been the cause of a civil war, powerful political movements, and countless violent uprisings. Yet the gap between the rich and the poor is larger in the United States than in any other Western industrialized nation,<sup>4</sup> and has been steadily widening since 1968.<sup>5</sup> In 1989, the wealthiest one percent of U.S. households owned nearly 40 percent of the nation’s wealth. That leaves precious little for the rest.<sup>6</sup> The income and wealth gap correlates closely with race. Minorities’ median net worth is less than 7 percent that of whites.<sup>7</sup> Nine percent of white families had incomes below the poverty line in 1992, while more than 30 percent of black families and 26.5 percent of Hispanic families fell below that level.<sup>8</sup> The consequences of the country’s race and class divisions are felt in every aspect of American life, from infant mortality and unemployment, where black rates are double white rates;<sup>9</sup> to public education, where the proportion of black children educated in segregated schools is increasing;<sup>10</sup> to housing, where racial segregation is the norm, integration the rare exception.<sup>11</sup> Racial inequality, which Alexis de Tocqueville long ago recognized as “the most formidable evil

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<sup>4</sup> Keith Bradsher, *Gap in Wealth in U.S. Called Widest in West*, N.Y. TIMES, Apr. 17, 1995, at A1; Keith Bradsher, *Low Ranking for Poor American Children*, N.Y. TIMES, Aug. 14, 1995, at A9 (reporting that gap between rich and poor children is larger in United States than any other Western industrialized nation).

<sup>5</sup> Steven A. Holmes, *Income Disparity Between Poorest and Richest Rises*, N.Y. TIMES, June 20, 1996, at A1.

<sup>6</sup> Elmer W. Johnson, *Corporate Soulcraft in the Age of Brutal Markets*, BUS. ETHICS Q., Oct. 1, 1997, at 109.

<sup>7</sup> BUREAU OF THE CENSUS, U.S. DEPT. OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES – 1993, at 447 (Table 753).

<sup>8</sup> *Id.* at 47 (Table 50), 471 (Table 741), 473 (Table 743).

<sup>9</sup> In 1993, the infant mortality rate among whites was 6.8 deaths per 1,000 live births, while the rate among blacks was 16.5 deaths per 1,000 births. BUREAU OF THE CENSUS, U.S. DEPT. OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES – 1996, at 93 (Table 127) (Infant Mortality Rates, by Race). From 1980 to 1995, the unemployment rate among blacks has always been at least twice that among whites. In 1995, unemployment among blacks was 10.4 percent, and among whites was 4.9 percent. *Id.* at 413 (Table 644) (Unemployed Workers – Summary: 1980 to 1995).

<sup>10</sup> GARY ORFIELD ET AL., DEEPENING SEGREGATION IN AMERICAN PUBLIC SCHOOLS (Harv. Project on School Desegregation, 1997).

<sup>11</sup> DOUGLAS MASSEY & NANCY DENTON, AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS (Harvard Univ. Press, 1993).

threatening the future of the United States,”<sup>12</sup> remains to this day the most formidable of our social problems.

This inequality is in turn reflected in statistics on crime and the criminal justice system. The vast majority of those behind bars are poor; 40 percent of state prisoners can't even read; and 67 percent of prison inmates did not have full-time employment when they were arrested.<sup>13</sup> The per capita incarceration rate among blacks is seven times that among whites.<sup>14</sup> African Americans make up about 12 percent of the general population, but more than half of the prison population.<sup>15</sup> They serve longer sentences, have higher arrest and conviction rates, face higher bail amounts, and are more often the victims of police use of deadly force than white citizens.<sup>16</sup> In 1995, one in three young black men between the ages of twenty and twenty-nine was imprisoned or on parole or probation.<sup>17</sup> If incarceration rates continue their current trends, one in four young black males born today will serve time in prison during his lifetime (meaning that he will be convicted and sentenced to more than one year of incarceration). Nationally, for every one black man who graduates from college, 100 are arrested.<sup>18</sup>

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<sup>12</sup> ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA*, 340 (George Lawrence trans., J.P. Mayer ed., Harper & Row, 1969) (1835).

<sup>13</sup> David C. Leven, *Curing America's Addiction to Prisons*, 20 *FORDHAM URB. L.J.* 641, 646 (1993) (socioeconomic characteristics of prisoners).

<sup>14</sup> MICHAEL TONRY, *MALIGN NEGLECT – RACE, CRIME AND PUNISHMENT IN AMERICA*, 4 (Oxford Univ. Press, 1995) (white and black incarceration rates).

<sup>15</sup> In 1996, there were 526,200 black men and 510,900 white men in prison. Fox Butterfield, *Prison Population Growing Although Crime Rate Drops*, *N.Y. TIMES*, Aug. 9, 1998, at 18.

<sup>16</sup> The average sentence imposed on black offenders sentenced to incarceration in U.S. district courts in 1992 was 84.1 months, while the average sentence for white offenders was 56.8 months. BUREAU OF JUSTICE STATISTICS, *SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS – 1995*, at 474 (Table 5.25) (1996). Although they are only 12 percent of the population, blacks make up 31.3 percent of those arrested. *Id.* at 408 (Table 4.10). Among convicted offenders, 80 percent of black defendants and 75 percent of whites are sentenced to incarceration. *Id.* at 471 (Table 5.22); *See also* David B. Mustard, *Racial, Ethnic and Gender Disparities in Sentencing: Evidence from the US Federal Courts*, (Univ. of Georgia Economics Working Paper, No. 97-458, 1997) (finding that even under federal sentencing guidelines, and controlling for offense level and criminal history, black receive sentences six months longer on average than whites); Ian Ayres & Joel Waldfogel, *A Market Test for Race Discrimination in Bail Setting*, 46 *Stan. L. Rev.* 987 (1994) (finding that judges impose higher bail amounts on black defendants).

<sup>17</sup> Marc Mauer & Tracy Huling, *Young Black American and the Criminal Justice System: Five Years Later* (The Sentencing Project, 1 October 1995) (young black men under criminal justice supervision).

<sup>18</sup> Henry Louis Gates, Jr., *The Charmer*, *THE NEW YORKER*, April 29, 1996, at 116 (100 black men arrested for every one in college).

In addition, poor and minority citizens are disproportionately victimized by crime. Poorer and less educated persons are the victims of violent crime at significantly higher rates than wealthy and more educated persons.<sup>19</sup> African Americans are victimized by robbery at a rate 150 percent higher than whites; they are the victims of rape, aggravated assault, and armed robbery 25 percent more often than whites.<sup>20</sup> Homicide is the leading cause of death among young black men.<sup>21</sup> Because we live in segregated communities, most crime is intraracial; the more black crime there is, the more black victims there are. But at the same time, the more law enforcement resources we direct toward protecting the black community from crime, the more often black citizens, especially those living in the inner city, will find their friends, relatives, and neighbors behind bars.

I argue that while our criminal justice system is explicitly based on the premise and promise of equality before the law, the administration of criminal law—whether by the officer on the beat, the legislature, or the Supreme Court—is in fact predicated on the exploitation of inequality. My claim is not simply that we have ignored inequality's effects within the criminal justice system, nor that we have tried but failed to achieve equality there. Rather, I contend that *our criminal justice system affirmatively depends on inequality*. Absent race and class disparities, the privileged among us could not enjoy as much constitutional protection of our liberties as we do; and without those disparities, we could not afford the policy of mass incarceration that we have pursued over the past two decades.

White Americans are not likely to want to believe this claim. The principle that all are equal before the law is perhaps the most basic in American law; it is that maxim, after all, that stands etched atop the Supreme Court's magnificent edifice. The two most well-known Supreme Court decisions on criminal justice stand for equality before the law, and that is why they are so well known. In *Gideon v. Wainwright*, the Court in 1963 held that states must provide a lawyer at state expense to all defendants charged with a serious crime who cannot afford to hire their own lawyer.<sup>22</sup> The story became a best-selling book and an award-winning motion picture. Three years later, in *Miranda v. Arizona*, the

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<sup>19</sup> U.S. DEPT. OF JUSTICE, BUREAU OF JUSTICE STATISTICS, CRIME VICTIMIZATION IN CITY, SUBURBAN, AND RURAL AREAS: A NATIONAL CRIME VICTIMIZATION SURVEY REPORT, 6 (June 1992).

<sup>20</sup> JOHN HAGEN & RUTH PETERSON, CRIME AND INEQUALITY 25 (Stanford Univ. Press 1995).

<sup>21</sup> *Id.* at 16.

<sup>22</sup> *Gideon v. Wainwright*, 372 U.S. 335, 345 (1963).

Court required the police to provide poor suspects with an attorney at state expense and to inform all suspects of their rights before questioning them in custody.<sup>23</sup> In these landmark decisions, the Court sought to ameliorate societal inequalities—both among suspects and between suspects and the state—that undermined the criminal justice system’s promise of equality. As the Court stated in *Miranda*, “[w]hile authorities are not required to relieve the accused of his poverty, they have the obligation not to take advantage of indigence in the administration of justice.”<sup>24</sup>

The prominence of these decisions, however, is misleading. They were both decided by the Supreme Court under Chief Justice Earl Warren, at a time when the Court was solidly liberal and strongly committed to racial and economic equality. At virtually every juncture since *Gideon* and *Miranda*, the Supreme Court has undercut the principle of equality reflected in those decisions, and has itself “take[n] advantage of indigence in the administration of justice.” Today, those decisions stand out as anomalies. *Gideon* is a symbol of equality unrealized in practice; poor defendants are nominally entitled to the assistance of counsel at trial, but the Supreme Court has failed to demand that the assistance be meaningful. Lawyers who have slept through testimony or appeared in court drunk have nonetheless been deemed to have provided their indigent clients “effective assistance of counsel.”<sup>25</sup> And today’s Court has so diluted *Miranda* that the decision has had little effect on actual police interrogation practices.

The exploitation of inequality in criminal justice is driven by the need to balance two fundamental and competing interests: the protection of constitutional rights, and the protection of law-abiding citizens from crime. Virtually all constitutional protections in criminal justice have a cost: they make the identification and prosecution of suspected criminals more difficult. Without a constitutional requirement that police have probable cause and a warrant before they conduct searches, for example, police officers would be far more effective in rooting out and stopping crime. Without jury trials, criminal justice administration would be much more efficient. But if police could enter our homes whenever they pleased, we would live in a police state, with no meaningful privacy protection. And absent jury trials, the community would have little check on overzealous prosecutors. Much of the public and academic

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<sup>23</sup> *Miranda v. Arizona*, 384 U.S. 436, 467-68 (1966).

<sup>24</sup> *Id.* at 472.

<sup>25</sup> *See, e.g., Haney v. State*, 603 So. 2d 368 (Ala. Crim. App. 1991); *McFarland v. State*, 928 S.W.2d 482 (Tex. Crim. App. 1996).

debate about criminal justice focuses on where we should draw the line between law enforcement interests and constitutional protections. Liberals tend to argue for more rights-protective rules, while conservatives tend to advocate rules that give law enforcement more leeway. Both sides agree, at least in principle, that the line should be drawn in the same place for everyone.

In fact, however, we have repeatedly mediated the tension not by picking one point on the continuum, but in effect by picking two points—one for the more privileged and educated, the other for the poor and less educated. For example, the Supreme Court has ruled that the Fourth Amendment bars police from searching luggage, purses, or wallets without a warrant that is based on probable cause to believe evidence of crime will be found.<sup>26</sup> But at the same time, the Court permits police officers to approach any citizen—without any basis for suspicion—and request “consent” to search.<sup>27</sup> The officer need not inform the suspect that he has a right to say so. This tactic, not surprisingly, is popular among the police, and is disproportionately targeted at young black men, who are less likely to assert their right to say no. In this way, the privacy of the privileged is guaranteed, but the police still get their evidence, and society does not have to pay the cost in increased crime of extending to everyone the right to privacy that the privileged enjoy. This pattern is repeated throughout the criminal justice system: the Court affirms a constitutional right, but in a manner that effectively protects the right only for the privileged few, while as a practical matter denying the right to those who are less privileged. By exploiting society’s “background” inequality, the Court sidesteps the difficult question of how much constitutional protection we could afford if we were willing to ensure that it was enjoyed equally by all people.

Nor is the Supreme Court alone in exploiting inequality in this way. If there is a common theme in criminal justice policy in America, it is that we consistently seek to avoid difficult trade-offs by exploiting inequality. Politicians impose the most serious criminal sanctions on conduct in which they and their constituents are least likely to engage. Thus, a predominantly white Congress has mandated prison sentences for the possession and distribution of crack cocaine one hundred times more severe than the penalties for powder cocaine.<sup>28</sup> African Americans

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<sup>26</sup> See, e.g., *Ark. v. Sanders*, 442 U.S. 753 (1979).

<sup>27</sup> See, e.g., *United States v. Mendenhall*, 446 U.S. 544 (1980).

<sup>28</sup> 18 U.S.C. Appx § 2D1.1 (setting equal base offense levels for federal sentencing for possession of powder cocaine and crack cocaine where amount of powder cocaine is 100 times greater than crack cocaine).



comprise more than 90 percent of those found guilty of crack cocaine crimes, but only 20 percent of those found guilty of powder cocaine crimes. By contrast, when white youth began smoking marijuana in large numbers in the 1960s and 1970s, state legislatures responded by reducing penalties and in some states effectively decriminalizing marijuana possession. More broadly, it is unimaginable that our country's heavy reliance on incarceration would be tolerated if the black/white incarceration rates were reversed, and whites were incarcerated at seven times the rate that blacks are. The white majority can "afford" the costs associated with mass incarceration because the incarcerated mass is disproportionately nonwhite.

Similarly, police officers routinely use methods of investigation and interrogation against members of racial minorities and the poor that would be deemed unacceptable if applied to more privileged members of the community. "Consent" searches, pre-textual traffic stops, and "quality of life" policing are all disproportionately used against black citizens. Courts assign attorneys to defend the poor in serious criminal trials whom the wealthy would not hire to represent them in traffic court. And jury commissioners and lawyers have long engaged in discriminatory practices that result in disproportionately white juries.

Those double standards are not, of course, explicit; on the face of it, the criminal law is color-blind and class-blind. But in a sense, this only makes the problem worse. The rhetoric of the criminal justice system sends the message that our society carefully protects everyone's constitutional rights, but in practice the rules assure that law enforcement prerogatives will generally prevail over the rights of minorities and the poor. By affording criminal suspects substantial constitutional protections in theory, the Supreme Court validated the results of the criminal justice system as fair. That formal fairness obscures the systemic concerns that ought to be raised by the fact that the prison population is overwhelmingly poor and disproportionately black.<sup>29</sup>

I am not suggesting that the disproportionate results of the criminal justice system are wholly attributable to racism, nor that the double standards are intentionally designed to harm members of minority groups and the poor. Intent and motive are notoriously difficult to fathom, particularly where there are multiple actors and decision makers, and I do not set out to prove intentional discrimination. In fact, I think it more likely that the double standards have developed because they are convenient mechanisms for avoiding hard questions about competing interests, and it is human nature to avoid hard questions. But whatever

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<sup>29</sup> See *supra* notes 13-16 and accompanying text.

the reasons, we have established two systems of criminal justice: one for the privileged, and another for the less privileged. Some of the distinctions are based on race, others on class, but in no true sense can it be said that all are equal before the criminal law. Thus, I take issue with those, like Professor Randall Kennedy, who argue that as long as we can rid the criminal justice system of *explicit* and *intentional* considerations of race, we will have solved the problem of inequality in criminal justice.<sup>30</sup> The problems canvassed in this book for the most part do not stem from explicit and intentional race or class discrimination, but they are problems of inequality nonetheless. To suggest that a “color-blind” set of rules is sufficient is to ignore the lion’s share of inequality that pervades the criminal justice system today. The disparities I discuss are built into the very structure and doctrine of our criminal justice system, and unless and until we acknowledge and remedy them, we will have “no equal justice.”

Equality in criminal justice does not necessarily mean more rights for the criminally accused. Indeed, I think it likely that were we to commit ourselves to equality, the substantive scope of constitutional protections accorded to the accused would be reduced, not expanded. If we had to pay full cost, in law enforcement terms, for the constitutional rights we now claim to protect, the scope of those constitutional rights would probably be cut back for all. But at least we would then strike the balance between law enforcement and constitutional rights honestly.

Much of this book will be dedicated to demonstrating how the double standards in criminal justice operate. Some readers will need more convincing than others on this score. By a detailed description of the problem, I hope to shake the confidence of those who believe the system is fair. But I also hope to demonstrate to those more skeptical of the system that the problems cannot be explained by simple charges of racism, and cannot be solved by banning intentional racism from the system. I discuss in turn the constitutional rules governing police practices, the provision of legal representation to those who cannot afford it, jury discrimination, disparities in sentencing, and legal challenges to discrimination in the criminal justice system. In each of these areas, we have “used” inequality to forge an illegitimate compromise between law enforcement needs and constitutional rights. Sometimes the double standard is achieved by exploiting ignorance, as in the Supreme Court’s refusal to require police officers to inform suspects of their right to say no when they are asked to “consent” to a search. Sometimes the double standard stems from the different resources that

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<sup>30</sup> RANDALL KENNEDY, *RACE, CRIME, AND THE LAW* (Pantheon Books 1997).

rich and poor defendants have at their disposal for their defense. And sometimes the double standard is integral to the criminal justice policy set by legislators; politicians can afford to be “tough on crime” because society has already written off most of those on whom we will be “tough.”

No one disputes that the criminal justice system’s legitimacy depends on equality before the law, so demonstrating that we have not lived up to that promise—this book’s first purpose—should be a sufficient argument for demanding a remedy. It should require little argument to maintain that as a moral matter we must take Justice Black’s dictate about equal justice much more seriously if we are to remain true to the first principle of criminal justice. We should do it because it is the right thing to do. But my second task in writing this book is to demonstrate that there are also strong pragmatic reasons for responding to inequality in criminal justice, because a criminal justice system based on double standards both fuels racial enmity and encourages crime.

The racially polarized reactions to the Simpson case illustrate a deep and longstanding racial divide on issues of criminal justice: blacks are consistently more skeptical of the criminal justice system than whites. A long history of racially discriminatory practices in criminal law enforcement has much to do with this skepticism, but it is not just a matter of history: the double standards we rely on today in drawing the lines between rights and law enforcement reinforce black alienation and distrust. Because criminal law governs the most serious sanctions that a society can impose on its members, inequity in its administration has especially corrosive consequences. Perceptions of race and class disparities in the criminal justice system are at the core of the race and class divisions in our society.

The perception and reality of double standards also contribute to the crime problem by eroding the legitimacy of the criminal law and undermining a cohesive sense of community. As any wise ruler knows (and many ineffective despots learn), the most effective way to govern is not through brute force or terror, but by fostering broad social acceptance for one’s policies. Where a community accepts the social rules as legitimate, the rules will be largely self-enforcing. Studies have found that most people obey the law not because they fear formal punishment—the risk of actually being apprehended and punished is infinitesimal for all crimes other than murder—but because they and their peers have accepted and internalized the rules, and because they do not want to let their community down. The rules will be accepted, and community pressure to conform will be effective, only to the extent that

“the community” believes that the rules are just and that the authority behind them is legitimate. Thus, although the double standards I discuss in this book were adopted for the purpose of *reducing* the costs of crime associated with protecting constitutional rights, I argue that in the end they undermine the criminal justice system’s legitimacy, and thereby *increase* crime and its attendant costs.

When significant sectors of a community view the system as unjust, law enforcement is compromised in at least two ways. First, people feel less willing to cooperate with the system, whether by offering leads to police officers, testifying as witnesses for the prosecution, or entering guilty verdicts as jurors. Second, and more importantly, people are more likely to commit crimes, precisely because the laws forbidding such behavior have lost much of their moral force. When the law loses its moral force, the only deterrents that remain are the strong-arm methods of conviction and imprisonment. We should not be surprised, then, that the United States has the second highest incarceration rate of all developed nations. And it should be no wonder that black America, which has been most victimized by the inequalities built into the criminal justice system, is simultaneously most plagued by crime and most distrustful of criminal law enforcement.

What is to be done? In the book’s final chapter, I suggest a series of responses. The first step, of course, is to recognize the scope of the problem. Although African Americans are generally skeptical of the criminal justice system’s fairness, their skepticism is not shared by the white majority, nor apparently by the courts. Until now, the courts and legislatures have been extremely reluctant even to allow the issue of inequality in criminal justice to be aired, and have instead impermissibly exploited inequality to make the hard choices of criminal justice seem easier. This book argues that a realistic response to crime, and in the end our society’s survival as a cohesive community, depend on a candid assessment of the uses of inequality in criminal justice.

The second step is to eliminate the double standards. This turns out to be rather straightforward in some instances, but difficult if not impossible in others. We could certainly require, for example, that police officers seeking consent to search inform citizens that they have the right to say no. But wealthy defendants will always be able to outspend poor defendants; not everyone can afford Johnny Cochran. Even an *attempt* to limit such disparities would be a reversal of the current approach, however, which affirmatively exploits them. Such reforms are necessary if the criminal justice system is to regain the legitimacy so critical to effective law enforcement.

But restoring legitimacy through adjusting the rules that govern criminal law enforcement will not be nearly enough. The double standards have also had a devastating impact on black communities, particularly in poor, inner-city enclaves. The racial divide fostered and furthered by inequality in criminal justice has contributed to a spiral of crime and decay in the inner city, corroding the sense of belonging that encourages compliance with the criminal law. Therefore, we cannot limit ourselves to restoring the criminal law's legitimacy, but must also seek to restore the communities that have been doubly ravaged by crime and the criminal justice system. To accomplish this, we must both reinforce and support community-building organizations in the inner cities, and change the way we respond to crime itself.

These remedies go hand in hand. In order to adopt a more effective approach to criminal punishment, we must rebuild communities. In order to rebuild communities, we must forgo our reliance on mass incarceration—a policy that has robbed inner-city neighborhoods of whole generations of young men. We respond to crime today in a self-defeating way, by stigmatizing criminals, cutting them off from their communities, and fostering criminal subcultures that encourage further criminal behavior. In doing so, we undermine one of the most important deterrents to crime: a sense of belonging to a law-abiding community. By the same token, to the extent that we reinforce and reify divisions between the law-enforcing and law-breaking communities, we encourage continuing criminal behavior. If we are to reduce criminal recidivism, we must adopt measures that seek to reintegrate offenders into the community, and that reinforce social ties within and across communities.

This is an ambitious agenda. But unless all Americans begin to see the problem of inequality in criminal justice as their own, and unless we take responsible measures to respond to it, America's crime problem and racial divide will only get worse.

#### I. WHERE WE ARE TODAY

In the year and a half since the above first appeared in print, as the introduction to *No Equal Justice: Race and Class in the American Criminal Justice System*, much has changed. The criminal justice system remains dependent upon the exploitation of race and class inequities, but public concern about that state of affairs has grown significantly. The month the book was published, four white New York City police officers shot Amadou Diallo, an unarmed West African immigrant, 41 times in

Harlem.<sup>31</sup> The incident led to massive public protests and extended civil disobedience.<sup>32</sup> Shortly thereafter, the New Jersey Attorney General admitted that New Jersey State Police officers had engaged in racial profiling.<sup>33</sup> Since that time, there has been a steady drumbeat of media attention to issues of race, class and criminal justice.

On some issues, real progress has already been made. Government officials across the country, from President Clinton on down, have condemned racial profiling. North Carolina and Connecticut have enacted legislation requiring police to record and make public data on the racial demographics of their traffic law enforcement patterns. In other states and cities, executive officers have independently undertaken such reporting. President Clinton has required reporting on all federal law enforcement agencies. The Civil Rights Division has entered into consent decrees with individual police departments addressed to, among other things, the problem of racial profiling. And it's difficult to find anyone these days to defend the practice of racial profiling, a practice that has been going on for decades without generating any public scrutiny.

On other issues, we have only begun to recognize the problems. In February 2000 the incarcerated population in the United States passed the two million mark, and there has been growing criticism of the extent to which we have relied on lock-'em-up-and-throw-away-the-key tactics in responding to crime in general, and drugs in particular. But the White House drug czar, Barry McCaffrey, consistently emphasizes the importance of treatment alternatives to incarceration, and drug courts, which provide such an alternative, have grown exponentially in the last few years. There were 12 drug courts nationwide in 1994; today there are more than 400, with 200 more in the planning stages.

Two years ago, New York's aggressive "quality of life" policing was widely hailed as the New York miracle. Today, the costs of responding to crime much as an invading army might, by stopping and arresting thousands of civilians for minor offenses in the hope of reducing more serious crime, has substantial costs. The legitimacy of the police force in New York has been gravely undermined, and the broader public is beginning to be aware not only of the costs of such strategies,

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<sup>31</sup> Michael Cooper, *Officers in Bronx Fire 41 Shots, and an Unarmed Man Is Killed*, N.Y. TIMES, Feb. 5, 1999, at A1.

<sup>32</sup> Susan Sachs, *Charges May Be Dropped in Diallo Protest*, N.Y. TIMES, Apr. 3, 1999, at B2 (1200 people charged with civil disobedience during previous month's daily protests).

<sup>33</sup> Iver Peterson, *Whitman Says Troopers Used Racial Profiling*, N.Y. TIMES, Apr. 21, 1999, at A1.

but of the availability of more community-friendly policing strategies that have achieved equal drops in crime without the attendant increase in arrests and complaints of police misconduct.

So there is reason for hope. As I argue in my book, the first step toward reform is recognizing the extent of the problem, and there are encouraging signs that the broader American public is beginning to pay attention to this issue in a way we didn't before. The newfound concern may in part be a reflection of the fact that crime has dropped so significantly over the past decade. As people begin to feel safe in their neighborhoods again, they may have room to address other concerns in the arena of criminal justice.

The question remains whether this newfound concern can be harnessed and directed toward real reform. On that question, unfortunately, the jury is still out. But it is my belief that once we acknowledge the flaws of the current system, we have no choice but to seek major reform.