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ISSUES AND POLICIES**

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**JUSTICE POLICY JOURNAL:  
ANALYZING CRIMINAL AND JUVENILE JUSTICE ISSUES AND POLICIES**

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# BALANCED JUSTICE OR RACISM IN JUVENILE JUSTICE

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A century ago progressive reformers had to choose between initiating social structural reforms that would either ameliorate inequality and criminological forces or minister to the individuals damaged by adverse social conditions. Driven by class and ethnic antagonisms, these reformers ignored the social structural and political economic implications of their own deterministic theories of delinquency and chose instead to “save children” and, incidentally, to preserve their own power and privilege (Rothman, 1980). As a result, the creation of the juvenile justice system espoused social structural or deterministic explanations of delinquent behavior and then individualized its sanctions.

A century later, similar choices are faced between rehabilitating “damaged” individuals in a juvenile system or initiating more fundamental social structural changes. Frustrated by the policy pendulum swings between treatment and retribution and by unclear and unrealistic public expectations, growing numbers of judges, probation officers, prosecutors, and other juvenile justice professionals are embracing a “new vision for juvenile justice”—accountability-based sanctions for juveniles.

Unfortunately, this “new vision” continues to ignore social structural and political implications for the creation and maintenance of the juvenile justice system, while maintaining myths to the “fairness” of justice processing and the prejudice toward “other people’s children.”

## **AN ACCOUNTABILITY-BASED APPROACH**

Holding a juvenile offender “accountable” in the juvenile justice system today means that once the juvenile is determined to have committed law-violating behavior by admission or adjudication, he or she is held responsible for the act through consequences or sanctions, imposed pursuant to law, that are proportionate to the offense. At the highest level, of course, being held accountable for an offense means being held responsible. In that sense, any system that is set up to ensure that no offenses go unpunished can be said to be accountability based. Today, there is ostensibly more to accountability than that in juvenile justice circles. The term in recent years has become increasingly associated with the “balanced approach” to the juvenile court/probation practice under which, in addition to protecting public safety and rehabilitating offenders, the juvenile justice system must “respond to illegal behavior in such a way that the offender is made aware of and responsible for the loss, damage, or injury perpetrated upon the victim” (Maloney, Romig, & Armstrong, 1988). It is necessary, but not sufficient, that wrongdoers be “called to account” for their deeds. They should be made to recognize what they have done and feel the obligation that arises from their behavior.

In recent years, legislatures in a number of states have begun to reconsider the basic missions and purposes of their juvenile

justice systems. They have turned away from the traditional offender-centered, treatment and rehabilitation-oriented philosophy that has dominated the field for the better part of a century, focusing instead on an approach that emphasizes additional social goals, including protecting the public and promoting individual accountability. In fact, at the end of the 1997 legislative sessions, 17 states had amended their juvenile court purpose clauses to emphasize a balanced approach to juvenile justice (Szymanski, 1998). Of these, Pennsylvania provides a particularly instructive example of an attempt to rethink a juvenile justice system "from the purpose clause down."

In 1995 a revision of the fundamental purpose clause of Pennsylvania's Juvenile Act discarded traditional "supervision, care, and rehabilitation" language and replaced it with a new requirement that juvenile courts "provide balanced attention to the protection of the community, the imposition of accountability for offenses committed and the development of competencies to enable children to become responsible and productive members of the community."

The restorative response to the justice needs of communities was thus allegedly focused less on getting tough on crime by punishing offenders and more on holding offenders accountable to those they have harmed. The focus was on reducing fear, building youth-adult relationships, and increasing the capacity of community groups and institutions to prevent crime and safely monitor offenders in the community rather than incarcerating individual offenders. Apparently, sanctioning, public safety, and reintegration are best accomplished not by criminal justice experts in a formal setting such as courts and programs, but by crime victims, community groups, and socializing institutions through the informal process of relationship building and social control.

Unfortunately, the conceptual framework of accountability-based and restorative justice fails to acknowledge the social structural and political environment of today's juvenile justice system. Structural inequalities have affected, and will continue to affect, the balance between positive and negative views of children in a class-divided society. With latent hostility increasingly directed toward lower class and minority children, this view reinforces the efforts of the juvenile justice system to control lower class and minority children.

### **THE PAST AND PRESENT AS HISTORY**

Both the public and politicians view youth crime and violence through a prism of race and social class (Hacker, 1992). Youth crime is characterized as the private problems of minority families and children rather than as a matter of public concern. A century ago, progressive reformers used "conscience and convenience" to distinguish between their own children and "other people's children" (Rothman, 1980). Politicians and parents tend to make similar distinctions today.

They simultaneously invest resources, affection, and high hopes in their own children, viewing other people's children with suspicion as potential threats to the well-being of their own. An apparent hostility toward lower class and minority children has developed, which affects those who are the most threatening, the most costly, and the least like middle-class children. In turn, this hostility has undermined public responsibility for such children and has reinforced efforts to control them (Grubb & Lazerson, 1982, p. 85).

Many observers have raised the issue that current calls for severe anticrime measures harbor racial subtexts (Hacker, 1995; Wilson, 1992). Feiler and Shelly (1999) examined the issue of public support for the harsher treatment of offenders through an

analysis of individuals' willingness to treat juvenile offenders as adults, making them subject to criminal penalties. They found that when the crime in question is seriously violent, citizens are less likely to desire the transfer of a younger juvenile. Though the race of the respondent play a role in the desire to transfer a youth to an adult court, the race of the offender clearly does. Whether black or white, citizens are more likely to express a preference for transfer if the juvenile in question is black. Feld (1998) calls this "The political demonization of young black males as morally impoverished 'super-predators....'" Fear of violent juvenile offenders is often a fear of other people's children and has been throughout the twentieth century history of the United States (Zimring, 1998).

Discretionary decisions at various stages of the justice process amplify racial disparities as minority youths proceed through the system, resulting in more severe dispositions than for comparable white youths. Although minority youth constituted about 32% of the youth population in the country in 1995, they represented 68% of the juvenile population in secure detention and 68% of those in secure institutional environments such as training schools (Sickmund, Snyder, & Poe-Yamagata, 1997). These figures reflect significant increases from 1983, when minority youth represented 53% of the detention population and 56% of the secure juvenile corrections population. Additional research has consistently substantiated that minority overrepresentation has not been limited to confinement in secure facilities.

After controlling for the present offense and prior records, a juvenile's race consistently exerts an independent effect on detention decisions (Pope & Feyerherm, 1990). Between 1977 and 1982, the proportion of minority youths held in detention centers increased from 41% to 51%, a growth rate that did not reflect

either racial demographics or arrest rate trends (Krisberg et al., 1986). Although juvenile courts detained about 20% of all referred youths, white juveniles experienced somewhat lower detention rates (18%), while black (25%) and other racial minority (22%) juveniles experienced somewhat higher rates (Butts et al., 1996). A study of felony cases referred by police and detained by juvenile courts found that a youth's race affected both decisions, even after controlling for weapon use, victim injury, and socioeconomic and family structure (Wordes, Bynum, & Corley, 1994).

Cases involving white youths were less likely to be waived than cases involving black youth and other minorities (Stahl, 1999). In 1996 1.4% of formally processed cases involving black juveniles were waived to criminal court, compared with 0.8% of the cases involving white juveniles. In addition to a disproportion between minorities and white youths in terms of numbers, differential rates are also found in the type of offense. An analysis in four states that examined the effects of race on judicial waiver decisions found that:

Blacks were more likely than whites to have their cases waived for violent, property, and drug offenses. For violent offenses, the differential rates are fairly consistent across states, with black juveniles having waiver rates from 1.8 times to 3.1 times higher than whites. The differences varied more widely for drug offenses. Pennsylvania black juveniles were more than twice as likely to have their cases waived than whites.... Arizona's waiver rates for whites were twice those of California; while for blacks, Arizona's rates were 55 times those of California (U.S. General Accounting Office, 1995).

This differential rate based on type of offense is confirmed by national data (Stahl, 1999). Throughout the period from 1987 to 1996, cases involving white juveniles were most likely to be waived if the serious charge

was a personal offense. The use of waiver in cases involving black youths changed considerably between 1987 and 1996. The use of transfer for black youths charged with drug offenses increased substantially between 1985 and 1991, from 2.3% to 5.9% of formal cases. In 1992, waivers of drug cases declined for black youths to 3.6%, though this was still higher than for white juveniles (1%). By 1996, waivers of drug cases for black youths declined to 1.9%, but this still remains higher than for white youths (0.8%).

Prevalent studies examining the likelihood of juveniles being incarcerated in a juvenile corrections facility before the age of 18 were conducted in 16 states (DeComo, 1993). These studies showed that African-American youths had the highest prevalence rates of all segments of the population in 15 of the 16 states. In two states, it was estimated that one in seven African-American males (compared with approximately one in 125 white males) would be incarcerated before the age of 18.

Race and class-tinged perceptions have allowed the public, politicians, and the mass media to perceive the "crime problem" and juvenile justice system's clientele primarily as poor, urban, black males, but also including Latinos and poor white youngsters. These myths of juvenile crime and "other people's children" exist because they reinforce traditional values of classism, racism, and prejudice.

#### **MYTHS AS REINFORCERS OF BELIEFS**

Myth is often used to refer to some false belief or illusion. For example, historians Gerster and Cords (1977) defined myths as "'false beliefs' which have traditionally been accepted as 'true' and taken to be 'real.' Myth becomes reality when people act as if the myth were true and their beliefs and attitudes are

based upon it...." This blurring of the distinction between what is true and what is false is one of the more intriguing aspects of myths. It is also an aspect that may help account for their persistence and influence.

As the general public, government officials, and the media try to understand and shape youthful misbehavior, they run into two broad types of myths. The first consists of false beliefs that are held out of simple ignorance or misunderstanding. These can be thought of as "pseudo" myths because they refer to some subject with a clearly relevant body of information, such that it is not necessary to rely simply on belief. In the case of pseudo myths, it might be supposed that reasonably open-minded people, given evidence that contradicts what they previously held to be true, could be expected to alter their opinion. If they are ignorant of any contrary information, they naturally have no reason to change their opinion.

Some examples of the continuing pseudo myths about juvenile crime concern such statements as "juveniles account for the bulk of serious crime in the United States;... juveniles are more likely than adults to victimize the elderly;... juveniles commit more serious violent crimes than adults." A variety of sources show that none of these statements are true. Over 81% of the violent crimes of murder, rape, robbery, and aggravated assault (as measured by arrests in 1996) are committed by adults. Delinquent juvenile behavior is, in fact, overwhelmingly nonviolent. Nevertheless, people believe the opposite. As not everyone is open-minded, and because there is usually plenty of room to attack the evidence against the pseudo myths, only some of them will be dispelled.

With the second type of myth, the "real" myths, there is even less possibility for refutation. This is because these myths

provide explanations in situations where there is otherwise none or where there is a need to create and maintain a certain image of reality. Whereas we may be able to falsify pseudo myths with hard evidence, real myths are much more likely to survive no matter what the evidence. The “real” myths are jumbles of basic beliefs—combinations of facts, prejudices, values, pictures, memories, and projections. This montage helps us explain our world to ourselves. Once we have our own set of myths, we become comfortable and resist giving them up. For this reason, myths can be thought of as gnarled thickets of ideas that do not yield readily to contrary evidence. Thus, the image of the violent juvenile offender, now and in the future, is that of a dark-skinned stranger. Yet, in 1997, in contrast to the proportions in the general population, 53% of juvenile arrests for violent crimes involved white youths, while 44% involved black youths (Snyder, 1998).

The idea that myths may give meaning and direction to reality, and help govern our perception of the world, has very significant implications. It means, for example, that we may accept, modify, or reject new information depending upon how well it fits the myths in which we believe. This is why new knowledge or evidence will not necessarily dispel belief in myths, whether they are pseudo or real. According to Edelman (1975), “large numbers of people ... cling to myth ... and reject falsifying information when prevailing myths justify their interests, role and past actions, or assuage their fears”. Beliefs in myths seemingly help us to avoid cognitive dissonance and to maintain cognitive integrity. Such beliefs also may support our self-interest. This could account for the fact that people often hang on to pet ideas in the face of overwhelming contrary information. Opposing information is simply disparaged or ignored.

Prejudice towards other people’s children, and the class-ism and racism which allows the general public to view the “crime problem” as the product of poor, urban white, Latino and black males are products of such beliefs.

### **TRANSFORMATION OF JUVENILE JUSTICE**

In their book *Myths that Rule America*, London and Week (1981) point out that numerous public policies have been developed on the basis of myth. Addressing this issue, Edelman (1975) concluded that validity is neither a help nor a hindrance to the employment of rationalizations for individual beliefs and the public policies derived from them. This may be especially true of programs for juvenile offenders, where we run into issues of good and evil, as well as heated emotional debates about what is wrong and what should be done. People generally don’t know or care whether these myths are true or false. They hold these beliefs because it is convenient. It is inconvenient to have one’s basic beliefs and self-interest undermined. To the extent that efforts to deal with delinquent behavior are grounded in myth, it would seem that they are headed for failure, especially if their effectiveness is measured in empirical terms. “Empirical” simply refers to the hard data on matters such as recidivism and cost-effectiveness. Casting efforts in terms of myth, however, appear to have another anomalous feature, namely that they don’t have to “work” or be effective as long as those efforts provide useful and acceptable ways of thinking about the problem. The constituents of such programs (the true believers) are rewarded not by substantial changes, but by symbolic reassurances that needs are being attended and problems are being managed. Bennett (1980) developed what he called a “policy as myth” perspective that illustrates the power of myths

in this respect. Bennett said that the point of many government policies is not really to solve problems. The policies are not the real political ends, but only a means to the creation of certain public images of society and politics. Myth-based programs may thus ultimately persist because they reinforce societal traditions and values. The area of juvenile justice would seem to be particularly ripe for this approach.

Efforts to combat juvenile crime are grounded in an incompletely understood problem; yet practically everyone believes that he or she has the expertise to solve it. This contradiction is compounded by the high visibility of the problem and the enormous pressure to do something about it. Thus, it is not surprising that there might be a readiness to grasp simplistic explanations and solutions. Panaceas derived from mythical assumptions could be expected to be grasped by the public and public officials who are looking to find fast, familiar, and comfortable ways to deal with problems. After all, they do not wish to be troubled with solutions that are too complicated on the one hand or modest on the other. More importantly, they especially do not want solutions that challenge or are dissonant with their basic beliefs.

The supporters of the accountability-based sanctioning approach ignore the reality that discretionary decisions at various stages of the justice process amplify racial disparities as lower class and minority youths proceed through the system. While Pennsylvania provides a particularly instructive example of an attempt to rethink a juvenile justice system "from the purpose clause down," it also illustrates the continued issue of social structural and political impact on even an "accountability-based" system. According to recent data from Pennsylvania, Whites comprise over 56% of juveniles arrested for delinquent acts and are

responsible for the majority of persons arrested for six of the Part I Index crimes (forcible rape, aggravated assault, burglary, larceny-theft, motor vehicle theft, and arson). Arrests for the remaining two offenses were predominantly African-American: robbery (67.5%) and murder (60.7%) (Pennsylvania State Police, 1998). Minorities represent only 30% of juveniles diverted before a court hearing, over 74.4% of those committed to a public secure institution (Juvenile Court Judges' Commission, 1997). Even when one acknowledges the rate of arrests of African-Americans for robbery and murder, one still must confront the disproportionate commitment of minorities to secure institutions. This has not changed for over four years. In 1993, the rate was 73.5%.

Indeed, everyone should receive "equal or fair justice" under the law or have their "restoration to the community" made a priority without worrying that the scales of justice are weighed against them as a result of class, race, or ethnicity. This is not the case. To the extent that "equal and fair justice" under the law represents little more than an elusive goal for many poor white and minority youngsters, the balanced and accountability-sanctioning approach offers nothing more than another disguise for harsher punishment and another panacea phenomenon.

The recent transformation of the juvenile justice system provides a graphic illustration of the conversion of public fear of and hostility toward other people's children into harsh and punitive social control practices. The mass media depicts, and the public perceives, the "crime problem" and juvenile justice system's clientele primarily as poor, urban black males. Politicians have manipulated and exploited these racially tinged perceptions for political advantage with demagogic pledges to "get tough" and "crack down" on youth crime.

The current trend of the juvenile justice system toward harsher punishments and overt, disproportionate handling of minority juveniles reflects a selective manipulation of the alter-native conceptions of young people as depen-dent and vulnerable, or as autonomous and responsible, to continue to justify policies that entail cultural and class discrimination. The admonition that a balanced and accountable approach in the juvenile justice system must respond to illegal behavior in such a way that the offender is made aware of, and responsible for, the loss, damage, or injury perpetrated upon the victim, without acknowledging the social and political inequalities which impact the system, will continue a pattern of stigmatizing other people's children.

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THE EMERGENCE OF ECSTASY:  
FINDINGS FROM THE NATIONAL HOUSEHOLD SURVEY  
ON DRUG ABUSE

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**INTRODUCTION**

Media reports have suggested that the use of 3,4-methylenedioxymethamphetamine (MDMA or “ecstasy”) is a prodigious problem among youth in the United States (Central Broadcasting System (CBS) Worldwide, Inc., 2000; Cloud, 2000; DeYoung, 2000; Leinwand & Fields, 2000). Leinwand and Fields (2000), for example, described how easily ecstasy pills can be smuggled into “raves” and how attendees relished the atmosphere of illegal drug

acceptance. While these reports have popular appeal, little scientific evidence exists to support the media’s portrayal of an ecstasy epidemic in the United States. As shown in Table 1, only five ecstasy-related studies conducted in the United States have been published in peer-reviewed, social science periodicals during the past two decades (Buffum & Moser, 1986; Cuomo & Dymont, 1994; Klitzman, Pope, & Hudson, 2000; Meilman, Gaylor, Turco, & Stone, 1990; Peroutka, 1987).

**Table 1.** Summary of ecstasy-related studies conducted in the United States and published in social science periodicals.

<b>Author(s)</b>	<b>Year of Publication</b>	<b>Population</b>
Buffum and Moser	1986	Self-reported ecstasy users
Peroutka	1987	College students
Meilman et al.	1990	College students
Cuomo and Dymont	1994	College students
Klitzman et al.	2000	Gay and bisexual men

Buffum and Moser (1986), for example, administered a survey to 76 self-reported ecstasy users in San Francisco between December 1985 and September 1986. Questions were posed about changes in sexual behavior, quality of orgasms, and the effects of drug ingestion on sexual patterns. The results were mixed. When questioned as to whether MDMA caused any temporary changes in their sexual patterns, 15 of the women (62%) and 20 of the men (74%) said no (Buffum & Moser, 1986). Interestingly, however, 18 of the women (75%) and 17 of the men (71%) said that they used ecstasy to enhance their sexual experiences (Buffum & Moser, 1986).

Peroutka (1987) estimated the prevalence of recreational ecstasy use at Stanford University by surveying a random sample ( $n=369$ ) of undergraduate students. Respondents were asked if they had ever used ecstasy, the total number of times they had used it, and the amount of ecstasy taken in a single dose. Of the 369 students interviewed, 143 (39%) reported using ecstasy at least once, with the frequency of use falling between 1 and 38 times (Peroutka, 1987).

Klitzman et al., (2000) explored the relationship between MDMA use and high-risk sexual behaviors among a sample of 169 gay and bisexual men in New York City. The questionnaire captured information on frequency of ecstasy and other drug use, history of sexually transmitted diseases (STD), HIV status, and frequency of anal intercourse without a condom during the past year. A strong association was found between frequent MDMA use and high-risk sexual behavior, even after controlling for demographic characteristics and alcohol and other drug (AOD) use. The odds ratio for high-risk sexual behavior was 37% greater among frequent versus non-frequent MDMA users (Klitzman et al., 2000).

While these studies offer preliminary

insight into the use of ecstasy, no studies have explored the use of ecstasy among a representative sample of household youths in the United States. Research within this population is critical given the international evidence suggesting that mainstream youths are at high risk for ecstasy ingestion (Lynskey, White, Hill, Letcher, & Hall, 2000; Measham, Newcombe, & Parker, 1994). In the current study, the drug-using behaviors of 14,096 household members between the ages of 12 and 25 are examined with data collected through the 1998 National Household Survey on Drug Abuse (NHSDA). One primary research question is explored: What are the associations between ecstasy use, demographic characteristics, and alcohol and other drug use within this population?

## METHODS

The NHSDA, funded by the Substance Abuse and Mental Health Services Administration (SAMHSA), is designed to estimate the prevalence of drug use in the United States. All civilian, non-institutionalized residents in the United States age 12 and over are eligible for inclusion, as well as individuals living in college dormitories, group homes, shelters, rooming houses, and military personnel (SAMHSA, 2001). A multi-stage probability sampling design is utilized (SAMHSA, 2001). Stage 1 is the selection of counties within the United States. Stage 2 is the selection of blocks or block groups within a particular area. Stage 3 is the selection of listing units within the sub-areas. Stage 4 involves the selection of age domains within sampled listing units. Finally, stage 5 involves interviewing individuals within the sampled age domains.

Respondents are first asked if they have ever used drugs in the following classes: alcohol, cocaine, hallucinogens, heroin, inhalants, marijuana, tobacco, and non-medical prescription drugs. If respondents report having used any

drugs within these classes, questions are then posed about specific drugs of abuse. For example, if respondents report having ever used any hallucinogens, questions are asked about specific types within this class, including mescaline, peyote, and ecstasy. For those drug classes respondents report having tried, they are asked to indicate age of first use and whether they have used the class within the past 12 months and the past 30 days. Respondents are also asked about criminal history, AOD treatment history, problems resulting from AOD use, need for AOD treatment, and needle sharing. Finally, demographic data, including gender, race, age, marital status, and educational levels, are collected.

While the NHSDA sample is designed to be representative of household members age 12 and older in the United States, the data have two major limitations (SAMHSA, 2001). First, the information is based exclusively on self report. As such, underreporting and overreporting may occur. Second, the data are cross-sectional in nature. An exploration over time for specific individuals is therefore not possible. These caveats aside, the NHSDA is the only study that regularly produces estimates of drug use among civilian members of the non-institutionalized population of the United

States. With this preliminary summary, data analysis and findings are presented below.

### DATA ANALYSIS AND FINDINGS

Data for the current analysis were collected in 1998 from a sample of 14,096 household members between the ages of 12 and 25. Data analysis was accomplished in three phases. First, descriptive statistics were generated. Second, the sample was divided into ecstasy users and non-users based on self-reported lifetime use of ecstasy. Chi-square statistics were employed to detect significant associations between ecstasy use, demographic characteristics, and AOD use. Third, logistic regression was utilized to evaluate the association between lifetime ecstasy use and any statistically significant variables identified by chi-square analyses.

### DESCRIPTIVE STATISTICS

As shown in Table 2, 53% of the sample were female. A majority of the respondents was white (69%) and between the ages of 14 and 21 (59%). Seventy-six percent were unmarried. Forty percent of the sample were high school graduates, while 39% were employed outside of the home at least part time.

**Table 2.** Demographic Characteristics of 1998 Household Members between the Ages of 12 and 25 (N=14,096)

Variable	Frequency
Sex	
Female	53%
Race/Ethnicity	
White	69%
Black	24%
Other	7%

(Cont'd.)

Variable	Frequency
Age	
12-13	16%
14-17	32% = 59%
18-21	27%
22-25	25%
Mean age (in years)	18.1
Marital Status	
Never married	76%
Married	13%
Divorced, separated, widowed	11%
Education	
High school graduate	40%
Employment Status	
In school only	49%
Employed full-time	24% = 39%
Employed part-time	15%
Full-time homemaker	4%
Other	8%

#### CORRELATES OF ECSTASY USE

Table 3 compares self-reported lifetime ecstasy users (n=377) and household members between the ages of 12 and 25 who reported no lifetime ecstasy use (n=13,719).

Compared to non-users, lifetime ecstasy users were significantly more likely to be older (p<0.001), white (91% vs. 68%, p<0.001), a high

school graduate (63% vs. 40%, p<0.001), and to have used all other drugs of abuse within the past 12 months, including cigarettes (83% vs. 31%, p<0.001), alcohol (93% vs. 51%, p<0.001), marijuana (79% vs. 18%, p<0.001), powder cocaine (34% vs. 3%, p<0.001), lysergic acid diethylamide (LSD) (31% vs. 2%, p<0.001), and stimulants (16% vs. 1%, p<0.001).

**Table 3.** Comparisons of Lifetime Ecstasy Users to Non-Users (N=14,096)

Variable	Non-users (n=13,719)	Lifetime Users (n=377)
Sex		
Female	53%	49%
Age*		
12-13	16%	1%
14-17	32%	24%
18-21	27%	39%
22-25	25%	36%
Mean age (in years)	18.0	20.0

(Cont'd.)

<b>Variable</b>	<b>Non-users (n=13,719)</b>	<b>Lifetime Users (n=377)</b>
<b>Race/Ethnicity*</b>		
White	68%	91%
Black	24%	3%
Other	7%	6%
<b>Marital Status*</b>		
Never married	63%	87%
Married	11%	7%
Divorced, separated, widowed	12%	3%
<b>Education</b>		
High school graduate	40%*	63%*
<b>Employment Status*</b>		
In school only	50%	27%
Employed full-time	24%	40%
Employed part-time	15%	20%
Full-time homemaker	5%	3%
Other	6%	10%
<b>Alcohol and Other Drug Use</b>		
12-month cigarette use	31%	83%
12-month alcohol use	51%	93%
12-month marijuana use	18%	79%
12-month powder cocaine use	3%	34%
12-month crack cocaine use	<1%	11%
12-month heroin use	<1%	5%
12-month LSD use	2%	31%
12-month PCP use	<15	9%
12-month inhalant use	2%	23%
12-month analgesic use	3%	29%
12-month tranquilizer use	<1%	16%
12-month stimulant use	1%	16%

\* Chi-square significant at the  $p < 0.001$  level.

### LOGISTIC REGRESSION

To supplement the descriptive findings, logistic regression was utilized to explore the relationship between lifetime ecstasy use and any statistically significant variables identified by chi-square analyses. The dependent variable in the current model was self-reported lifetime ecstasy use. The 16 independent variables were: age, race, marital status, employment, and the self-reported, 12-month use of cigarettes, alcohol, powder cocaine, crack cocaine, heroin, LSD, PCP, inhalants, analgesics, tranquilizers, and stimulants.

The variable measuring age was recoded into two categories: "17 and under" and "18 and over." The variable measuring race was recoded into two categories: "white" and "non-white." The variable measuring marital status was recoded into two categories: "married" and "unmarried." The variable measuring employment was recoded into two categories: "employed at least part-time outside of the home" and "not employed outside of the home." The reference categories used in the

current model were "17 and under," "non-white," "unmarried," "no outside employment," "no 12-month cigarette use," "no 12-month alcohol use," "no 12-month powder cocaine use," "no 12-month crack cocaine use," "no 12-month heroin use," "no 12-month LSD use," "no 12-month PCP use," "no 12-month inhalant use," "no 12-month analgesic use," "no 12-month tranquilizer use," and "no 12-month stimulant use."

The results of the logistic regression model are shown in Table 4. If a respondent used marijuana within the past 12 months, the odds ratio (OR) of lifetime ecstasy use was 365% higher than for a respondent who reported no 12-month marijuana use, holding all other variables constant. If a respondent was white, the OR of lifetime ecstasy use was 251% higher than for a respondent who was non-white, holding all other variables constant. These data indicate that, among our sample, the two strongest predictors of lifetime ecstasy use were race and self-reported 12-month marijuana use.

**Table 4.** Logistic Regression on Self-Reported Lifetime Ecstasy Use (N=14,096)

Variable	Multiple Logistic Regression Model		Variable	Multiple Logistic Regression Model	
	OR	CI		OR	CI
Age	2.45	1.80-3.34	12-month crack cocaine use	1.39	.81-2.39
White	3.51	2.42-5.07	12-month heroin use	2.44	1.12-5.31
Married	.87	.57-1.35	12-month LSD use	2.97	2.15-4.12
Employed at least part-time	1.30	1.00-1.69	12-month PCP use	2.47	1.31-4.67
12-month cigarette use	2.28	1.65-3.15	12-month inhalant use	1.88	1.32-2.66
12-month alcohol use	1.64	1.02-2.64	12-month analgesic use	2.03	1.43-2.86

(Cont'd.)

Variable	Multiple Logistic Regression Model		Variable	Multiple Logistic Regression Model	
	OR	CI		OR	CI
12-month marijuana use	4.65	3.39-6.37	12-month tranquilizer use	1.56	.98-2.48
12-month powder cocaine use	1.90	1.35-2.66	12-month stimulant use	1.47	.95-2.27

## DISCUSSION

The use of ecstasy is unquestionably injurious to the human body. While initial effects may include feelings of peacefulness and empathy, MDMA users can encounter problems similar to those experienced by amphetamine and cocaine users (Bolla, McCann, & Ricaurte, 1999; McCann, Mertl, Eligulashvili, & Ricaurte, 1999; Peroutka, Newman, & Harris, 1988). Physical effects include blurred vision, involuntary teeth clenching, muscle tension, nausea, and sweating (Bolla et al., 1999; McCann et al., 1999; Peroutka et al., 1988). Psychological effects, which can linger for weeks after ingestion, include anxiety, depression, insomnia, memory loss, and paranoia (Bolla et al., 1999; McCann et al., 1999; Peroutka et al., 1988).

Data for the current analysis were collected in 1998 from a sample of 14,096 household members between the ages of 12 and 25 surveyed through the National Household Survey. Compared to non-users, ecstasy users were significantly more likely to be older, white, and to have used all other drugs during the past 12 months, including alcohol, marijuana, powder cocaine, LSD, and stimulants. Logistic regression identified that the two strongest predictors of lifetime ecstasy use were race and self-reported 12-month marijuana use. The race findings confirm previous research identifying ecstasy use as primarily a white phenomenon

(Arria, Yacoubian, Fost, & Wish, in press; Yacoubian, Arria, Fost, & Wish, in press; Yacoubian, in press). Moreover, the relationship between ecstasy use and the recent use of all other drugs confirms research with other juvenile populations (Arria et al., in press; Yacoubian et al., in press; Yacoubian, in press) that ecstasy-using youth are significantly more likely to use other drugs than their non-ecstasy-using counterparts.

There are two major areas for future research. The current data preclude any inferences about the extent to which these household members are polydrug users. Future research should consider inquiring about patterns of ecstasy ingestion. Questions could be posed about the extent to which users typically use ecstasy with other substances and the extent to which users seek out ecstasy cut with other drugs. Moreover, while ecstasy's availability may preclude any definite conclusions about its place within the drug-using pathway (Kandel, 1975; Kane & Yacoubian, 1999), future analysis of NHSDA data should include age of first use data. Such an analysis could determine whether age of first ecstasy use is a product of deliberate, temporal sequencing or whether it is simply an artifact of low ecstasy availability. This would then influence whether prevention and treatment efforts should consider the incorporation of ecstasy education into their curricula.

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# JUVENILE CRIME, ADULT ADJUDICATION, AND THE DEATH PENALTY: DRACONIAN POLICIES REVISITED

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## INTRODUCTION

As we enter a new millennium and discussions arise concerning juvenile crime, a turning point in the history of juvenile justice has emerged. Politicians, policy-makers, and the general public demand that juveniles take responsibility for their actions and call for punishments typically reserved for adults. This movement is allowing more and more juvenile offenders to be prosecuted in the adult criminal court. Such a movement may eventually take us back to the type of punishments that occurred before the end of the 19th century when the “child saving movement” sought to soften the response to juvenile crime, ushering in an era of rehabilitation within the newly established juvenile court. Court waivers (or “certification”) of juveniles to the adult system reflect, in our view, draconian policies that can only make matters worse. Moreover, these policies have specifically targeted poor African-American and other minority youths, while more lenient policies have been reserved for their white, middle-class counterparts. In a growing number of states, a “zero tolerance” policy has widened the net to the extent that even minor offenses result in arrest and jailing in already overcrowded “detention” centers. The recent passage of Proposition 21 in California represents the latest in a long line of such changes.

With the “get tough” movement, many abuses against young offenders have become

all too common, as a recent report from Amnesty International (AI) reveals (Amnesty International, 1998b). For instance, AI reported a 13-year-old girl residing in Tuscaloosa County, Alabama, was detained for five weeks in a juvenile “jail” for possessing what was believed to be marijuana, yet was actually oregano. Under the “zero tolerance” policy of this county, anyone charged with any drug offense may be detained until their case is heard, which can take up to six weeks. A report by the Youth Law Center (1996) reveals that many juveniles are still being detained for status offenses such as truancy, running away, or even missing a meeting with a probation officer.

More recently, in Michigan an African-American youth named Nathaniel Abraham was found guilty of second-degree murder for shooting a man to death. Although Nathaniel was only 11 years old at the time, he was nevertheless charged with first-degree murder and prosecuted in adult court. (A photo of this youth comprises the cover of Amnesty International’s latest report, “Betraying the Young,” 1998b.) Nathaniel’s attorney maintained that at the time of the shooting, Nathaniel’s reasoning ability was that of a six-year-old and that he had the language skills of an eight-year-old. He was subsequently convicted by a jury and sentenced to a correctional facility until the age of 21.

According to Amnesty International, the human rights violations of juveniles in the

United States number in the thousands, including 70 on death row for crimes they committed while they were under 18—in clear violation of Article 6 (5) of the International Covenant on Civil and Political Rights (ICCPR).

Other violations include the use of force and restraints, solitary confinement, the excessive use of incarceration, and inadequate services for children with mental health problems. We also found consistent failure in separating children from adults in many correctional facilities, harsh and inflexible sentences, and limited access to education and other needed services. Numerous forms of racial and gender discrimination were also found. Other studies have indicated such abuses, in addition to the lack of suitable community-based programs for both pretrial detention and adjudicated juvenile offenders (Krisberg et al., 1995; Annie Casey Foundation, 1997; Butterfield, 1997; Howell, 1997). These practices fall disproportionately upon the children of the poor and racial minorities, a consistent practice throughout the history of juvenile justice in this country (Shelden, 2001).

A thorough understanding of current policies requires an examination of the historical backdrop of juvenile justice policies. It is our contention that recent policies are throwbacks to an earlier era and represent still another in several cycles of juvenile justice “reform” (Bernard, 1992). In the next section, a brief history of societal responses to juvenile crime will be undertaken.

### **HISTORICAL OVERVIEW**

The appearance of adolescence as a social category in the nineteenth century coincided with an increasing concern for the regulation of the “moral behavior” of young people (Platt, 1977; Empey, 1982). Although

entirely separate systems to monitor and control the behavior of young people began to appear during the early part of the nineteenth century, differential treatment based upon age did not come about overnight. The roots of the juvenile justice system can be traced to much earlier legal and social perspectives on childhood and youth. One of the most important of these was a legal doctrine known as *parens patriae*.

*Parens patriae* has its origins in medieval England’s chancery courts. At that point, it had more to do with property law than children; it was, essentially, a means for the crown to administer landed orphans’ estates (Sutton, 1988). *Parens patriae* established that the king, in his presumed role as the “father” of his country, had the legal authority to take care of “his” people, especially those who were unable, for various reasons (including age), to take care of themselves. The king or his authorized agents could assume the role of guardian for children in order to administer their property. By the nineteenth century, this legal doctrine had evolved into the practice of the state assuming wardship over a minor child and, in effect, playing the role of parent if the child either had no parents or if the existing parents were declared unfit.

In the American colonies, for example, officials could “bind out” as apprentices “children of parents who were poor, not providing good breeding, neglecting their formal education, not teaching a trade, or were idle, dissolute, unchristian or incapable” (Rendleman, 1974, p. 63). Later, during the nineteenth century, *parens patriae* supplied (as it still does to some extent), the legal basis for court intervention into the relationship between children and their families (Rothman, 1971; Krisberg & Austin, 1993; Shelden, 2001).

In the United States, interest in the state's regulation of youth was directly tied to explosive immigration and population growth. Between 1750 and 1850, the population of the United States went from 1.25 million to 23 million. The population of some states, such as Massachusetts, doubled in numbers, while New York's population increased fivefold between 1790 and 1830 (Empey, 1982, p. 59). Many of those coming into the United States during the middle of the nineteenth century were of Irish or German background; the fourfold increase in immigrants between 1830 and 1840 was, in large part, a product of the economic hardships faced by the Irish during the potato famine (Brenzel, 1983: 11). The social controls in small communities were simply overwhelmed by the influx of newcomers, many of whom were either foreign born or of foreign parentage. The problem of "juvenile delinquency" emerged as one among many social problems urban dwellers faced.

This is an important development that needs further comment. The term "juvenile delinquent" originated around the early 1800s and referred to two different meanings: (1) "delinquent" which means "failure to do something that is required" (as in a person being "delinquent" in paying taxes) and (2) "juvenile" meaning someone who is "malleable," not yet "fixed in their ways," and subject to change and being molded (i.e., "redeemable").

By the 1700s, with colleges and private boarding schools developing, various "informal" methods of social control of more privileged youths emerged. (This paralleled the emergence of capitalism and the need to reproduce the next generation of capitalist rulers.) More formal systems of control emerged to regulate working and lower class "delinquents" around the early 1800s,

including the juvenile justice system and uniformed police. In other words, the attitude that even working and lower class offenders could be "redeemed" developed (Bernard, 1992, pp. 49-55).

Throughout the 19th century, social reformers (starting with New York City's Society for the Reformation of Juvenile Delinquents, which helped found the first House of Refuge in 1824, and ending with the Child Savers of Illinois, which helped establish the first Juvenile Court) constantly called attention to the fact that children, some as young as six or seven, were locked up with adult criminals in jails and prisons and were also appearing with increasing regularity in criminal courts. It was believed that such practices were not only inhumane but would also inevitably lead to the corruption of the young and the perpetuation of youthful deviance or perhaps a full-time career in more serious criminality (Pickett, 1969; Platt, 1977).

### THE "CYCLE" OF JUVENILE JUSTICE

One view of the history of juvenile justice policies in the United States is that there is a cyclical tendency, fluctuating from acting in the "best interest of the child" or rehabilitation (based upon the *parens patriae* doctrine) to an emphasis on upholding certain rights that also apply to adults, along with their corresponding punishments (Bernard, 1992). In recent years, the cycle has shifted toward the latter view with an emphasis on due process rights and punishment.

This "cycle" begins with the case of *Ex Parte Crouse* in 1838. So much has been written about this case that a complete review is not necessary (see Sheldon, 1998). In this case, the Pennsylvania Supreme Court ruled that the Bill of Rights did not apply to juveniles. Based upon the *parens patriae* doctrine, the court asked, "May not the

natural parents, when unequal to the task of education, or unworthy of it, be superseded by the *parens patriae* or common guardian of the community?" Further, the court observed that "the infant has been snatched from a course which must have ended in confirmed depravity..." (*Ex Parte Crouse*, 1938, pp. 9-11).

The ruling assumed that the Philadelphia House of Refuge (and presumably all other houses of refuge) had a beneficial effect on its residents. It "is not a prison, but a school," the court said, and because of this, not subject to procedural constraints. Further, the aims of such an institution were to reform the youngsters within them "by training ... [them] to industry; by imbuing their minds with the principles of morality and religion; by furnishing them with means to earn a living; and above all, by separating them from the corrupting influences of improper associates" (*Ex Parte Crouse*, 1938, p. 11).

About 30 years later, another case arose that challenged *Crouse*. This came in 1870 with a Chicago case concerning a boy named Daniel O'Connell in *People v. Turner* (1870). This young boy was incarcerated in the Chicago House of Refuge, not because of a criminal offense, but because he was "in danger of growing up to become a pauper." His parents, like Mary Crouse's father, filed a writ of *habeas corpus*, charging that his incarceration was illegal. What is most intriguing about this case is that although the facts were almost identical to *Crouse*, the outcome was the exact opposite.

The matter went to the Illinois Supreme Court which concluded that, first, Daniel was being punished, not treated or helped by being in this institution. Second, the Illinois court based its ruling on the realities or actual practices of the institution rather than merely on "good intentions" as in the *Crouse*

case. Third, the Illinois court rejected the *parens patriae* doctrine because they concluded that Daniel was being "imprisoned" and thus based their reasoning on traditional legal doctrines of criminal law. They therefore emphasized the importance of due process safeguards. In short, while the court in the *Crouse* case viewed the houses of refuge in a very rosy light, praising it uncritically, the court in the *O'Connell* case viewed the refuge in a much more negative light, addressing its cruelty and harshness of treatment (Bernard, 1992, pp. 70-72; *People v. Turner*, 1974).

The *O'Connell* decision was to have far-reaching effects in the development of the movement to establish the juvenile court in Chicago in 1899. Much has already been written about the "child saving movement" and the founding of the juvenile court, so this will not be covered in any detail. However, it needs to be mentioned in passing at this time that the founders of the juvenile court established this institution in part as a method of getting around the argument in *O'Connell*.

In the 1905 case of Frank Fisher (ironically another Pennsylvania case), the court returned once again to the logic of *Crouse* (*Commonwealth v. Fisher*, 1905). This case would be overturned in 1967 in *Gault*, along with several others like *Kent*, where the United States Supreme Court ruled that certain Constitutional rights should be accorded to children. A new cycle had begun which has evolved into the recent "get tough" on juvenile crime movement.

It seems as if certain politicians and criminal justice officials have taken *Gault* and other similar cases to their logical conclusions—namely, that since children are to be accorded the same rights as adults, then children should be ready to assume adult responsibilities and accept adult-type punishments for their crimes.

## THE FORMAL PUNISHMENT OF CHILDREN

The legal responsibility of children in the United States during the 19th century was formulated according to common law principles. Blackstone's (1796) commentary on children's criminal incapacitation was incorporated into American law. Blackstone noted that children were judged to be incapable of criminal offenses before the age of seven. Between the ages of 7 and 14, they were presumed innocent unless evidence of a criminal state of mind could be presented. Youths at the age of 14 who participated in criminal or delinquent behavior were considered adults and treated as such (Blackstone, 1796, pp. 23-24).

Two illustrations of Blackstone's opinion can be found in *State v. Aaron* (4 N.J.L. 263, 1818) and Stage's case (5 City-Hall Recorder, New York City, 1820). In *State v. Aaron*, a young male slave of 11 years was accused of murdering another young child. Before and during the trial, he denied the crime, but was convicted and sentenced to death. The second case involves a group of children between the ages of 7 and 14 who were indicted for grand larceny. George Stage, who was eight years old at the time he was arrested, was caught while trying to escape from a private house with a stolen bear skin. He was convicted and sentenced to three years in the state prison.

Platt (1977) documents fourteen cases between 1806 and 1882 on the criminal responsibility of children in the United States. Of these fourteen cases, seven children were indicted for homicide, one for manslaughter, five for various degrees of larceny, and one for malicious trespass. In ten instances, the jury returned a verdict of not guilty, one child was found guilty of trespass, but the sentence was not reported, two children ages 11 and 12 were

executed, and the remaining child was sentenced to three years in a state prison. Granted, although these cases were unusual and involved appellate court decisions, they nevertheless suggest that at that time the criminal law recognized that some children under 14, particularly children of color, were held as responsible for their actions as adults.

However, throughout most of U.S. history, children under a certain age (since the founding of the juvenile court, this age has been around 18 in most states) have generally been viewed as dependents, not as right-bearing, responsible adults. This view mitigated youths' criminal responsibility (Moore & Kelling, 1987). The general impression in juvenile justice literature is that prior to the reforms of the child-saving movement, children were treated by the criminal courts as though they were adults (Platt, 1977). In part, this is true, but there were a few misconceptions. The English criminal law of the 19th century contains accounts of children under 14 being executed for felonies, but there is no evidence to suggest that this was a regular pattern. According to Platt (1977), the severity of the law was mitigated by bringing minor charges against children, refusing to prosecute children, and refusing to convict a child in cases where there was the possibility of the death penalty. Hence, before the child-saving movement, the criminal responsibility of children was somewhat mitigated. This is partly a matter of justice and partly a matter of prudence. A certain amount of leniency and tolerance of the acts of children has been a constant in U.S. history (Moore & Kelling, 1987).

## MORAL PANICS AND THE CRACKDOWN ON YOUTH CRIME

The perceptions of lawmakers and the general public about the nature of juvenile crime obviously have an influence on current

and future policies concerning youths. These perceptions are shaped by “moral panics” rather than reality. A moral panic has been defined as a “condition, episode, person or group of persons” that “emerges to become defined as a threat to societal values and interests.” The nature of this problem “is presented in stylized and stereotypical fashion by the mass media,” while the “moral barricades are manned by editors, bishops, politicians and other right thinking people” (Cohen, 1980, p. 9). These kinds of threats are “far more likely to be perceived during times of widespread anxiety, moral malaise, and uncertainty about the future” (McCorkle & Miethe, 2002, p. 15). These panics build upon already existing divisions in society such as race, class, and age. (Typically the most visible crime is the focus of attention, which just happens to be the outrageous and, it should be noted in the case of gangs, the rare, “drive-by” shootings.) The moral panics typically focus on youths because they always represent the most serious challenge to conventional values held by adults. The recent growth of the underclass—consisting disproportionately of minorities and the young in an isolated and deteriorating inner city—is where the greatest concentration and growth of gangs have been.

Moral panics have three distinguishing characteristics (McCorkle & Miethe, 2001, pp. 19-20). First, there is a focused attention on the behavior (either real or imagined) of certain groups who are transformed into a sort of “folk devils” with the corresponding emphasis upon negative characteristics over any positive ones. There is an “evil” in our midst and it must be eliminated. Second, there is a gap between the concern over a condition or problem and the objective threat that it poses. Typically, as in the case of gangs, the objective threat is far less than popularly

perceived. Third, there is a great deal of fluctuation over time in the level of concern over a problem. The threat is “discovered,” then concern reaches a peak, and subsequently subsides—but perhaps re-emerges once again.

Conservatives have effectively denounced juvenile courts for lenient policies toward young offenders despite evidence to the contrary. In almost every state, the “get tough” movement has been successful in increasing the likelihood of more (and younger) juveniles receiving more severe punishments (Feld, 1999).

However, the get tough movement has failed to recognize the important differences in the definitions of “juveniles” and “adolescence.” The federal government and most states define juveniles as individuals under the age of 18 (Bortner, 1988). This definition of juvenile is based on the historical definition of a child. On the other hand, child development researchers define adolescence as based on human development. Adolescence begins at puberty and extends to age 19 or 20. During this time, not only are there hormonal changes, but most importantly there are psychological changes, enhancements of intellectual abilities and motor skills. This is a time in human development where individuals gain maturity, begin to understand complex and abstract concepts (Solomon, Schmidt, & Ardagana, 1990), and develop abstract reasoning (Piaget, 1965).

A criminal defendant must be capable of participating in their defense. Competency to stand trial is defined as having “sufficient present ability to consult with his attorney with a reasonable degree of rational understanding and a rational as well as factual understanding of the proceedings against him” (*Dusky v. U.S.*, 362 U.S. 402, 1960). The competency of juveniles is questionable at best. Most states recognize this, and the law does not presume that juveniles are capable of voting, deciding about their medical

treatment, entering binding legal contracts, or purchasing tobacco or alcohol. Juvenile competency follows legal precedent (*Godinez v. Moran*, 113 S. Ct. 2680, 1993) that includes the facts that juveniles must have the ability to: (1) understand the nature and possible consequences of charges, the trial process, the participant's roles, and the accused's rights, (2) participate with and meaningfully assist counsel in, developing and presenting a defense, and (3) make decisions to exercise or waive important rights (Bonnie, 1992).

Research demonstrates that juveniles have a limited understanding of their rights and ability to make decisions in their best interests (Grisso, 1981) and do not understand the impact of waiving their rights and subsequent consequences. Grisso (1981) examined 400 detained juvenile offenders (ages 14 to 16) and found that only 25 percent of these juveniles understood the Miranda warning. When asked what is meant when police said, "You do not have to make a statement and have the right to remain silent," many juveniles indicated that they understood this to imply a conditional view of legal rights—"You can be silent unless you are told to talk" or "You have to be quiet unless you are spoken to." Juveniles asked to imagine the consequences of waiving or asserting rights to silence when questioned by police responded that the police may send them home if they said they did it.

We are beginning to punish juveniles with only a token gesture toward due process while providing inadequate services for youths with mental health problems. Further, we have failed to separate youths from adults in state and federal penitentiaries and now expose youths to the possibility of being executed for their crimes. The remainder of this paper focuses on the most serious abuses that occur when transferred youths are

sentenced in adult criminal court, youths who are confined within adult populations in state and federal prisons, and youths sentenced to death for a crime committed while under 18 years of age.

## **THE LEGISLATIVE RESPONSE TO JUVENILE CRIME**

One of the fastest growing changes within the juvenile justice system is what is commonly known as waiver or certification. This term means that if a juvenile court believes that an offender is too "dangerous" or is "not amenable to treatment" then the court transfers its jurisdiction (i.e., "waives") to the adult system by, legally speaking, making the youth an adult. Generally, juvenile courts either lower the age of jurisdiction or exclude certain offenses (in most jurisdictions, homicide), known respectively as judicial waiver and legislative waiver.

Every state has some provisions for transferring offenders to adult courts. In some states the age-only provisions are used with growing numbers making the age lower and lower (e.g., in Vermont it is age 10, while in Montana it is 12, and Georgia, Illinois, and Mississippi it is age 13). Most states, however, do not go below 14 (Bartollas, 1997, pp. 441-442).

There are several important issues surrounding certification. First, although the proportion of those transferred is small (currently around five percent), the numbers are increasing. One study found that in four Southern states between 1980 and 1988, the number increased by over 100% (Champion, 1989). The number of delinquency cases transferred to criminal court increased by 71% between 1985 and 1994 (Butts et al., 1996). Second, contrary to popular opinion, the majority of those transferred to the adult system are not violent offenders, but rather are

property offenders, and in some cases public order cases such as drunkenness and other minor cases. Specifically, in 1992 almost half (45%) of all waiver cases involved youths who had committed property offenses, while about one-third were those who committed violent crimes and 12% had committed drug offenses. Speaking of drug offenses, the largest increase in certification cases during the period 1987-1991 was for drug offenses, going up by 152% (Donziger, 1996, pp. 135-136). This suggests that the movement to transfer youths is more of a political issue than a public safety issue. Many local politicians are gaining votes for their "get tough" stance on juvenile crime, using mostly anecdotal evidence to support their cause (Bortner, 1986). In other cases it is merely an attempt to get rid of "troublesome cases" (Bartollas & Miller, 1998, pp. 214-215). In fact, the transferring of juveniles to adult court does not result in a reduction of crime and may even contribute to at least a short-term increase in crime (Bishop et al., 1996). An even more sinister problem is that of racism. The disturbing fact, typically ignored in the debate, is that the majority of those transferred to the adult court are African-American youths. Given the above facts, it is obvious that the movement to transfer youths is a political issue rather than one of public safety.

Judicial waivers and prosecutorial discretion are often arbitrary, fluctuating from judge to judge, jurisdiction to jurisdiction, and do not form a consistent pattern (Bishop & Frazier, 1991; Fritsch & Hemmens, 1995; see Feld 1999). For instance, Bishop, Frazier, and Henretta (1989) find that Florida juvenile waivers to adult court (1981-1984) were predominately low risk juveniles and property offenders. These juveniles were not accused of committing a violent crime. The examination of legislative waivers, particularly changes, is

a reflection of perceived public opinion, changing values and norms, and a response to the "get tough" on juvenile crime. Legislative waiver strategies attempt to reconcile the cultural conceptions of youth (Feld, 1999, p. 190) and choose between the boundaries of criminal activities and criminal responsibility of youths.

While the minimum age varies across states, there are three states—Indiana, South Dakota, and Vermont—that allow the certification of a juvenile as young as 10 years old. While state laws differ, most have a variation or combination of requirements from *Kent v. United States* (383 U.S. 541, 566-67, 1966) that meet specific age and serious crime criteria. The crime must be serious, aggressive, violent, premeditated, and done in a willful manner. Further, the crime must be against persons with a seriousness of personal injury. Juveniles are evaluated on their sophistication or maturity, determined by external factors, such as emotional attitude and the juvenile's record and history. The evaluation must conclude that the public is adequately protected, in that if the juvenile is not treated and punished as an adult, the public is not protected from future victimizations. All of these transfer processes authorize juvenile courts to designate juvenile delinquency cases to adult criminal proceedings. There are three types of legislative waivers: discretionary, mandatory, and presumptive. All waivers must meet some aspect in any given case: a minimum age, a specified type or level of offense, serious record of previous delinquency, or a combination of these three criteria. Waivers may be initiated by prosecutors by filing a motion or juvenile court initiation.

Discretionary waivers (found in 46 states) specify broad standards to be applied for consideration of a waiver. Most common is when the court exercises its discretion to

waive jurisdiction when the interests of the juvenile would be served. Further, some state legislations call on waivers when public safety or interest requires it or when the juvenile does not seem responsive to rehabilitation. Many states combine these standards. For instance, a waiver in the District of Columbia requires adult prosecution of a juvenile if it is in the interest of the public welfare and security, and there are no prospects for rehabilitation. In contrast, Kansas allows waivers whenever the court finds “good cause,” while Missouri and Virginia allow waivers when the juvenile is not a “proper subject” for treatment (Griffin et al., 1998). In 1997, Hawaii lowered the age limit for discretionary waivers, adding language that allows a waiver of a minor at any age (previously 16) if charged with first- or second-degree murder (or attempts) and there is no evidence that the person is committable to an institution for the mentally defective or mentally ill (Torbet & Szymanski, 1998).

The statutes of 14 states provide mandatory waivers in cases that meet certain age, offense, or other criteria. In these states, the proceedings are initiated in juvenile court, sending the case to the adult criminal court. All states with mandatory waivers specify age and offense requirements. Ohio requires that a juvenile who commits any criminal offense at the age of 14 or higher and meets certain legislative requirements must be waived to criminal court. West Virginia requires that a juvenile must be 14 and have committed specific felonies before the case is waived to criminal court. Delaware and Indiana do not specify an age. In Connecticut, the law stipulates that where the mandatory waiver provision applies, the juvenile’s counsel is not permitted to make any argument or file a motion to oppose transfer, arguably a due process violation. In fact, mandatory waiver

occurs where a finding of probable cause is necessary. The court makes it without notice, a hearing, or any participation on the part of the juvenile or their attorney.

Presumptive waivers (found in 15 states) place the burden of proof on the juvenile. If a juvenile meets a specific age, offense, or other statutory criteria and fails to make an adequate argument against transfer, the juvenile court must send the case to criminal court. In some states, older juveniles are singled out, even when the offense of which they are accused would not otherwise trigger a waiver. For example, New Hampshire requires that the same crimes that would merely authorize consideration of a waiver in the case of a 13-year-old, would require one for a 15-year-old.

Although these provisions of juvenile transfer to criminal court are generally believed to be responses to the increase in juvenile violence, a large number of laws also includes prosecution for nonviolent offenses. Most often arson and burglary (21 states) and drug offenses (19 states) committed by a juvenile may be prosecuted in criminal court. Nine states authorize or mandate prosecution for escape (Arkansas, Illinois, Michigan, Oregon), soliciting a minor to join a street gang (Arkansas), “aggravated driving under the influence” (Arizona), auto theft (New Jersey), perjury (Texas), and treason (West Virginia). Further, many states allow or require transfers for misdemeanors, ordinance violations, and summary statute violations, such as fish and game violations (Griffin et al., 1998).

### **JUVENILES INCARCERATED IN ADULT PENITENTIARIES**

The trend to waive more youths to criminal court coincides with the increased willingness of criminal courts and juries to sentence adult offenders to death (Feld, 1999).

According to the Office of Juvenile Justice and Delinquency Prevention (Snyder, 1999), in 1998 seven percent of all juvenile admissions to custody were referred directly to criminal court. The average daily juvenile population held in adult jails in 1992 was 2,527, an increase of 62% since 1983. A 1992 survey of 29 states found that 1,090 youths were sentenced to prison by adult courts (Austin et al., 1995). The American Correctional Association (1999) reports that in 1995, more than 11,000 juveniles were in prison or other long-term adult correctional facilities, and more than 2,600 of these were under the age of sixteen. In 1996, the one-day count of juvenile offenders held in local adult jails was 8,100, an increase of 20% from 1994 (Sickmund, Synder, & Poe-Yamagata, 1997). The average prison sentence for juvenile offenders convicted as adults averaged about nine years; for violent offenses the average was almost 11 years (Strom, Smith, & Snyder, 1998).

Get tough policies for juvenile offenders are viewed as a deterrent for “out of control” juveniles and a means to protect society, yet in reality incarcerating juveniles in adult facilities has proven to be detrimental. Failure to separate juveniles from adults leads to exposure to people with extensive criminal records and the youths are common targets for sexual or physical assault (Struckman-Johnson, et al., 1996). Juveniles housed in adult penitentiaries and jails commit suicide at a far higher rate. This applies to juveniles as young as 12 and relatively minor, non-violent offenders. Studies have found that juveniles who are prosecuted and punished as adults are more likely to re-offend and to do so more quickly compared to juveniles who are dealt with by the juvenile justice system (Howell, 1997).

Federal and state governments and correctional authorities have recognized the

inherent dangers in housing juveniles with adults, yet their responses to the need to protect incarcerated children from adult inmates are inconsistent. In 1974 the U.S. Congress passed legislation to provide a strong financial incentive for states to separate adult and juvenile offenders. In 1980 Congress reviewed the evidence of the detrimental effects of housing juveniles with adults (noted above), resulting in legislation requiring the complete removal of juveniles from adult jails and police lockups (Amnesty International, 1998b). However, the protection offered by the federal legislation only applies to some juveniles. States are not required to separate juveniles from adults if the juvenile is prosecuted as an adult for violating a state criminal law. In some jurisdictions, a juvenile who has committed even a relatively minor, non-violent offense may be imprisoned in the general population. For instance, in 1977 Native American Yazi Plentywounds (age 16) was convicted of shoplifting two bottles of beer. He was sentenced to two years at the adult state prison in Cottonwood, Idaho, because he had a prior conviction for “grand theft,” which involved breaking a shop window worth \$300 in order to steal some cases of beer (Amnesty International, 1998b).

### **RACE AND THE CRACKDOWN ON YOUTH CRIME**

It is apparent that the recent crackdown on youth crime has specifically targeted racial minorities, especially African-Americans. In 1995, for instance, while African-American youths made up about 12% of the juvenile population, their rate of arrests for all crimes was double that of white youths. The “war on drugs” has been the biggest culprit in this crackdown. Whereas in 1972 white youths had a higher arrest rate than African-Americans, by the early 1980s (at

roughly the beginning of the “war on drugs”) the difference was reversed. By 1995 the change was incredible: the arrest rate for African-Americans was almost three times greater than for whites!

Race may actually play an indirect role in that it relates to the offense, which in turn affects the police in their decision to arrest. Race may also relate to the visibility of the offense. This is especially the case with regard to drugs. There is abundant evidence that the “war on drugs” has, in effect, resulted in a targeting of African-Americans on a scale that is unprecedented in American history. As the research by Jerome Miller has shown, young, African-American males have received the brunt of law enforcement efforts to “crack down on drugs.” He notes that in Baltimore, for example, African-Americans were being arrested at a rate six times that of whites with more than 90% of the arrests for possession (Miller, 1996, p. 8; see also Currie, 1993; Tonry, 1995; Mann, 1995; Chambliss, 1995; Lockwood, Pottieger, & Inciardi, 1995).

An even more alarming study in Baltimore found that total arrests for black youths was around 86 in 1981 (versus 15 for whites); by 1991 that number had increased to 1,304 for blacks, compared to a mere 13 for white youths (p. 86)! Nationally, between 1987 and 1988, the number of whites brought into the juvenile court remained virtually the same (up 1%), but the number of minorities referred to the court increased by 42%. In Miller’s own study of Baltimore, he found that during 1981 only 15 white juveniles were arrested on drug charges compared to 86 African-Americans; in 1991, however, the number of whites arrested dropped to a mere 13 while the number of African-Americans skyrocketed to a phenomenal 1,304, or an increase of 1,416%! The ratio of African-American youths to whites went from about

6:1 to 100:1 (Miller, 1996, pp. 84-86).

Another study found that “black youths are more often charged with the felony when [the] offense could be considered a misdemeanor...” Those cases referred to court “are judged as in need of formal processing more often when minority youths are involved.” When white youths received placements, such “placements” are more often than not “group home settings or drug treatment while placements for minorities more typically are public residential facilities, including those in the state which provide the most restrictive confinement” (Miller, 1996, p. 257). A study by McGarrell found evidence of substantial increases in minority youths being referred to juvenile court, thus increasing their likelihood of being detained. Cases of the detention, petition, and placement of minorities never-the-less exceeded what would have been expected given the increases in referrals. There has been an increase in the formal handling of drug cases, which has become a disadvantage to minorities. “Given the proactive nature of drug enforcement, these findings raise fundamental questions about the targets of investigation and apprehension under the recent war on drugs” (McGarrell, 1993, quoted in Miller, 1996, p. 258). As noted in a study of Georgia’s crack-down on drugs, the higher arrest rate for African-Americans was attributed to one single factor: “it is easier to make drug arrests in low-income neighborhoods....Most drug arrests in Georgia are of lower-level dealers and buyers and occur in low-income minority areas. Retail drug sales in these neighborhoods frequently occur on the streets and between sellers and buyers who do not know each other. Most of these sellers are black. In contrast, white drug sellers tend to sell indoors, in bars and clubs and within private homes, and to more affluent purchasers, also primarily white” (Fellner, 1996, p. 11).

Given the above data, it is little wonder that African-American youths have received the brunt end of law enforcement, including certification and incarceration in adult facilities and the imposition of the death penalty. Speaking of the death penalty, here we have one of the ultimate results in the recent crackdown on youth crime. It is to this topic that we now turn.

### DEATH PENALTY CONVICTIONS AND EXECUTIONS

The death penalty is an inappropriate penalty for individuals who have not attained full physical or emotional maturity at the time of their actions. Currently, 38 states and the federal government have statutes authorizing the death penalty for certain forms of homicide. Of these 38 states, four have chosen the age of 17, and 20 states use age 16 as the minimum age a person must be in order to receive the death penalty. About one in every 50 individuals on death row is a juvenile offender. Almost three percent of all new court commitments to death row are those persons who committed their crimes while a juvenile (Strieb, 1999).

Imposing sentences of “life without parole” on waived youth for crimes committed at 13 or 14 years of age and executing them for crimes committed at 16 or 17 challenges the social construction of adolescence and the idea that juveniles are less criminally responsible than adults (Feld, 1999, p. 236). Strieb (1999) finds that executions for crimes committed by youths under 18 account for 1.8 percent (357) of all confirmed legal executions carried out between 1642 and the present. In 1993, there were 36 persons on death row who were convicted of committing a crime while under the age of 18 (Regoli & Hewitt, 1994). As of June 1999, there were 70 persons (24 in Texas) on death row who were juvenile offenders when they committed their crime. Between 1973 and

June 1999, 13 juvenile offender executions have been carried out in the U.S. (Strieb, 1999) and three juvenile offenders were executed in the U.S. during January 2000 (American Bar Association, 2000).

The U.S. accounts for the majority of known juvenile offender executions (ten since 1990). More than 72 countries that retain the death penalty in law have abolished it for juvenile offenders. The United States stands along with five other countries in which such executions are reported to have been carried out in the 1990s: Iran, Pakistan, Saudi Arabia, Yemen, and Nigeria. In other words, the United States stands alone among western, democratic nations that impose the death penalty upon those who commit their crimes as juveniles.

The imposition of the death penalty on juveniles is not without international criticism. Eleven countries—Belgium, Denmark, Finland, France, Germany, Italy, Netherlands, Norway, Portugal, Spain, and Sweden—have voiced their objection to this continued practice in the United States (United Nations, 1997). The United Nations Human Rights Committee contends that the U.S. “undermine[s] the effective implementation of the Covenant [International Covenant on Civil and Political Rights] and tend[s] to weaken respect for the obligations of the State parties” (United Nations, 1998).

The legality of capital punishment for juveniles is left up to individual jurisdiction. In the case of *Thompson v. Oklahoma* (487 U.S. 815, 1988), the Supreme Court ruled that executing youths under the age of 16 was unconstitutional and “the chronological age of the minor is itself a relevant mitigating factor” (*Eddings v. Oklahoma*, 455 U.S. 104, 1982).

Public calls for the death penalty for juvenile offenders are made in response to high-profile juvenile homicides. Several

politicians appear to be in a contest to see who can appear to be the toughest. The governor of New Mexico has publicly stated that he favored the death penalty for juveniles as young as age 13. The governor of California has indicated personal support for the death penalty against 14-year-olds, and a Los Angeles District Attorney stated that he favored the death penalty for children “no matter what their age.” A Texas state representative contemplated introducing legislation under which 11-year-olds who commit murder could be sentenced to death (Amnesty International, 1998a).

In 1998 the case of Michael Domingues was brought before the Nevada Supreme Court. Michael Domingues was convicted in 1994 for a crime he committed when he was 16 years old, the murder of his next door neighbor and her four-year-old son in their home. His case was appealed based on the violation of international law and the U.S. ratification of International Covenant on Civil and Political Rights (ICCPR).

The Nevada Supreme Court voted that the death sentence was legal and binding. The justices stated that “many of our sister jurisdictions have laws authorizing the death penalty for criminal offenders under the age of eighteen and such laws have withstood Constitutional scrutiny” (cited in Amnesty International, 1998b). The Court reached this conclusion by looking at other U.S. states rather than examining international opinion or practice. They also ignored the fact that in 1998, 14 states and two federal jurisdictions (civilian and military) have legislation that prohibits the death penalty for any juvenile offender. Yet, there is a long-standing principal of international jurisprudence that the nation state is the subject of international law, which the United States continues to ignore.

## **VIOLATIONS OF INTERNATIONAL LAWS AND TREATIES**

According to the United Nations (1998), the U.S. policy on executing juvenile offenders violates international laws and treaties signed or ratified by the United States. In 1955 the United States ratified Article 68 of the Fourth Geneva Convention (1949), relative to the Protection of Civilian Persons in Time of War, which states “...the death penalty may not be pronounced on a protected person who was under 18 years of age at the time of the offense” (Amnesty International, 1998a). Thus, for four decades, the U.S. has protected all civilian youthful offenders in protected countries from the death penalty during war or armed conflict. Yet, U.S. policies and practices refuse to protect youths in this country during peace. The International Covenant on Civil and Political Rights was signed by the U.S. in 1977 and ratified in 1992 (United Nations, 1997).

The provisions in this covenant include that youths should be separated from incarcerated adults and receive appropriate treatment (Article 10) and that the death penalty (Article 6) must not be imposed for crimes committed by juvenile offenders. The U.S. submission to the Human Rights Committee examining compliance with ICCPR states that the U.S. reserves the right to treat juveniles as adults in exceptional circumstances, including the right to imprison children with adults and imposing the death penalty. These exceptional circumstances include juveniles as young as 13 and 14 years old being housed with adults. The U.S. government submitted that the policy and practice of the United States are generally in compliance with and supportive of the Covenant’s provisions regarding treatment of juveniles in the criminal justice system. Nevertheless, the United States reserves the

right in exceptional circumstances to treat juveniles as adults... (United Nations, 1997, p. 28).

The Inter-American Commission on Human Rights has also found that the United States violates international law (Paul, 1999), as did the U.N. Special Rapporteur, which “emphasizes that international law clearly indicates a prohibition of imposing the death sentence on juvenile offenders. Therefore, it is not only the execution of a juvenile offender which constitutes a violation of international law, but also the imposition of a sentence of death on a juvenile offender by itself” (United Nations, 1998, p. 10). Nevertheless, the Republican National Committee Chairperson called on the U.S. administration to publicly renounce this report and ensure that none of the U.S. debts to the U.N. were paid until the report was formally withdrawn and apologized for (Amnesty International, 1998a).

Further, the U. S. resists international human rights commitments for children in the failure to ratify the Convention of the Rights of the Children (CRC). A total of 192 countries have ratified the convention, while two countries have not—United States and Somalia. Article 6 of the convention states that all children must be guaranteed the right to survival, life, and development. Article 3 refers to the “best interests of the child” being a primary consideration. These laws apply to all juveniles, including those who are accused or convicted of violating the law (United Nations, 1997, 1998).

The general perception that human rights are a prerogative of international affairs and not a domestic issue is predominant in state jurisdictions. Within the U.S., state, and local jurisdictions have a low level of awareness of international human rights standards. Hence, human rights seem not to be taken seriously in the U.S. (United Nations, 1998). When defense

attorneys bring international human rights issues to the courtroom, judges, and prosecutors dismiss treaties and international laws stating that these laws are irrelevant because they are not state law. This demonstrates a serious gap between federal and state governments concerning international obligations taken by the U.S. government. The United Nations (1998) documents that the U.S. cannot claim to represent states at the international level and ensure that human rights obligations are fulfilled.

The vast majority of juvenile offenders executed in the U.S. before 1972 was sentenced to death and executed while still teenagers. The current application of the death penalty means that most juvenile offenders will be well into their adult years by the time they are executed. Perhaps the fact that it is not actually a child strapped down and killed makes it easier for society to stomach this human rights violation. The fact remains, however, that such prisoners are being executed for crimes they committed as juveniles. Many have been sentenced to death by juries that were not in the position to fully consider the mitigating aspects of the youths and their backgrounds.

For instance, on October 14, 1998, Dwayne Allen Wright was executed in the Greensville Correctional Center in Virginia. Dwayne Wright grew up in a poor family in a neighborhood characterized by illegal drug activity, gun violence, and homicides. At the age of four, Dwayne’s father was incarcerated. His mother, suffering from mental illness, was unemployed for most of his life. When he was 10, his older brother was murdered, after which Dwayne developed serious mental problems. He did poorly at school and for the next seven years spent time in hospitals and juvenile detention facilities. He was treated for major depression with psychotic episodes,

his mental capacity was evaluated as borderline retarded, his verbal ability retarded, and doctors found signs of organic brain damage. Many appealed to the state governor to give Dwayne clemency. These included appeals from the American Civil Liberties Union, Reverend Jesse Jackson, and Senator Edward Kennedy. The American Bar Association president reportedly wrote: "A borderline mentally retarded child simply cannot be held to the same degree of culpability and accountability for their actions to which we would hold an adult." Dwayne Wright's attorneys obtained affidavits from two jurors in his 1991 capital trial who stated that they would not have sentenced him to death had they known of brain damage suffered at birth which left Dwayne prone to violent outbursts. One juror stated "Had I been told the truth about Dwayne during his trial, I never would have voted to impose a death sentence" (Amnesty International, 1998a).

On January 10, 2000, Douglas Christopher Thomas was executed in Virginia. Questions still remain about his responsibility for the crime of which he was convicted—killing his girlfriend's mother. Witnesses came forward before his execution to reveal that Thomas's co-defendant (his girlfriend, Jessica Wiseman) admitted that it was she who killed her mother. Further, psychologists chosen by the Commonwealth found that Thomas's intellectual deficits and emotional disturbances mitigated the criminal behavior. In fact, the Commonwealth's psychologist opposed Thomas's execution (American Bar Association, 2000).

## CONCLUSION

Putting juvenile offenders on death row reflects an inherent cruelty, is a failure as a deterrent, and risks wrongful conviction, inadequate legal representation, and prejudice

and discrimination. William Paul (1999), president of the American Bar Association, publicly renounces capital punishment for juvenile offenders. With absolutely no deterrent effect, the executions of juvenile offenders only satisfies a need for vengeance. Society overlooks the fact that many juvenile offenders on death row have mental or behavioral disorders or have suffered from physical, psychological, or sexual abuse.

These recent trends must be seen in the context of growing inequality and racism within this country. The most recent data show that growing numbers of minorities are living in poverty; almost half of African-American children live in poverty. These trends also parallel the overall growth in the amount of inequality within the United States (Children's Defense Fund, 2000).

In the meantime, the share of the total capital going to the top wealth-holders has increased, with the top five percent getting 61% of all household assets in 1997, up from 56% in 1983. During this same period, all other households received proportionately less (Sklar, 1998). Overall inequality, measured by what is known as the *Gini Index of Inequality* (a scale where 0 means everyone earns the same amount and 1 means one person earns all), has gone up since the late 1960s. Whereas in 1970 the index for the United States was 0.353, in 1996 it was at 0.425, larger than any other industrialized nation (Miringoff & Miringoff, 1999, p. 105). During this same period of time, the proportion of total income received by the top five percent of the households went from 16.6% to 20%. The "super-rich" reaped the most benefits from the "trickle-down economics" of the 1980s as the wealthiest ten percent of the population received 85% of the stock market gains between 1989 and 1997. Indeed, the rich are getting richer and practically everyone else is

getting poorer! And most of the increase has been the result of the “tax reforms” of the Reagan-Bush years in the 1980s, resulting in an estimated one trillion dollars going to the very rich! One study found that between 1977 and 1994 the share of after-tax-income of the top one percent of all families increased by 72% compared to a decrease of 16% by the bottom 20% of all families (Shapiro & Greenstein, 1997).

Several social-structural changes have devastated most inner cities. The movement of capital out of the inner cities (“capital flight”) corresponded to the phenomenon of “white flight” and the exodus of many middle-class minorities, while the decline of the tax base for these areas and the increasing concentration of the poor were left behind. There has also been a corresponding decline in federal funding for social programs, particularly those targeting

the urban underclass. Among the specific types of programs that suffered were aid to disadvantaged school districts, housing assistance, financial aid to the poor, legal assistance to the poor, and social services in urban areas in general (Cummings & Monti, 1993, p. 306).

There has been a marked decline in job opportunities, especially for minorities. Many jobs and basic services have shifted to the suburbs, as has the tax base. It used to be common for many minority youths to be able to find unskilled and semi-skilled jobs. Today these jobs are disappearing and being replaced by either low-wage service jobs or high-wage jobs requiring advanced skills and education. But recent “moral panics” have deflected concern away from these structural problems and onto those most disadvantaged, especially children.

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# PREGNANT GIRLS AND MOMS IN DETENTION

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## INTRODUCTION

### FEMALE DELINQUENTS

The whole matter of delinquent activity by girls received little attention until the 1960s (Kratcoski & Kratcoski, 1990). Since then, there has been some controversy about the criminality of girls. A public conception that girls are becoming more violent and more dangerous prevails. According to the FBI, the violent crime index rate almost doubled for females, while increasing 60% for males, between 1988 and 1994. The violent crime arrest rate for females was 129 (in every 100,000) in 1998 compared to 69 in 1981. The increases in rates for property crimes are similar.

In 1998 females accounted for 29% of juvenile arrests for property crime compared to 19% in 1981 (Office of Juvenile Justice Detention Prevention, 2000). According to the Sourcebook of Criminal Justice statistics (1999), females made up 13.5% of juveniles in public or private detention, corrections and shelter facilities in 1997 (p. 495). The increase in arrest and custody rates for girls may not indicate that girls are actually more dangerous in 2000 or that differences between the delinquency of males and females are diminishing (Chesney-Lind, 1997). Significant gender differences were found in both the

types of offenses and the frequency rates of delinquency. The offense rate for boys was four times greater than for girls. Ratios clearly indicate that as the levels of crime-related delinquency increase, fewer and fewer females are found to be involved compared to males (Kempf-Leonard & Tracy, 2000). Several studies have revealed significant decreases in girls' involvement in felony assaults, minor assaults, and hard drugs, and no change in a wide range of other delinquent behaviors (Chesney-Lind, 1997).

Despite sustained differences in offending, evidence shows a trend toward a male-female convergence in the numbers of juvenile arrest rates (Regoli & Hewitt, 1997). The changes result from legal and political shifts, such as the shift from the paternalistic attitude pervasive during the 1960s to the law-and-order attitude which has prevailed since the late 1970s (Stevenson, 1999). The U.S. is going through a repressive period in juvenile justice; a period in which the emphasis on rehabilitation has virtually disappeared (Hubner & Wolfson, 1999). For females, although their crimes are generally less serious than those committed by males, a get-tough approach means that females are subject to harsher treatment within the juvenile justice system because of few adequate alternatives (Beger & Hoffman, 1998).

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Both structural and procedural gender bias is pervasive in juvenile justice, which has negatively affected programs and services for female juvenile offenders (Albrecht, 1996). On the basis of both official statistics and self-reported delinquency studies, it appears that females do commit fewer offenses than males. But, beginning at the point of arrest, girls receive different treatment from that accorded boys from law-enforcement and other juvenile justice officials (Kratcoski & Kratcoski, 1990). Female juveniles are more likely than males to be detained and committed to residential programs for less serious offenses and infractions which would not be crimes for adults (Schaffner et al., 1998). Data on juvenile status offenses reveal that females are more likely to be taken into custody for running away, whereas males are more likely to be detained for liquor law violations (Potter, 1999). The misdeeds for which girls are arrested reproduce a pattern which has been, and is still, tied to the desire to control girls' sexuality. The actions of the juvenile justice system have historically served to reinforce the obedience of all young women to patriarchal authority, no matter how abusive and arbitrary (Chesney-Lind & Sheldon, 1998). Detaining females for status offenses has been the most obvious application of the double standard by the juvenile court. Females are more frequently committed to long-term institutions for delinquents for status offenses than for delinquent acts (Kratcoski & Kratcoski, 1990).

At the national level, the major source of current data on juveniles in custody is the 1991 Children in Custody Census. It showed that of the youths admitted to juvenile facilities and adult jails, males represented 79% and females 21%. Females were more likely to be held in private facilities and less likely to be placed into adult jails. In 1991

13% of juveniles held in adult jails and private facilities were female. Females were held for more low-level, status offenses than males; private juvenile facilities are primarily non-secure or low-level security. According to the census, 20.5% of males and 10.4% of females were held for violent offenses. Probation violations accounted for 13% of the females held in custody and 7% of the males (OJJDP, 1993). Detention centers have become settings for punishing juvenile probationers who misbehave rather than facilities for the temporary care and custody of minors awaiting court adjudications. Statistical results indicate that females were incarcerated longer than males for disobeying probation rules (Beger & Hoffman, 1998). Status offenses show an even greater disparity: 1.8% of males and 12.9% of females were held for status offenses. Between 1983 and 1991, delinquent offenders in public facilities increased, but status offenders decreased almost 27% (OJJDP, 2000). This decrease results in fewer males in the system for status offenses with more females being detained. The preponderance of the research suggests that males are just as likely as females to commit most status offenses. It is evident, however, that females are treated more harshly. Chivalrous treatment appears to be reserved for adult women who are not prostitutes, whereas the treatment of juveniles (and prostitutes) at many stages of the justice process is harsh (Belknap & Holsinger, 1998).

#### **ABUSE**

The correlation between child abuse and later juvenile delinquency is very strong (Reed, 1997; Prescott, 1997; Kelley, Thornberry, & Smith, 1997). This social issue may detract from attempts to explain females' delinquency if the factor of abuse is not placed into a social context. Earlier criminologists

described female delinquents as defective, disorganized, dependent, and oversexed (Leonard, 1982). Recent research has also documented a correlation between female delinquency, birth defects, slow early development, and poor self-esteem, which leads to early sexual relations and conflicts with parents (Siegal & Senna, 2000). Females in juvenile detention facilities are also reportedly at a higher-risk for self-destructive behavior (Mace, Rohde, & Gnau, 1997).

The data can be interpreted from a psychological or a sociological perspective. Factors which contribute to the risk of female delinquency include sexual victimization and abusive and traumatizing home lives (Dembo, Williams, & Schmeidler, 1993). A seriously troubled home life appears to be a more significant factor for female delinquents (Ellis, O'Hara, & Sowers, 1999). Clearly, family crises result in personal issues for the girls involved, but a broader social perspective provides a more useful outlook for policy and, more important, implications for intervention. The lives of incarcerated young women reveal three common themes: independence at an early age, extensive free time, and the inadvertent nature of their crimes (Chesney-Lind & Sheldon, 1998). While each of these themes describes personal characteristics, they suggest that treatment implies constructive supervision and free time activities—changing the situation.

#### **GIRLS IN THE JUVENILE JUSTICE SYSTEM**

Although it led to sweeping reforms, The Juvenile Justice and Delinquency Prevention Act (1974) failed to address the special needs of female delinquents. It is clear that females are generally kept longer in detention than males if they are unmanageable or abused (Martinez, 1992). Females now make up the fastest growing segment of the

juvenile justice system (Acoca, 1999). In addition, a study by *US News & World Report* in Colorado, Florida, and Ohio found that 51%, 49%, and 44% of females in their systems respectively had mothers who had been arrested or incarcerated. According to a separate study by the National Council on Crime and Delinquency, more than half of the nearly 200 girls locked up in four California counties said their mothers had been incarcerated during their childhood (Locy, 1999). Most females in the juvenile justice system need fewer programs and more support to live on their own because many cannot or will not return home (Chesney-Lind & Sheldon, 1998).

The warehousing of children has traditionally been structured along class lines, and the current model of juvenile justice is not an exception (Curtin, 1998). While representing 34% of the total U.S. juvenile population in 1997, minorities represented 62% of those in detention (The Center on Juvenile and Criminal Justice, 2000). According to the study, "Children taken into custody" (OJJDP, 2000) in every category of criminal activity, black females are more likely to be admitted than whites. For personal crimes the rate is 24 (per 100,000) for blacks compared to four for whites. For property crimes the difference is 26 (per 100,000) for blacks and nine for whites. In Florida non-whites make up 23% of the population of the state, but they are 40% of those charged as delinquent, 40% of juveniles in community control, 50% of juveniles in residential treatment, and 50% of youths prosecuted as adults (Florida Juvenile Justice Advisory Board, 2000). Studies of court behavior in recent years have signaled a new form of double standard of juvenile justice—one for white girls and another for girls of color (Chesney-Lind & Sheldon, 1998).

The present study took place in District Twelve of the Juvenile Justice System in Florida,<sup>1</sup> where detention was systematized state-wide during 1951. Now detention is available for a wider assortment of juvenile offenses compared to other states. The Florida Juvenile Justice Act of 1994 demonstrated a punitive stance resulting in a detention system that is overcrowded with delays in the intake process and postponed hearings (Coffey, 1995).

In recent years, the number of youths held in detention in Florida has risen steeply from about 30,400 in 1992-93 to 51,844 in 1996-97 (FDJJ, 1999-2000). From January 1994 through December 1995, the utilization rate of secure detention in Florida increased from 94.7% to 125% (FDJJ, 1996). This is important because detained youths in every state tend to be processed further into the juvenile justice system and are more likely to be adjudicated delinquent than youths with similar offense profiles who are not detained (Chesney-Lind & Sheldon, 1998). One out of four youths in the Florida system today is a girl; five years ago, it was one out of five. Between 1993-94 and 1997-98, there was a 30% increase in delinquency cases involving females in Florida. Females currently represent 29% of all youths referred to the state Department of Juvenile Justice. The number of girls committed to delinquency programs almost doubled from 1993-98. In 1997-98, 21% of the violent felonies in the state involved girls (FDJJ, 1999-2000).

#### **PREGNANT GIRLS AND MOMS**

Given their childbearing potential and the general low risk they pose to their

communities, addressing the needs of delinquent girls offers the best hope of healing the inter-generational cycle of family fragmentation and crime (Acoca, 1999). The number of children born to teenage mothers increased in every state from the mid-1980s until 1990. Beginning in 1991, rates have dropped in 46 states, with the national birth rate for teen mothers also declining. Nevertheless, birth rates for adolescent mothers remain higher in the U.S. than in other industrialized nations. Reports of teen pregnancy are significantly higher among girls with a history of childhood maltreatment. Girls exposed to multiple types of maltreatment are even more likely to become pregnant than girls who experience only one (Kelley, Thornberry, & Smith, 1997).

Overall there were 157,000 births to unmarried females ages 15-17 in 1996. Mothers under age 18, were less likely than older women to receive prenatal care starting the first trimester of pregnancy. Overall, in 1996, low birth weights occurred in 10% of births to mothers younger than age 18, compared with 7% of births to those older than 18. Black teen mothers were more likely to have a low birth weight baby than white teens (14% compared to 9%). The 1996 birth rate for those 15 to 17 years old was less than half the rate for those 18 to 19 years old. The rate for older teenagers dropped 9% between 1991 and 1996. Despite recent declines in birth rates among teens, 1996 rates were still higher than rates during the early to mid-1980s. Birth rates in 1996 were highest for Hispanic teens, followed by Blacks, American Indians, and Whites in that order. Pacific Islanders had the lowest rates.

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<sup>1</sup> This research would not have been possible without the co-operation of Superintendent Paul Finn and the staff of the Volusia County Regional Detention Center in Daytona Beach, FL.

Between 1991 and 1996, the highest decline was in birth rates to Black teens, while the smallest decline was found in numbers of Hispanic teen births (OJJDP, 2000). Notwithstanding racial differences, there was a commonality of experience among pregnant teenagers: childhood physical and sexual abuse, coercive adolescent sexual relationships, early first sexual contact, early first pregnancies (often as a function of rape or incest) abortions, and drug dependence (Waters, Roberts, & Morgen, 1997).

### **METHODS OF STUDY**

Three types of data were employed to examine the self-concepts of pregnant girls and moms in detention: group discussions, essays, and interviews.

### **DISCUSSION IN FOCUS GROUPS**

Four focus groups were held over a six-month period from May to October of 2000. The participants were detainees in District Twelve who chose to attend a "Mom's Discussion Group," which was announced in advance by a handbill posted in the girls' unit of the detention center, asking: Are you a mom? Are you thinking about being a mom? Do you plan to be a mom some day?

Those interested were asked to sign up for a Sunday evening meeting. The number of girls attending varied depending on the number of girls being held at the detention center where the discussion was located, whether or not other activities were scheduled, and prior incidents and conflicts. The groups varied in size from a small group of six

participants to a larger group of 27 girls. The discussion centered around three questions: What does "mother" mean to you? How will you be different from your mother? What is your plan for ten years from now?

### **ESSAYS**

Written data were collected from detainees who participated in weekly parenting classes. The curriculum for the class included ten different topics.<sup>2</sup> The topic of the previous week's class was written on the board in the form of a discussion question during the next session. Detainees were given small legal pads and pencils and encouraged to write their answers to the question. Boys were given yellow pads and girls white in order to establish gender differences in the answers.

Essays were collected over a six-month period from May through October 2000. The number of essays collected differed from week to week. The numbers of detainees attending the sessions varied from 20 to 50 each week. Of those, one-third was likely to be female, depending on the population in the center, staffing, and other administrative factors.

The number in attendance who submitted answers also depended on the situation and their choices. A total of 457 essays were tabulated: 241 from girls; 216 from boys.

Considering the smaller number of girls attending the sessions, females were much more likely to turn in an answer. Essays were based on the following questions:

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<sup>2</sup> Parenting Alternatives is a ten week parenting skills training course designed for readers at any level. Some participants attended one class and others repeated all ten classes several times, depending on their length of stay in detention. The topics were selected because of common needs and general interests: Healthy Parenting, Understanding, Making Plans, Positive Discipline, Emotions, Communication, Sexuality, Stress, Consequences, and Democratic Families.

1. What is your plan? What kind of family do you plan to have?
2. What is the meaning of a "healthy parent?"
3. What does positive discipline mean to you?
4. What is your worst emotion? How can you handle your emotions?
5. How can you communicate with kids?
6. Who is responsible when a baby is born?
7. What is the biggest cause of stress in the family? How can families deal with stress?
8. What is the difference between punishment and consequences?
9. What is your purpose in life?
10. How can you have a family democracy?

#### INTERVIEWS

A closer look at the self-concept of pregnant girls and moms in detention was also possible from ten interviews with detainees who were tested by health department nurses and found to be pregnant. Five of the interviewees were in the detention center of District Twelve, where a daily census identified special needs detainees, such as pregnant girls. The researcher checked the census daily from May through October of 2000. A total of five girls was identified and asked if they would be interested in doing an interview. All agreed. The interviews were held in a private office on a one-to-one basis.

Five of the interviews were held in the detention center of district four where they were conducted in the open day room of the girls' unit. The interviews in district four included observation, interaction, and a more intimate view of the pregnant detainees' perspectives. These interviews were carried out over a three-month period, from August through October 2000 with the subjects consent. The researcher interacted on a daily basis with the five pregnant detainees at district four: attending school, going to meals, participating in outside recreation and education, as well as in games and activities. One of the detainees in district four was chosen for a case study because her experiences were extreme and serious. She provides an exceptional illustration of the problems related to pregnant girls and moms in detention.

#### SELF-CONCEPTS OF PREGNANT GIRLS AND MOMS IN DETENTION

This study is a qualitative evaluation of sensitizing theoretical concepts. Qualitative data have been used to describe patterns, to support quantitative findings, and to provide a useful perspective about pregnant girls and moms in detention. Symbolic Interactionism was the starting point for this inquiry into the self. The sensitizing concepts were ideas discussed in depth by Symbolic Interactionists under the broad topic heading of socialization. Conceptual categories derived from Symbolic Interactionism focused the research on features of self-concept such as self-image, self-control, self-esteem, role, and identity (Hewitt, 1991).

The sensitizing concepts were operationalized for this study using ideas gleaned from a host of theorists including Chas. H. Cooley, George H. Mead, Wm. James, W. I. Thomas, Herbert Blumer, and others. Later scholars, such as Howard S.

Becker, Irving Goffman, Edwin Schur, and Anselm Strauss, contributed to the depth of Symbolic Interactionist theory (Stryker, 1981). Sensitizing concepts such as these developed from Symbolic Interaction theory have a life apart from the experiences of the pregnant girls and moms which gave rise to them because of their connections to conceptual categories and formal theory (Glaser & Strauss, 1967). Operational definitions provided a clear focus for study and a way to ground theoretical concepts in the lives of delinquent girls.

#### **OPERATIONALIZING THE SENSITIZING CONCEPTS**

##### ***Socialization—Becoming a Self in Society***

*Essays:* How can you communicate with children? How can you have a family democracy?

*Interviews:* What is your present relationship with your family? A life-long process that takes place in many ways, socialization can be both formal and informal. It involves learning from personal relationships in everyday life, but also formal arrangements over which the individual has little control. For socialization the focus was on relations of power and also processes and interactions of daily life.

##### ***Self-Concept—That Which I Accept as Part of Me***

*Essays and Interviews:* What is your plan for the future? The idea of self was explored as projected into the future. Self-concept was defined as outlook, tendency to act, and self-reported motives. The focus was on how they saw themselves in the future and how they included the perception of themselves as parents in their viewpoint.

##### ***Self-Image—The Mental Picture I Hold of Myself***

*Essays:* What is the biggest cause of

stress in the family? How can you handle emotions?

*Interviews:* How do you feel about being pregnant? Delinquents were asked about emotions as a means of studying the ideas they had about self-expression. The subject of stress was also of interest because of concerns about the dramatic results of family stress and its impact on the way the girls saw themselves.

##### ***Self-Control—Behavior in Accord with What is Perceived as Right***

*Essays:* What is the difference between punishment and consequences? What does positive discipline mean to you?

*Interviews:* How many times have you been pregnant and what were the outcomes? The concept of self-control or governance was viewed from two perspectives. The concept of self-mastery has to do with maintaining order on the sociological level. It implies restraint and self-discipline on the personal side.

##### ***Self-Esteem—The Fluctuating Estimation I Make of Myself***

*Essays:* What is a healthy parent?

*Interviews:* How do you plan to take care of this baby? Self-esteem varies from positive to negative and is manifest somewhere between the two extremes. The focus was mostly on their perspectives of ideal motherhood, but also on their personal experiences. The goal was to examine the estimates the delinquents made about themselves as moms.

##### ***Role—Expected Patterns of Behavior (for Males and Females)***

*Essays:* Who is responsible when a baby is born?

*Interviews:* What is your relationship with the baby's father? Expectations for

females and males were studied in order to examine their perceptions about gender and parenthood. Self-reports about personal relationships with males were also sources of information about social roles.

***Identity—Attachment to a Position or Status in Society, Connection to Social Institutions***

*Essays:* What is my purpose?

*Interviews:* What do you recommend for policy to handle teenage pregnancy? Identity includes present as well as future aspects of the self. It is rooted in structural and economic causes. One's identity as a particular self either grows with experiences or is diminished by them.

**FINDINGS**

**FOCUS GROUP DISCUSSIONS**

***Socialization: Present Relationship with Your Family***

Although many of the participants talked about love for their mothers, most admitted that they planned to treat their children differently than their moms had treated them. Many horror stories about family life were related by members of the groups; abuse, neglect, exploitation, molestation, and other themes emerged. However, the most negative reactions had to do with having been abandoned.

***Self-Concept: Plans for the Future***

Participants evidently had previous discussions about their plans for the future as most had well articulated dreams for their lives ahead. Their plans were not necessarily well thought out or practical, but most had definite views on how they and their children would be supported. The majority did not want to depend on a male to provide their sustenance, but planned to have good jobs.

***Self-Image: Emotions***

Feelings about pregnancy were explored in all of the focus groups. Because they were focused on pregnancy, there was a bias among those who attended. Very few reported that they did not want any children. Yet the girls in these groups were typical of most girls in detention as evidenced by discussions in similar parenting classes, which were attended by a large number of girls over a long period of time. As they expressed it, being pregnant was a frightening, yet very appealing process. Babies were described in idealistic terms by most girls, although more down-to-earth views were presented by mothers who attended. Nevertheless their feelings toward the concept of motherhood were strong and idealistic. Being there for their children was a dominant theme which emerged in contrast to the participants' actual experiences of abandonment.

***Self-Control: Preventing Unwanted Pregnancy***

Few of the girls attending the focus groups were listed as pregnant or were already mothers. Many more of them thought they might be pregnant. In other words, being pregnant in detention was a concern for many more girls than official statistics revealed. With regard to questions of control and discipline, controversy emerged about sex, drug usage, and their own responsibility to their children. There was no consensus about how much of their liberty they were willing to give up and how much self-restraint they chose to maintain as mothers.

***Self-Esteem: How Do You Plan to Take Care of Your Child?***

Most of the girls in the focus groups had definite plans for their children, which included relationships with other family

members as well as independent means. Their outlooks were mostly positive and generally saw themselves as capable, reliable, and able to care for children.

***Role: Gender-based Relationships and Expectations***

Many of the girls in the groups discussed the males in their lives in idealistic terms. Most also described a male significant other who was important to their expectations for themselves as mothers. They generally saw their boyfriends as positive influences, but many girls also discussed negative experiences and fear and anger in their relationships with males.

***Identity: Experiences with Child Care***

To form an identity, individuals must experience the behavior involved in order to see themselves in the social position. Girls in focus groups frequently described personal experiences in which they were responsible for the lives of small children on an extended basis.

The theme of parental abandonment that emerged in the discussion also included being left with the responsibility of small children at a very young age. Without exception, the girls expressed strong positive feelings about caring for children and deep and abiding love for the children for whom they had been responsible. Strong negative feelings emerged about the lack of resources they had faced and all the problems that arose from having too much responsibility too soon.

**INTERVIEWS WITH TEN PREGNANT MOMS**  
(see Chart 1)

The most common crime for which the subjects were charged was vehicle theft or joy riding. However, whatever the original charge which had brought them into the juvenile justice system, the majority—80 % of the subjects—

were being held for violation of probation or absconding. Six of the interviewees were white four were black. The age differences are also the same; six of the subjects were 16, and the rest were older; their ages were not related to race.

***Socialization: Family Relations***

Six of the subjects reported functional families, although four of their functional families were single-parent relationships in which the girls lived with their mothers but not their fathers.

***Self Concept: Future Plans***

Two subjects reported no future plan. Two subjects discussed marriage and being housewives as their future plan.

The rest of the subjects (70%) mentioned plans which included careers. One planned to be a business executive with a house-husband; another hoped to be a teacher. Three others mentioned vocational training and secure jobs.

***Self-Image: Feelings about Being Pregnant***

Eight of the subjects were happy about being pregnant and two reported fear. Of the 80% who had a positive reaction to questions about being pregnant, many had come to this feeling after surprise and other emotions had been worked out.

***Self-Control: Numbers of Pregnancies***

This was the second pregnancy for 50% of the subjects. Two of them already had children. Having a living child was related to the girls' ages since all of the subjects who were over 16 reported more than one pregnancy.

***Self-Esteem***

*Plans for pregnancy outcome*—Two of the subjects had no plans as yet for their upcoming childbirth. Three hoped to raise the

**CHART 1: INTERVIEWS WITH TEN PREGNANT MOMS**

Race	Age	Socialization; Relation to Family	Self-Concept; 10-Year Plan	Self-Image: How do you feel?	Self-Control: # PGs & Outcomes	Self-Esteem: What plans for this baby?	Identity: PG Policy	Role-Relationship w/baby's dad	Offense
W	18	O.K.— Lives with mom	I don't know	Happy/ Scared	2nd PG 1st Misc.	Raise with baby's dad	Care for children	Yes/Good theft	Vehicle
W	16	O.K.— Lives with mom and dad	Another kid; cosmetology	Nervous/ Happy	2nd PG 1st =Abortion	Be best mom she can be	Promote protection	Yes/Good	Simple assault & battery; multi drug chrages
W	16	Lives with mom	Pre-school teacher	Nervous	1st PG	None yet	Promote protection	Yes/Good	Simple battery V.O.P.
B	16	Lives with mom, dad, & grandma	Married; wants four boys	Happy	3rd PG 2 boys PG now	None	Care for children	Yes - In Detention	Vehicle theft V.O.P.
W	16	Severe sexual abuse; foster care	Computer tech.; pro bull rider	Positive about baby - not dad	1st PG	Support with help of older sister	Care for children	No - He's too young	Battery, larceny, burglary, V.O.P.
B	16	O.K.— Lives with mom	Married housewife	Happy	2nd PG 1st Misc.	Raise baby alone	Care for children	No - In detention	Burglary, simple assault
W	16	Put into detention more than once by mom	I don't know	Happy	1st PG	Raise baby w/her own dad's help	Care for children	Yes - Insecure	Burglary, battery on mom, V.O.P.
W	17	Lives with mom and dad	Office exec with house-husband	Happy	2nd PG 1st Boy	Raise with baby's dad	Care for children	Yes/Good	D.U.I., reckless driving
B	17	Hates foster care; scared of foster parents	Trade school	Don't want baby	2nd PG 1st Girl	Raise with aunt	Protection	No time for boys	Battery, vehicle theft, escape, absconding
B of dad	16	Lives w/mom & dad; scared	Phlebotomist	Surprised	1st PG	Live with mom and dad	Caring detention	Yes - In absconding	Vehicle theft

baby themselves with the help of the baby's father. Three depended on their family members and two expected to take care of the baby on their own. From their responses it is evident that while girls are likely to have hopes for their child, their plans may not be realistic.

### **Role**

*Relationship with the baby's father*—Three of the boys involved in the pregnancies of the subjects were also in detention, but seven of the subjects reported good relations with the baby's dad. Although three subjects reported a negative relationship with their baby's father, only one reported that she had no time for boys.

### **Identity**

*Recommendations for policy for teens*—70% of subjects believed that child care was more important than pregnancy prevention. They would like to see their identities as mothers reflected in public policy priorities.

## **CASE STUDY OF A PREGNANT MOM IN DETENTION**

### **Socialization**

The subject viewed her foster mother as mean, her home as unhappy, and she desperately wanted to get out of her present home life.

### **Self-Concept**

The subject accepted the daughter she already had and the future child as her responsibility. She knew that raising children would be a life-long commitment. She planned to raise the child by herself with the help of her aunt, who is already responsible for the subject's first child.

### **Self-Image**

The subject felt that getting married and having children was the best way to raise children. She believed that women should stay home and take care of the household while the husband works. She said that she did not want her first baby when she was pregnant, but expressed affection and attachment to the little girl during her present detention.

### **Self-Control**

This was the subject's second pregnancy; she continued to have unprotected sex after the birth of her daughter. She had a history of violence including aggravated assault and battery on detention staff. But while in detention for the present charge, she did not receive any disciplinary reports or lose any rewards for negative behavior. She volunteered to do extra work and showed willingness to cooperate.

### **Self-Esteem**

When asked about her plans for the future, the subject was determined to go to trade school, graduate, and raise her children. She discussed this plan frequently and was committed to it despite her beliefs about marriage and being a housewife.

### **Role**

The subject expressed no interest in a relationship with the father of her child or with any other males. She did not discuss her relationship with her first child's father nor did she discuss the father of her current child.

### **Identity**

This subject felt that the best policy for teens was pregnancy prevention including birth control pills and condoms. Her opinion was not typical since 70% of interviewees felt the most important policy focus was child care.

## CHART 2: ESSAYS ABOUT PARENTING CONCEPTS

Level of understanding by gender, number, and percentage

Concept	Subject of Essay	Clear		Limited		Confused		None	
		Boys	Girls	Boys	Girls	Boys	Girls	Boys	Girls
Socialization	Communication with Children (34 boys, 25 girls)	20 59%	19 76%	11 32%	6 24%	2 6%	0 0%	1 3%	0 0%
Socialization	Achieving a Family Democracy (12 boys, 16 girls)	0 0%	0 0%	5 42%	9 56%	0 0%	2 12%	7 57%	5 31%
Self-oncept	Making a Plan (34 boys, 49 girls)	13 38%	21 43%	9 26%	8 16%	9 26%	13 27%	3 9%	1 2%
Self-Image	Largest Cause of Stress in a Family (29 boys, 29 girls)	0 0%	3 10%	24 83%	22 76%	4 14%	2 7%	1 3%	2 7%
Self-Image	Handling Emotion (20 boys, 30 girls)	9 45%	12 40%	6 30%	8 27%	3 15%	5 17%	2 10%	5 16%
Self-Control	Difference between Punishment and Consequences (16 boys, 21 girls)	0 0%	1 4%	9 56%	15 60%	4 25%	3 12%	3 19%	6 24%
Self-Control	Meaning of Positive Discipline (16 boys, 25 girls)	0 0%	3 12%	5 29%	10 40%	4 27%	5 20%	8 47%	7 28%
Self-Esteem	Meaning of a Healthy Parent (17 boys, 16 girls)	14 82%	11 69%	1 6%	1 6%	1 6%	1 6%	1 6%	3 19%
Role	Responsibility for Childbirth (22 boys, 23 girls)	18 82%	18 78%	1 5%	3 13%	0 0%	0 0%	1 5%	0 0%
Identity	Purpose (16 boys, 7 girls)	2 12%	5 71%	8 50%	1 14%	4 25%	0 0%	2 12%	1 14%
<b>TOTALS</b>	<b>271 boys (48%) 239 girls – (52%)</b>	<b>78 36%</b>	<b>95 40%</b>	<b>79 36%</b>	<b>83 35%</b>	<b>31 14%</b>	<b>31 13%</b>	<b>29 13%</b>	<b>30 13%</b>

**ESSAYS** (see Chart 2)

The essays submitted by detainees in parenting classes were tabulated based on the level of understanding of the concept. At the highest level were answers which showed a clear understanding of the concept; next were answers which were relevant to the concept but showed limited understanding; the third level included answers which demonstrated confusion about the concept; and the last level included submissions in which the detainee had either written, "I don't know" or copied the question without answering it. The question: "Who is responsible when a baby is born?" was tabulated slightly differently because the overwhelming majority of the detainees responded similarly with the clear conceptualization that both parties involved were responsible. A small number amplified these answers and showed a complex understanding, so their answers were counted separately.

Girls supplied 52% of the total number of answers, although they made up about one-third of the participants in the classes where essays were submitted. They demonstrated more interest in the topics as well as better writing skills. Their levels of understanding and the depth of their conceptualization were only slightly different from boys, however. Less than one percent of both boys and girls supplied answers tabulated as amplified. Slightly more girls (39%) than boys (35%) supplied essays which demonstrated clear conceptualization.

Boys supplied 36%, and girls supplied 35% of answers tabulated as limited. Boys' answers were very slightly more likely to be confused (14%) than girls' (13%). The same number of boys and girls (13%) wrote the question only, or wrote "I don't know." Similarities in levels of conceptualization about parenting between boys and girls in

detention suggest that boys' self-concepts about fatherhood can be strengthened and enhanced by interventions which bolster their self-esteem and their identities as parents.

***Socialization***

Essays about communication with children and achieving a family democracy addressed the process of socialization. These answers demonstrated diversity between boys and girls. Seventy-six percent of the girls were clear about communicating with children and 59% of boys' answers were tabulated as being clear conceptualizations. These answers may have demonstrated more experience with communicating with children on the part of females. The answers may also have shown better understanding and communication skills for girls. Despite many similarities, the divergence in their answers about communication shows that there are still notable differences between boys and girls and their socialization as parents.

***Self-Concept***

Essays about plans and making plans were considered illustrative of self-concepts. Girls (43%) were slightly more likely to be clear about their plans than boys (38%). Below that level, girls were more likely to describe a confused plan (27%) and boys were more likely to write about a limited plan (26%).

***Self-Image***

Essays about family stress and handling emotions contributed to an understanding of detainees' self-images. There were clearer conceptualizations about handling emotions and more limited conceptualizations about family stress. Differences between boys and girls were not great, but boys were slightly more likely to describe a clearer conceptualization about handling emotions than girls. Both boys' and

girls' conceptualizations about handling stress were likely to be limited.

### ***Self-Control***

Essays about positive discipline and answers about punishment and consequences provided information about self-control in action. Answers to these questions showed a large amount of variance and a majority of confused and limited conceptualizations. Respondents were also more likely to respond with "I don't know" to these questions.

### ***Self-Esteem***

Essays about healthy parenting were considered indicative of the detainees' self-esteem in their conceptualization of themselves as parents. Boys were more likely to be clear about what a healthy parent is. This is the question for which boys' responses (82%) showed greatest clarity.

### ***Role***

Essays about who is responsible when a baby is born showed little variance. These answers were tabulated into an additional category to demonstrate the number of detainees who amplified their answers to this question. Differences between boys and girls were slight.

### ***Identity***

Essays about their purpose in life showed a large difference between girls' and boys' clear conceptualizations. Of the boys, 12% were clear about their purpose in life while 71% of girls who responded were clear about their purpose. This finding is based on a small number of essays, however, and must be considered in that light.

## **DISCUSSION OF FINDINGS**

Although they have not been quantified,

the conclusions to be drawn from this study are complex. Goals, implications, and applications for policy are serious. It is important that teenagers who are pregnant be shown care and concern while, at the same time, girls who are not pregnant must have other means of receiving protection and consideration.

### **SOCIALIZATION**

Girls in detention were more prepared for childbirth and child-rearing than boys, but that is not to say that boys lacked conceptualizations of themselves as parents. Girls were more likely to communicate about themselves in the role of the parent and had more experiences and a better understanding of how to communicate with children. Socialization was a process which often involved caring for youngsters at an early age. Although there were many pressures involved, early responsibility for children did not diminish their desires to be mothers.

### **SELF-CONCEPT**

Although both boys and girls accepted their responsibilities as parents if they were involved in intercourse that resulted in child birth, girls were more likely to have a definite plan for the future which included their children.

### **SELF-IMAGE**

Rather than deterring pregnant mothers, detention may have spelled their doom. The mental picture of themselves as a mother was one which was enhanced and amplified by relations with others in detention. This may have been one of the few times in which they were the center of attention and the recipient of special treatment. When asked what is required in response to the needs of teens, pregnant girls were more likely to recommend a policy of

child care rather than pregnancy prevention. From their perspective, childcare needs came first. Girls were likely to have a realistic assessment of the resources that were available for teenage parents, but an idealized image of mothers. Pregnant girls needed their images as mothers to be validated by public policy, but they were more likely to be denigrated by the lack of resources to care for their children.

#### **SELF-CONTROL**

Rates of pregnancy in general may be decreasing; however, girls who were pregnant in detention were likely to have been pregnant more than once by the time they were 17. This underscores the importance of intervention directed toward the self-concept of pregnant teens and providing alternatives for birth control which are acceptable to females at risk of multiple early pregnancies.

Self-control, discipline, and the potential for abuse are serious concerns in the families of teenaged parents. It is essential that youngsters learn alternatives from the abusive and destructive measures they may have experienced in their own early lives.

#### **SELF-ESTEEM**

Girls had a positive outlook toward pregnancy and being pregnant. A number of girls in detention said they were pregnant and acted as if they were pregnant though health department tests proved negative. In self-reports some girls were troubled about being

pregnant, but if the condition was confirmed, the pregnant girl often found her self-esteem enhanced by the treatment she received. This is a positive result of policy. What is not positive is that pregnancy may be the only avenue to enhanced self-esteem for some adolescents. What are needed are constructive life choices and numerous options for teens.

#### **SOCIAL ROLE**

Relations between pregnant girls and the fathers of their babies were strained at best. The fathers may be in detention, too. Girls were likely to romanticize their relationships, but healthy bonds or productive interactions between pregnant girls in detention and the males who are to be the fathers of their children were not likely. Although intervention for teenage fathers is beyond the scope of this paper, it is a topic of great importance.

#### **IDENTITY**

There was a small number of pregnant girls in detention, but they were significant because of their impact on others. Since nearly half of them were likely to have had mothers who were also incarcerated, these girls represent important subjects for intervention. Far too many girls are being detained for absconding, violation of probation, and running away. In particular, it is not recommended that pregnant girls be arrested and held in detention nor that girls who are mothers be separated from their children by being held in custody for status offenses and escaping.

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# UNLAWFUL MOTIVES AND RACE-BASED ARREST FOR MINOR OFFENSES

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*“Indeed, as the recent debate over racial profiling demonstrates all too clearly, a relatively minor traffic infraction may often serve as an excuse for stopping and harassing an individual. After today, the arsenal available to any officer extends to a full arrest and the searches permissible concomitant to that arrest.”*

— Justice O’Connor, in dissent of the *Atwater* decision

Through a legal and sociological theoretical analysis, this paper shows how two U.S. Supreme Court decisions enable police officers to engage in racially discriminatory policing with ease. The court’s decisions in *Whren vs. United States*, 517 U.S. 806 (1996), and *Atwater v. City of Lago Vista*, 69 U.S.L.W. 4262 (U.S. April 24, 2001) have consequences that exacerbate the epidemic of racially discriminatory policing.

Showing how the *Whren* and *Atwater* decisions pave the way for increased, racially discriminatory policing requires a brief discussion of what is meant by the terms racial profiling and racially discriminatory policing. For the purpose of this paper, racially discriminatory policing is defined as any police treatment of visible minorities that is less than adequate or fair where a similarly situated, white person would receive adequate and fair police treatment, or a situation where a person is singled out for police attention not

because of a violation of law but due to his/her race or ethnicity.

This paper holds that racially discriminatory policing is a white versus people of color problem—specifically, interpersonal conflict between white police officers and people of color. There is not an epidemic problem in America of black police officers, for example, engaging in racially discriminatory behavior toward black people. Often times, white liberals (as well as some conservatives) choose to characterize strained relations between communities of color and white police as a phenomenon of people of color versus the police. Yet the evidence (e.g., in Cincinnati since 1995, 15 black men have been killed by the police, only two by black police officers, although the Cincinnati Police Department has a large number of black police officers<sup>1</sup>) shows that it is most often the behavior of white police officers that rightly outrages black and Latino people.<sup>2</sup> If whites

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<sup>1</sup> CNN, April 12, 2001. *State of emergency, curfew declared in Cincinnati.*

<sup>2</sup> In fact, many black police associations have aligned themselves with black citizens. The associations, comprised of black police officers, are just as critical of police actions against black people as are black citizens and black leaders. See Dulaney (1996); Cooper (2001); Chivers (2001); and the National Black Police Association website at [www.blackpolice.org](http://www.blackpolice.org).

could successfully show that racially discriminatory policing is not primarily a problem of white versus black, then they could argue that race does not play a part in many police/black person interaction situations. The fact that the vast majority of police in America are white<sup>3</sup> and that race relations in general between blacks and whites tend to worsen when there is negative interaction between a black person and a white police officer (e.g., the beating of Rodney King and black vs. white carnage that ultimately followed<sup>4</sup>) explains why people assume that negative references to “police” with regard to matters of race are references to white police officers and not to the police establishment. No doubt there are black police officers who are part of the “problem” however, the data, the sentiment that is expressed publicly of people of color, and the fact that we know the race of the officers complained about leads a reasonable person to believe that racial profiling and racially discriminatory policing is not for example a “black on black” dilemma or a “Puerto Rican on Puerto Rican” problem.<sup>5</sup>

*Racial profiling* represents one type of

racially discriminatory policing. Although police officers have always profiled, just as every thinking human being profiles, problems arise when police officers take action based on aversions or misguided assumptions or beliefs about others. To illustrate: a police officer seeks out black motorists, for example, in order to give them traffic citations because of the officer’s aversion to black people. In this case, the officer is looking for a person who fits the profile of what a black person looks like in his/her mind. He or she has decided not to issue citations to whites who commit traffic violations but will cite blacks who commit them.

Problematic profiling also occurs when police suspect, stop, and detain any and all people belonging to a specific racial or ethnic class of people rather than those in the class who fit the description of the subject sought in an investigation. By illustration, in September 1992, in Oneonta, New York, a white woman was attacked by a person whom she described as a black male.<sup>6</sup> In response, the police conducted a “sweep” of the State University of New York College of Oneonta

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<sup>3</sup> U.S. Department of Justice, Bureau of Justice Statistics Law Enforcement Management and Administrative Statistics (1999).

<sup>4</sup> Reference to the 1992 Los Angeles riot that followed the acquittal of the officers who beat Rodney King.

<sup>5</sup> Dunham and Alpert’s study, *The Effects of Officer and Suspect Ethnicity in Use of Force Incidents* (1999), needs to be interpreted properly. The results of the study were not intended as a massive frontal assault on Black opinion and black police officers, but in the wrong hands, the findings could have that impact. The study of the Miami-Dade Police Department shows that the department’s black officers use slightly more [physical] force on blacks than do white officers. Dunham and Alpert are not saying that the force used is illegal, brutal, or racially motivated. Officers in the study are required by departmental policy to report all uses of force (via filling out a form). Black officers (and visible Latino officers) know that the police department regulations are often applied to them more harshly than they are for Anglos. For example, in New York City, the data show that black police officers are more harshly punished for actions than white officers who engage in the same behavior. Where a black officer would be inclined to report a use of force out of fear of a double standard policy for noncompliance, a white officer would not be so inclined. Additionally, while white officers routinely shoot black police officers (e.g., Charles McGee killed by a colleague in 1994 in Washington, D.C.) since they assume that black police officers not in uniform and performing a police function are suspects, there is no evidence to show that a black police officer has ever shot a white police officer in similar circumstances in the United States.

<sup>6</sup> See *Brown vs. City of Oneonta*, 1999.

campus looking for black males. The police stopped more than 200 non-white persons. The U.S. Supreme Court ruled in *U.S. v. Brignoni-Ponce* (1975) that race/ethnicity cannot serve as the sole factor in justifying the police stopping a person. However, 24 years later, the United States Court of Appeals for the Oneonta region held otherwise, defending the right of the police department to stop people solely on the basis of their race (see *Brown v. City of Oneonta*, [1999]).

Some argue that racial profiling does not occur (McPhee, 2000, p. 2). Rudolph Giuliani, the mayor of New York City, in response to the U.S. Civil Rights Commission and others who say that racial profiling is epidemic in the New York City Police Department stated: “The whole idea of racial profiling in the New York City Police Department is absurd” (Colangelo & Marzulli, 2000, p. 43)<sup>7</sup>. Giuliani, like many who say that racial profiling or any form of racially discriminatory policing does not exist, asserts that the reason so many black people are stopped and frisked by the police, when black people make up a small percentage of the population, is because victims of crimes report that their assailants were black (Colangelo & Marzulli, 2000, p. 43). In other words, the critics want to show that police officers are merely responding to the information provided them.

Racial profiling also occurs when

police are not working with specific information about a suspect or the occurrence of crime; rather the police assume out of naiveté or racial animus that all black people or all Puerto Rican people are “criminals” or that all people of color are “about” to engage in law violating behavior (see Goldberg, 1999<sup>8</sup>). Hence the police target black and other non-white people and perform illegal searches and seizures of persons and property. This particular type of profiling is at the crux of the racial profiling problem in the United States—at a minimum, it is an epidemic of illegal traffic stops.<sup>9</sup>

Case in point: fifteen-year-old Amadou Diallo did not fit a description of a suspect. The only commonality that he had with the rapist, whom the police say they were looking for on the night that they shot Diallo, was that both men were black. Dante Johnson was shot and critically wounded by a white police officer who was looking for a black suspect. When he saw Johnson, he chased him and shot him at point blank range. (Wilson, 2001, p. 26). The officer has since asserted that the shooting was a mistake (ibid.). There are countless verified reports by black and Latino people in America who say that they were stopped on foot or in an automobile not because the police had reasonable suspicion<sup>10</sup> or probable cause,<sup>11</sup> but because they were in

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<sup>7</sup> McPhee’s *New York Daily News* article describes a U.S. Civil Rights Commission Report that cites the New York City Police Department for engaging in racial profiling. Both the police commissioner and the mayor, Rudolph Giuliani, dismissed the report as flawed and described the commission as “lazy and not skilled.” The two stated that no officer in the New York City Police Department engages in racial profiling. Note that the NYPD has approximately 42,000 officers.

<sup>8</sup> Blacks and Latinos describe this type of harassment in a 1998 *New York Daily News* article entitled “Blacks, Latinos: Cops harass us. Young men call tactics offensive and degrading.”

<sup>9</sup> These stops are also known as “Terry stops” is the term coined in the U.S. Supreme Court case *Terry vs. Ohio* (1968). It is defined as the stopping of a person by a police officer, when a police officer observes conduct of the person that leads the officer to reasonably believe that a crime may be afoot. In order to ensure the safety of the officer, the decision in *Terry vs. Ohio* authorizes the officer to frisk (“pat down”) the stopped person for weapons.

white neighborhoods or in an area at a time when police were looking for a black suspect.

Racial profiling by the police often sets a chain of events into motion. The behavior of an officer after profiling is almost always a hasty, reckless, contentious overreaction that marginalizes the self-worth of the accused. Case in point: on January 28, 2000, in Providence, RI, black police sergeant Cornel Young was profiled by two of his white colleagues. They assumed he was a suspect rather than a plain-clothes police officer. Young was attempting to apprehend a gun-toting suspect. The white officers assumed that a black man holding a gun was not a police officer. Within seconds of seeing him, they gunned him down.<sup>12</sup> The officers who killed Sergeant Young said that they thought that he was a suspect, even though the officer standing between seven and 15 feet from Young as he fired knew Young well.<sup>13</sup> The two were in the same police academy class and had worked in a police car together for approximately two weeks.<sup>14</sup> The white officers who killed their fellow officer only saw a black face and what they associated with black faces.

Many interactions between the police and black citizens have a connection to racial

profiling since it is the race of the citizen that prompts the officer to confront the citizen in the first place (Cooper, 2001, p. 385). Clearly, when a police action escalates from officers forming profiles in their minds what criminals look like to using deadly force in reaction, it becomes apparent that racially discriminatory policing has incredible repercussions. For Cornel Young, it began with racial profiling, but soon became a deadly manifestation of racism.

We know that racially discriminatory policing exists although many people argue otherwise (Quinnipiac College Polling Institute, 1999). For those who believe that it does exist, there is an interest in bringing about reform. In New Jersey, reform may be underway and is characterized by admissions of political leaders that racially discriminatory policing exists. Consider a statement by the New Jersey attorney general speaking of the New Jersey state police: "We targeted minorities" (Moritz, 2000). Reforms in New Jersey and other states include requiring officers to document the race and/or ethnicity of all persons stopped. In some jurisdictions, reforms take the shape of stern warnings directed at cops and/or the enactment of policy that prohibits racially discriminatory policing.

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<sup>10</sup> Less than probable cause but sufficient for a police officer to detain a person, often to investigate if a crime is afoot. In *Terry vs. Ohio*, the U.S. Supreme Court held that an officer is legally permitted to conduct a brief, investigatory stop when the officer has a reasonable, articulable suspicion that criminal activity is afoot.

<sup>11</sup> "A requisite element of a valid search and seizure arrest, consisting of the existence of facts and circumstances within one's knowledge and of which one has reasonably trustworthy information, sufficient in themselves to warrant a person of reasonable caution to believe that a crime has been committed [in the context of arrest] or that property subject to seizure is at a designated location" (Giffs in Barron's Law Dictionary, 1996).

<sup>12</sup> Mingis, K. (2000, January 28). "Off-duty Providence police officer shot, killed by 2 other officers." *Providence Journal*; Davis, M. (2000, January 30). "Friendly fire victims haunt fellow police." *Providence Journal*; Rockoff, J. (2000, January 29). "Officer involved in peer's death had shot and wounded before." *Providence Journal*; Breton, T. (2000, February 8). "Experts: Criminal charges against officers unlikely." *Providence Journal*.

<sup>13</sup> Ibid.

<sup>14</sup> Ibid.

Sadly, reforms like these may not slow this policing because the United States Supreme Court is handing down decisions that counteract them.

### THE ROLE OF THE UNITED STATES SUPREME COURT

At this point in time, if we want to stop racially discriminatory policing, we must challenge the following United States Supreme Court decisions: (1) *Whren v. United States* (1996); and (2) *Atwater v. City of Lago Vista* (2001). The 1996 *Whren* decision allows police actions motivated by racism to pass muster in courts of law. All nine justices expressed the opinion that an officer's subjective state of mind (i.e., "I don't like black people") for conducting a traffic stop is irrelevant as long as the officer has a legal right to perform the traffic stop (*Whren*, 1996, p. 813). The 2001 *Atwater* decision allows a racist police officer to elevate the effects of racial profiling by allowing him discretion as to whether to issue a citation or to take a person into custody for minor<sup>15</sup> traffic violations and fine-only misdemeanors (e.g., littering). This enables an officer to have one standard of policing for whites and another for people of color. The officer can manifest his racial aversion by choosing to take non-whites into custody and will never be required to provide any reason why he chose to take a person to jail rather than issuing a citation. The *Whren* and *Atwater* decisions, when employed contemporaneously by a racist police officer, translate to mean that his or her actions will not be

deemed in violation of the Fourth Amendment as long as there was probable cause for the initial stop.

The Fourth Amendment guarantees the rights of persons to be secure in their homes and property (e.g., automobiles) and protected from unreasonable searches and seizures. Some people who are searched and seized by the police are found to have illegal drugs or weapons. In the past, the Fourth Amendment has provided protection in situations where the accused person could show that police violated search and seizure laws in discovering tangible evidence such as drugs or weapons. "Fruit of the poisonous tree" is a common way of describing evidence that was obtained in violation of the Fourth Amendment. If evidence was seized in a warrantless search or when police did not have reasonable suspicion or probable cause at the outset for detaining an individual, the court could suppress the evidence with a result [in many cases] that all charges against the accused are dismissed. With this information in mind, let us take a closer look at what happened in the *Whren* case.

### THE *WHREN* DECISION

On the evening of June 10, 1993, two plainclothes, vice-squad officers from the District of Columbia Metropolitan Police Department were patrolling in an unmarked police car. The officers testified that they performed a traffic stop of a vehicle in which there were two black males, Michael Whren and James Brown. The officers said they

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<sup>15</sup> The word "minor" is used by this author to describe traffic offenses that are not understood by the norms of American culture to be "so" grave that a custodial arrest of a violator is warranted. In this regard, while any type of "speeding" is serious, for the purpose of this paper speeding is a minor traffic offense unless it is indicated that the offense is that of reckless driving. In many jurisdictions, driving approximately 30 miles over the speed limit is defined as reckless driving.

pulled over the vehicle because it had remained stopped at a traffic light for what seemed like an unusually long time—more than 20 seconds—and that the vehicle had sped off from the intersection at an “unreasonable” speed (*Whren*, p. 808). Once the officers stopped the vehicle, they said that they observed two large plastic bags of what appeared to be crack cocaine (*ibid.*). Both Whren and Brown were subsequently arrested and convicted of drug possession. The two appealed their convictions and ultimately went before the United States Supreme Court. They asked the high court to overturn their convictions on the grounds that the stop was illegal. They said the police singled them out because they were black and the traffic stop would not have been performed if they had been white. In short, Whren and Brown wanted the court to hold that the racial discrimination warranted suppression of the evidence that was used to convict them. If the high court were to agree, it would announce that the evidence used to convict Whren and Brown should have been suppressed by the trial court. If the Supreme Court made such a ruling, it would overturn their convictions.

The high court took a different approach than the one sought by Brown and Whren. It directed its attention to the issue of whether or not the traffic stop of the vehicle

was for a “bonafide” traffic offense; hence the officers would have had the probable cause legally necessary to perform the traffic stop. The court held that the officers did have probable cause and that having made that determination, it had done all it was required to do in the matter. The court’s decision reflected that an officer’s subjective state of mind is irrelevant as long as the officer has probable cause. The court reasoned that it was not necessary or even proper<sup>16</sup> to entertain the claim of racism.

Contrary to the court’s position, I would argue that the court should have held that the Fourth Amendment’s definition of “unreasonable” includes racist behavior by a police officer. Therefore, a search or seizure motivated by racism is in violation of the Fourth Amendment. Courts should entertain issues of race in deciding whether or not a police action was legally permissible according to the Fourth Amendment. By illustration, if we are talking about a traffic stop made with probable cause but motivated by racial bias, the Fourth Amendment should be interpreted to mean that anything that culminated in the stop (e.g., the issuance of a citation, the seizure of evidence, and maybe incriminating statements by the driver) should not be admissible. The rationale of this position is analogous to the exclusionary rule

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<sup>16</sup> Whren and Brown had appealed their drug convictions to the Supreme Court on grounds that they had been seized (the traffic stop and then having been placed under arrest) and searched (their automobile and bodies) illegally. They sought relief (overturning of convictions) through a finding that the police had violated the Fourth Amendment. The Supreme Court held that racial discrimination could not be discussed in the context of the Fourth Amendment, so Whren and Brown were precluded from getting any relief from the Supreme Court for having been discriminated against. Racial discrimination claims, said the Supreme Court, must be made using the Fourteenth Amendment of the United States Constitution. The Fourteenth Amendment bars “government” from depriving you or me of life, liberty, or property without due process of law. Included is a ban against the police intentionally discriminating against someone because of their race. Whren and Brown were told that a claim of racism would have to be argued using the Fourteenth Amendment; as a separate and independent matter that would not have a bearing on the criminal convictions, hence could not enable for suppression of the evidence.

“which provides that otherwise admissible evidence may not be used in a criminal trial if it was the product of illegal police conduct.<sup>17</sup>” Racial discrimination by a law enforcement officer is illegal; hence the fruits of searches and seizures obtained on traffic stops following racially discriminatory behavior by the officer should be inadmissible under the Fourth Amendment.

The *Whren* court held that racism is not one of the reasons a court should find that evidence is “fruit of the poisonous tree” or not admissible. Racism, if it occurred, says the Supreme Court would not make a traffic stop<sup>18</sup> illegal if the police had probable cause in performing the traffic stop. In *Whren*, the Supreme Court established a precedent that racist motivations of a police officer will not bar admissibility of evidence seized.

Fortunately, states have the right to disregard *Whren*.<sup>19</sup> In New Jersey, for example, the *Whren* decision is not adhered to. That state’s highest court, the Superior Court of New Jersey, held that racism by a police officer is grounds to dismiss tickets, etc., and/or suppress evidence. In its holding in *State v. Soto*<sup>20</sup> (1996, p. 83), the New Jersey court wrote:

... Where objective evidence establishes that a police agency has embarked upon an officially sanctioned or de facto policy of targeting minorities for investigation and arrest, any evidence seized will be suppressed to deter future insolence in office by those charged with enforcement of the law and to maintain judicial integrity.<sup>21</sup>

In the vast majority of cases in which racial profiling or some other type of racially discriminatory policing has occurred, there are no drugs or heinous acts with which to contend. In most instances, accused or convicted persons of color ask a court to throw out or suppress evidence for a traffic violation or crime charge<sup>22</sup> because of the actions of a police officer. The objective of the accused is to show the court how the officer singled them out because of their skin color and treated them differently than a white person would have been treated (*Chavez v. Illinois State Police*, 1998). In some cases, the accused want to show that the police action was illegal in the first place, and the police did not witness a traffic violation at all.

With a conceptual understanding of the *Whren* decision, it is possible to show how it works hand-in-hand with the *Atwater* decision in exacerbating racially discriminatory policing. In fact, I would argue that to view the two

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<sup>17</sup> The definition of the Exclusionary Rule (see Giffs, 1996, in Barrons Law Dictionary).

<sup>18</sup> See *Whren* (p. 813) for a discussion of the officer’s subjective state of mind.

<sup>19</sup> There is nothing reasonable about performing a traffic stop because of racial hatred or naiveté or for any other racial motivation. The law holds that the fruits of illegal police action are not admissible in a court of law; they are excluded because “the constable has blundered” (Justice Cardozo, 1926). Similarly, traffic tickets or littering citations, for example, issued pursuant to racism by an officer should be dismissed. Had the *Whren* case been decided this way, the Supreme Court would have been following the rule of law in New Jersey.

<sup>20</sup> New Jersey’s highest court decided that evidence of racism on the part of the police could be used to suppress evidence. In its holding in *State vs. Soto* (1996, p. 83), the court wrote: “... Where objective evidence establishes that a police agency has embarked upon an officially sanctioned or de facto policy of targeting minorities for investigation and arrest, any evidence seized will be suppressed to deter future insolence in office by those charged with enforcement of the law and to maintain judicial integrity.”

<sup>21</sup> Here the court is quoting, in part, from *State vs. Kennedy* (1991).

<sup>22</sup> It could be an appeal of a conviction that is sought by the accused.

decisions independently is to risk missing how the decisions will be used contemporaneously by many police officers with people of color throughout the United States.

### THE *ATWATER* DECISION: GIVING THE *WHREN* DECISION ADDED TEETH

In March 1997 in the town of Lago, Texas, Gail Atwater was arrested on a traffic stop for not wearing a seatbelt and for not fastening her two children with seat belts. Mrs. Atwater was handcuffed, placed in the back seat of a police car, and taken to jail. Mrs. Atwater soon took legal action against the City of Lago. She maintained that her arrest and custody were in violation of her Fourth Amendment right to be free from unreasonable search and seizure. Her case eventually made its way to the United States Supreme Court. While many Americans might find custodial arrest for not wearing a seatbelt absurd, five of the nine Supreme Court justices decided in April 2001 that the custodial arrest of Mrs. Atwater was not in violation of the United States Constitution. The court wrote: “The Fourth Amendment does not forbid warrantless arrests for a minor criminal offense, such as a misdemeanor seatbelt violation punishable only by a fine” (*Atwater*, 69 U.S.L.W. 4,262 [U.S. 2001]).

Let’s diverge a moment from the facts of *Atwater* and consider that the Fourth Amendment of the U.S. Constitution requires that a full custodial arrest, handcuffs and all, must be “reasonable.” “Reasonableness,” once again, is at the heart of a Fourth Amendment analysis. The Supreme Court has a method for determining reasonableness under that amend-

ment. It weighs the degree to which an action intrudes on an individual’s privacy and the degree to which the action is needed “for promotion of legitimate governmental interests.”<sup>23</sup> The dissent in *Atwater* rightfully called for the court to employ this test, among others, to evaluate the arrest of *Atwater*. The majority responded that [this] reasonableness test is applicable only when there is evidence that an arrest was carried out in extraordinary fashion. The court defined extraordinary as “unusually harmful to privacy or physical interests” and as determined by a court’s analysis of the manner in which the search or seizure was executed (*Atwater*, 69 U.S.L.W. 4,262, 4,263, citing *Whren*, 517 U.S. 806, 818 [1996]). As examples of extraordinary, the court cited “unannounced entry into a home” and “entry into a home without a warrant” (*Atwater*, 69 U.S.L.W. 4262, 4273; *Whren*, on 818, citing *Wilson v. Arkansas*, 514 U.S. 927, 131 L. Ed. 2d 976, 115 S. Ct. 1914 [1995]; *Welsh v. Wisconsin*, 466 U.S. 740, 80 L. Ed. 2d 732, 104 S. Ct. 2091 [1984]). The court ruled that Atwater’s arrest was not extraordinary:

It was surely “humiliating” ... but it was no more “harmful to ... privacy or ... physical interests” than the normal custodial arrest. She was handcuffed, placed in a squad car, and taken to the local police station, where officers asked her to remove her shoes, jewelry, and glasses, and to empty her pockets. They then took her photograph and placed her in a cell, alone, for about an hour, after which she was taken before a magistrate, and released on \$310 bond.<sup>24</sup> The arrest and booking were inconvenient and embarrassing to Atwater, but not so extraordinary as to violate the Fourth Amendment (*Atwater*, 69 U.S.L.W. 4262, 4273 [2001]).

I argue that Atwater’s arrest was “unreasonable” and that the majority should

<sup>23</sup> See *Wyoming vs. Houghton* (1999, p. 300); *Delaware vs. Prouse* (1979, p. 654).

<sup>24</sup> What will happen to the arrestee who cannot afford the bond? With so many people of color in the U.S. living below the poverty line, how will the *Atwater* decision adversely affect them?

have taken a more sensible approach in determining reasonableness. Reasonableness of a search or seizure should be determined on a case-by-case basis without the criterion that it must be an extraordinary case. The type of police action taken should be commensurate with the offense committed. It would have been more prudent for the majority in *Atwater* to announce that it employed the above-mentioned balancing test and that it concluded that the law holds that custodial arrest is an unreasonable response to a seatbelt violation, and that custodial arrest is not a “commensurate” response for dealing with a person who drives without a seatbelt, or who runs a stop sign, or who commits one of many driving offenses. While it may be “reasonable” pursuant to the Fourth Amendment for a police officer to pull a person over, it is “unreasonable” to take that person into custody for a minor traffic offense.

#### **SUBJECTIVE STATES OF MIND (WHREN) & CUSTODIAL ARRESTS (ATWATER)**

Although Mrs. Atwater is white, Justice O’Connor, writing for the dissent, mentioned the *Atwater* decision’s connection to racial profiling (see *Atwater*, 69 U.S.L.W. 4,262, 4,278). I share Justice O’Connor’s sentiment and wish to expound on it through a discussion of the *Atwater* decision in unison with the *Whren* decision.

A rule-of-law that allows the subjective state of mind or subjective motivations of an officer in making a traffic stop (i.e., “I don’t like Mexicans and every opportunity I have, I will pull over Mexicans and cite them with the offense carrying the maximum penalty”) to be deemed legal and irrelevant as long as the officer can show that he pulled over the driver for a bona fide traffic offense perpetuates the (existing) problem of racial profiling in the United States. Matters

become worse when the officer can take things one step further and manifest his racist aversion/mindset by a rule of law that allows him to subject people to a pointless custodial arrest. Until *Atwater*, the *Whren* decision was a problem, but with *Atwater*, it has the potential of causing much greater harm.

*Atwater*’s arrest shows that even white people can find themselves responding to an officer’s subjective, state-of-mind aversions. By illustration, three weeks prior to Mrs. Atwater’s arrest, she was pulled over by police officer Bart Turek. The officer believed that she and her son were not wearing seatbelts. Evidence shows that Turek became angry when he realized he was mistaken. Three weeks later (with the *Whren* decision on his side), Turek spotted Mrs. Atwater’s vehicle. Witnessing no other traffic offense, but allegedly believing that Mrs. Atwater was not wearing a seatbelt, he pulled her over a second time (*Atwater*, 69 U.S.L.W. 4,262, 4,277 [2001]). One might assume that Turek’s “subjective” motivation for the stop was his anger at Atwater because of what transpired on the previous stop. You cannot legally pull over an automobile because you are angry with the driver, but the *Whren* decision provides a large loophole: What is in an officer’s subjective state of mind is irrelevant as long as the officer has probable cause in performing the traffic stop (*Whren*, 517 U.S. 806, 813 [2001]). Officer Bart Turek had the legal authority to perform the traffic stop and to take Mrs. Atwater into custody because he had probable cause in believing that Atwater was not wearing her seatbelt.

In general, fine-only misdemeanors that involve violence or a threat of violence (e.g., a breach of the peace such as disorderly conduct) tend to be handled by custodial arrest. Other fine-only misdemeanors such as littering or consumption of alcohol in a public place are

commonly handled by issuing a citation.<sup>25</sup> Most states, like Texas where *Atwater* was arrested, have legislation and/or case law that permits an officer to perform a custodial arrest for any minor offense. For example, you can be taken to jail for not leashing your dog or parking your car properly.<sup>26</sup> However, custodial arrest is not the norm for very minor offenses. Exceptions are made for those offenses that are considered gravely serious like reckless driving, driving without a license, or driving without insurance.

When deciding *Atwater*, the court looked at a long and inconclusive history of court decisions, local legislation, and legal documents.<sup>27</sup> Some local legislation says or implies that the police may arrest for fine-only misdemeanors and other very minor offenses, and some says or implies that police may only arrest for a fine-only misdemeanor if the offense involves a “breach of the peace” (*Atwater*, 69 U.S.L.W. 4,262, 4,263). The majority of the justices concluded that more of the sources allow for arrest of a person for any fine-only misdemeanor or other very minor offenses. The court was not convinced that the framers of the Constitution ever intended that the Fourth Amendment restrict police from making custodial arrests for very minor

offenses (*Ibid.*, on 4,267). The dissenting justices held that the custodial arrest of *Atwater* was constitutionally unreasonable and not supported by legal history (*Ibid.*, on 4,275).

Just because there is a history and tradition of arrests for minor offenses does not mean that the legislation or case law allowing it has ever been constitutional. Case law and state legislation are superseded by Fourth Amendment requirements. Enforcement of state statutes allowing for arrest for minor offenses has been virtually obsolete, perhaps since it has not been clear until the *Atwater* decision that such statutes will be deemed constitutionally permissible by the country’s highest court.<sup>28</sup> The pre-*Atwater* uncertainty may explain, in some part, why police agencies and municipalities have enacted their own policies prohibiting arrest for minor traffic offenses and fine-only misdemeanors. So the decision in *Atwater* introduces a bright line rule into an area of law that many say lacked clarity and that others say is very clear in prohibiting arrest for most “very” minor offenses. With the *Atwater* decision, it will be very difficult on the state level for anyone to successfully argue the unconstitutionality of state legislation that allows custodial arrest for minor traffic offenses and fine-only mis-

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<sup>25</sup> The *Atwater* decision includes a lengthy historical review of how minor offenses involving a “breach of the peace” have been handled from the past to the present in the United States (*Atwater*, 69 U.S.L.W. 4262, 4263 [2001]).

<sup>26</sup> Texas statute § 543.001 states that “an arrest without a warrant is authorized” by the police, of a person found to be committing a violation of statute § 545.413 which reads in part: “Safety Belts; Offense (a) A person commits an offense if the person: (1) is at least 15 years of age; (2) is riding in the front seat of a passenger car while the vehicle is being operated; (3) is occupying a seat that is equipped with a safety belt; and (4) is not secured by a safety belt.” The police are permitted to issue a citation in lieu of arrest (Texas Legislature On-line. Retrieved May 24, 2001, from the World Wide Web: <http://www.capitol.state.tx.us/statutes/statutes>). In the appendix of the *Atwater* opinion, the Court has printed the statutes for all 50 states that authorize warrantless misdemeanor arrests. It is not clear if all 50 apply their legislation to acts that are not considered crimes, but “violations” (e.g., of local ordinances).

<sup>27</sup> See pp. 4,273-4,275 of the *Atwater* decision for a list of the sources used by the court and a discussion of the sources.

<sup>28</sup> An individual does not expect to be taken to jail for a traffic infraction, for example. This author posits that one reason.

demeanors. Now state justices will simply direct the petitioning accused to the holding in the *Atwater* decision.<sup>29</sup>

### PRETEXT TRAFFIC STOPS

The *Atwater* decision raises dozens of issues. Those that are relevant to racially discriminatory policing include: (1) Police officers having too much discretion on traffic stops, specifically the power to decide whether to arrest or cite a suspect; and (2) The epidemic of pointless custodial arrests<sup>30</sup> in communities of color. In some cases, an accused argues that a traffic stop was a pretext for looking for a more serious crime. Pretextual traffic stops happen when an officer witnesses a bona fide traffic violation, but has no intention of citing the driver for the violation. Rather, the officer performs the traffic stop in hopes that once he stops the car, talks with the car's occupant(s), and further investigates, he will find evidence of a larger crime. In the state of New York, pretextual stops are illegal.<sup>31</sup> In the *Whren* decision, the U.S. Supreme Court held that pretextual traffic stops are not illegal as long as the officer pulls the person over for a bona fide violation of the law (*Whren*, p. 813). Police officers who racially profile have a tendency to follow black drivers or Mexican drivers, etc., until they commit a traffic law infraction. It is only a matter of time before drivers will straddle the yellow line or drive below the speed limit or commit some infraction. The traffic stop that follows is initiated and predicated upon a belief that blacks and

Mexicans, for example, have something to hide—that further investigation by the officer will reveal a crime far more serious than the initial traffic violation.

If the police take a person into custody, even for a minor infraction, they are given the automatic, legal right to search the vehicle completely as well as to conduct a full body search of the driver or passenger.<sup>32</sup> Before the *Whren* decision, an officer may have been in violation of the law for performing pretextual traffic stops, depending on the venue of the court handling the matter. The Supreme Court of the United States in deciding the *Whren* case etched out a clear, bright, line rule authorizing states to hold that pretextual traffic stops are legal. So before the *Atwater* decision but after the *Whren* decision, the officer who performed a traffic stop for a minor offense as a pretext for being able to look for a larger offense, needed only to have probable cause for minor offense. Once he stopped the automobile, he could begin a “fishing expedition” for probable cause for an arrestable offense.<sup>33</sup> Now, with *Atwater*, no intermediate step (a hunt for evidence and an arrestable offense) is necessary to justify a custodial arrest. The officer need only have probable cause for a traffic violation and he can make a custodial arrest. Since custodial arrest allows the searching of “everything” (a person's automobile and strip search to check body cavities), a racist officer can legally take the dignity of a person of color by strip searching him at the station or chaining him to a post in a cell. The officer who is looking for fruits of a

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<sup>29</sup> Granted, some states will decide not to follow the *Atwater* holding as they can make the decision.

<sup>30</sup> The term “arrest” as used in this paper refers to custodial arrest.

<sup>31</sup> See *People vs. Dickson* (1998).

<sup>32</sup> See *New York vs. Belton* (1981).

<sup>33</sup> Do not assume that the officer could have “easily” made an arrest simply because there was state legislation that authorized it.

more serious crime knows that on-the-scene “fishing expeditions” don’t always bear fruit, so he can opt to arrest the driver and even passengers. From that point, there are few limits on investigations allowed at the stationhouse.

### HARM CAUSED BY ARREST

Custodial arrest, whether constitutional or unconstitutional, is among the gravest of actions that law enforcement agents can take against citizenry in a civilized society. The custodial arrest process can be traumatic and arrest records are hard to reverse. During a custodial arrest, the arrestee is often transported in a “cage” built into the back seat of a police car.<sup>34</sup> The person’s physical movement is restrained by handcuffs or leg irons, and he or she is locked in a retaining cell.

Personal property is confiscated, a “mug shot” is taken, and in some jurisdictions, a strip-search is performed. A newspaper article describing the process of strip-searching tells the story of Vivian Williams, a black woman arrested by white New York City police officers in 1997 on charges of selling sneakers without a license. “As her voice quivered with emotion, she recalled the arrest and how she was stripped of her clothes and her dignity: I was taken to a cell that was like a storage area and was told to strip.... I was told to lift my breasts, to turn, to lift up my legs, show my private parts” (Saul, 2001).

In addition to personal humiliations, arrestees have to deal with the permanent public record of their arrest. Regardless of whether the arrest was constitutional or not, arrestees are required to report the arrest when applying for jobs or housing.

“Expungement” of arrest records is never an easy task. Even people who are falsely arrested have to deal with this sometimes for the rest of their lives.

In the case of Gail Atwater’s arrest, Justice O’Connor wrote:

There is no question that Officer Turek’s actions severely infringed Atwater’s liberty and privacy. Turek was loud and accusatory from the moment he approached Atwater’s car. Atwater’s young children were terrified and hysterical. Yet when Atwater asked Turek to lower his voice because he was scaring the children, he responded by jabbing his finger into her face and saying, “You’re going to jail.” Atwater asked if she could at least take her children to a friend’s house down the street before going to the police station, but Turek—who had just castigated Atwater for not caring for her children—refused and said he would take the children into custody as well (*Atwater*, 69 U.S.L.W. 4,262, 4,277 [2001]).

Mrs. Atwater’s children, three and five years old, stood by their mother as Officer Bart Turek yelled at them and said that he was going to take them all them into custody (*Atwater*, 69 U.S.L.W. 4,262, 4,277 [2001]). They were ultimately spared arrest; Atwater’s 3-year-old son was “very traumatized” (*ibid.*, on 4,278). After the incident, he was seen by a child psychologist who reported that the boy “felt very guilty that he couldn’t stop this horrible thing ... he was powerless to help his mother or sister” (*ibid.*). Both of Atwater’s children are now terrified at the sight of any police car (*ibid.*).

The Atwater family experienced what countless black and Latino families experience daily in cities and towns throughout America. The decision in *Atwater* opens the floodgates for even more custodial arrests of black and brown people for traffic offenses and minor offenses such as littering.

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<sup>34</sup> Sometimes transport is inside a cage built into a truck (commonly called a “wagon”).

### CHALLENGES IN REVERSING RACIALLY DISCRIMINATORY RULINGS

There is a sharp division in opinion between whites and blacks as to the extent of racism or even whether it still exists in America. In such a climate, I posit that many social scientists who are not of color would agree with the *Atwater* majority conclusion. They might believe that inappropriate custodial arrests in communities of color are not a phenomenon worthy of political or judicial attention (*ibid.*, on 4,263). The majority opinion in the *Atwater* case asserts that there is “no evidence of widespread abuse of minor-offense arrest authority.”<sup>35</sup> It bases this position on the relatively small number of published cases dealing with such arrests (*ibid.*, on 4,278).

Although the number of published cases is small, it is important to consider that many complaints and claims of this sort are not given attention by the people who hear them such as police officials who oversee cell block areas, prosecutors who review cases, or judges that hear cases. Victims of improper arrests, often times the poor and indigent, do not have the financial power of bringing actions into the nation’s courts, making it known that they were the victims of pointless arrests. Justice O’Connor, writing the dissenting opinion, stated:

The majority takes comfort in the lack of evidence of an epidemic of unnecessary minor-offense arrests. But the relatively small number of published cases dealing with such arrests proves little solace. Indeed, as the recent debate over racial profiling demonstrates all too clearly, a relatively minor traffic infraction may serve as an excuse for stopping and harassing an individual (*Atwater*, 69 U.S.L.W. 4,262, 4,278)

It is difficult to prove quantitatively the number of pointless arrests of people of color (compare NAACP, 1995).<sup>36</sup> There is a litany of qualitative literature and evidence that documents at least two standards of policing:<sup>37</sup> one for whites and another for black and brown people (Goldstein, 1960; Neiderhoffer, 1969; Black, 1980; and Goldberg, 1999). Although the data and other proof that can be provided by these non-quantitative sources confirm for people of color what they experience at the hands of many white police officers, detractors judge the data as inconclusive, scientifically invalid, or not specific enough to show a problem.<sup>38</sup>

In communities of color, it is common knowledge that, irrespective of how serious, traumatizing, and inconvenient custodial arrest is for those arrested, many officers decide to handcuff people and take them to jail (Neiderhoffer, 1969; Goldstein, 1960; Westley, 1970; Black, 1980; Goldberg, 1999). Hepburn (1978) concluded, “The findings of

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<sup>35</sup> Footnote 25 in *Atwater vs. Lago Vista*, 69 U.S.L.W. 4,262 (2001).

<sup>36</sup> As has been stated by the *Atwater* court (*ibid.*, on 4,276) and this author, people don’t appear to be taken to jail often for traffic infractions; however, this author is not opposed to deducing from the sentiment of black and brown Americans regarding police/people-of-color relations that many minorities would argue that when it happens, the arrestee is often a person of color.

<sup>37</sup> Compare Cureton (2000). His findings reveal “Blacks living in segregated cities, where whites are governing elites, are more likely to be arrested, independent of their criminal conduct.” Cuerton concluded that blacks living in these types of environments “are likely” to face discretionary, discriminatory justice from the police” (p. 716).

[his] analysis strongly support the hypothesis that nonwhites are more likely than whites to be arrested under circumstances that will not constitute sufficient grounds for prosecution” (p. 66). In this regard, it is sensible to assume that there are police officers throughout America who believe that black and Latino people are accustomed to custodial arrest; that custodial arrest does not have the traumatic effect on them that it has on a white person (ibid.). A notion that the severe intrusion (e.g., arrest record and temporary loss of freedom) arrest represents for most people will not be a factor in the lives of blacks and Latinos seems to be common among many white police officers.

## CONCLUSION

In a climate in which it is politically incorrect and career suicide to employ racism, most racist officers would unlikely use racial epithets and or make verbal admissions as to their motivations for police action. Even if the officer did make such admissions that a traffic stop was racially motivated, the *Whren* court has held that such statements and thoughts are off limits (p. 813) to a court’s Fourth Amendment scrutiny. Rather, all that matters to the court is whether the police had probable cause for the traffic stop. If the officer admits that, but for the driver’s race he would not have performed a traffic stop for a legitimate traffic violation, the officer has not violated the Fourth Amendment. We can call this legalized “profiling.”

Where there is evidence of racial motivation on the part of an officer, courts should find for a violation of the Fourth Amendment’s guarantee of reasonableness. Understandably, in cases absent of epithets or admissions by officers, the approach presented calls for a court to recognize an intangible—the subjective state of mind of an officer. While

this is much harder to do, I argue that from evidence of racial bias, inferences can be made that show racial motivation. This is how New Jersey’s highest court in *People v. Soto* (1996) was able to find an ongoing practice of racial discrimination by the New Jersey state police.

The *Whren* decision enables police to act on their racist inclinations. The *Atwater* decision gives police greater discretion in making arrests. Such unrestrained discretion carries with it serious potential for abuse. Case in point: a Los Angeles deputy admitted (in a *New York Times* exclusive) that he uses the law to administer one traffic stop protocol for whites and another for black males (Goldberg, 1999). Whites get to remain in their automobiles, while Blacks must exit the automobile and “spread eagle” for a pat down. The officer is not breaking the law since the U.S. Supreme Court decision in *Maryland v. Wilson* (1997) provides a police officer with the legal right to have a driver and passengers step out of a vehicle.

In jurisdictions where police are not restrained from arresting for minor traffic offenses or fine-only misdemeanors, police administrators should not wait for state legislatures to take offense to the *Atwater* decision. They should take the initiative and limit the arrest powers of their officers. In doing so, police administrators can justify their decrees by defining and conceptualizing the purpose of custodial arrest. Such an analysis will reveal that sometimes, custodial arrest is necessary to remove people from the populace who are a danger to themselves or others. In other cases, custodial arrest serves as punishment. Still, in other cases, the method may be necessary (as in extreme cases) to identify a person, to ensure that he/she will return for a future court date. Moreover, a professional examination of the

necessity of custodial arrest would reveal that traffic citations represent sufficient punishment for most traffic infractions; hence, custodial arrest is not necessary.<sup>38</sup>

Such a review process is a critical step in preventing the kinds of opportunities for racial profiling that *Whren* and *Atwater* decisions enable.

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<sup>38</sup> As a civilized people, we should recognize the symbolic message of arrest. To take away a person's freedom along with locking him/her in shackles is to assert [symbolically] that the person has committed a grave act.

