

Frequent Arrests, Harsh Sentencing, and the Disproportionate Impact they have on African Americans and their Community

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Abstract

This article discusses how African Americans, when compared to Caucasians, are arrested and convicted more frequently and sentenced more harshly for participating in drug crimes. Statistics show disparate treatment because African Americans participate in illegal drug activity less frequently than Caucasians. This article will show how incarceration for minor, non-violent drug offenses is counterproductive and that such sentences are effectively destroying the African American community. In addition to highlighting these problems, this article offers solutions that can change the adverse effects the aforementioned acts have on African Americans.

To decrease the racial disparity in arrests, this article proposes instituting a racial profiling education program for all law enforcement personnel—especially those working in drug units. To reduce the harsh and disparate sentencing of African Americans convicted of drug crimes, this article suggests that Congress amend

the Federal Mandatory Minimum Sentencing Guidelines— guidelines which the United States Supreme Court decided must be consulted and taken into account at the sentencing phase of a criminal trial. The statutory amendment would add culpability factors (a list of circumstances or mitigating factors that decrease a defendant’s culpability) that judges must consider for crimes that involve controlled substances. If a defendant meets a culpability factor, the judge would sentence the defendant to a lesser sentence, such as rehabilitation, than what Guidelines originally recommended.

Introduction

African Americans are arrested and convicted of drug crimes more frequently than Caucasians. This knowledge has led many people to believe that African Americans participate in drug crimes, such as possessing and distributing a controlled substance, more frequently than Caucasians. The logical assumption is that a person who engages in illegal activity more frequently is more likely to get caught than a person who engages in illegal activity less frequently. Unfortunately, this assumption is incorrect because when African Americans are charged and convicted of committing drug crimes, probability theories go out the door—unless, of course, that theory asserts that an African American is the most likely person to be caught, arrested, charged, and convicted of committing a drug crime.

Studies show that African Americans make up only thirteen percent of all the nation’s drug users.¹ Studies also show that, among adolescents, Latinos and African Americans use alcohol and other drugs less frequently than Caucasians.² Despite their less frequent use, African Americans, who constitute only about twelve percent of the U.S. population, make up thirty-eight percent of persons arrested for committing a drug offense.³ After arrest, the differential treatment

¹ Kary L. Moss & Daniel S. Korobkin, *Destination Justice*, 80 MICH. BAR J. 37, 39 (2001).

² Stephanie L. Rivaux et al., *Differences Among Substance Abusing Latino, Anglo, and African-American Juvenile Offenders in Predictors of Recidivism and Treatment Outcome*, 6 J. SOC. WORK PRAC. IN THE ADDICT 8 (2006).

³ CHAD THEVENOT, CRIM. JUST. POLICY FOUND., *CRISES OF THE ANTI-DRUG EFFORT* 4 (1999).

increases between African Americans and other racial groups. African Americans represent fifty-nine percent of persons who are convicted (and subsequently sentenced) for committing drug offenses.⁴ The disproportionate percentage of arrests, charging, and convictions of African Americans may suggest that racial prejudice exists throughout every stage of the judicial system (from arrest to sentencing).

The burden of this inequality is significant in the African American community because it causes a disparate number of community members to be incarcerated. Furthermore, because incarceration has become commonplace, African American youth have become less fearful of prison life and the legal system. This decreased fear of the legal system makes these adolescents more apt to commit crimes because they are not “rational drug offenders” who understand a basic cost-benefit analysis to help them measure the benefits against the risks.⁵ Once a child becomes a juvenile delinquent, the problems associated with incarceration (which will be discussed in section IV of this article) have come full-circle because the problems are now affecting the subsequent generation.

This article will first evaluate the creation of anti-drug laws in the United States. Second, it will show how the anti-drug laws have failed. Third, this article will show that law enforcement officials target African Americans for arrest by providing statistics which show a disconnect between the amount of criminal behavior among African Americans and the number of African Americans criminalized. Fourth, it will explain how the arrest and sentencing practices have had an extremely negative impact on the African American community. Finally, this article will conclude by providing solutions that will decrease the disproportionately high number of African American arrests and change the harsh and unsuccessful sentencing practices currently in place.

I. The Creation of the Anti-Drug Laws: The War on Drugs

⁴ *Id.*

⁵ Margaret P. Spencer, *Sentencing Drug Offenders: The Incarceration Addiction*, 40 VILL. L. REV. 335, 346 (1995).

In October 1982, President Ronald Reagan began the “War on Drugs.” To initiate this anti-drug campaign, Reagan “increased anti-drug spending and increased the number of federal drug task forces.”⁶ Reagan and Congress wanted to clean up the streets and “send a message across the country that the war on drugs is on, and it will be won because drug offenders will either be imprisoned or executed.”⁷ In response to this initiative, the Legislature enacted the Anti-Drug Abuse Act of 1986 (ADAA).⁸ The ADAA:

mandated a five-to-forty-year sentence, without probation or parole, for first offenders convicted of possession with intent to distribute small quantities of designated drugs, [and] mandated a sentence of ten-years-to-life, without probation or parole, for first offenders convicted of possession with intent to distribute larger quantities of drugs.⁹

In 1988, Congress amended the ADAA to increase the mandatory minimum and mandatory maximum sentences associated with drug crimes.¹⁰

The prison population has been significantly impacted by this policy. The number of drug offenders (typically low-level offenders) in prison and jails has increased by 110%.¹¹ Consequently, drug offenders occupy sixty-one percent of the beds in federal prison and constitute twenty-two percent of the inmate population in state prisons.¹²

⁶ Kenneth Nunn, *Race, Crime and the Pool of Surplus Criminality: or “Why the War on Drugs” was a “War on Blacks,”* 6 J. GENDER RACE & JUST. 381, 387 (2002).

⁷ Spencer, *supra* note 5, at 345.

⁸ *Id.* at 343-44.

⁹ *Id.*

¹⁰ *Id.*

¹¹ Saby Ghoshray, *America the Prison Nation: Melding Humanistic Jurisprudence with a Value-Centric Incarceration Model*, 34 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 313, 321 (2008).

¹² Spencer, *supra* note 5, at 365.

II. The Failure of the Anti-Drug Laws

Unfortunately, the War on Drugs has done much more harm than good. One such harm is the United State's incarceration rates (which are noticeably disproportionate to the incarceration rates of other countries). The War on Drugs "is one of the main reasons why America puts a higher percentage of its population behind bars than any other society on earth Twenty-five percent of prisoners in the world are in the U.S., even though we have only five percent of the world's population."¹³ The United States incarcerates so many people that some commentators have begun calling the country "Prison Nation" or "Lockdown America."¹⁴ This is problematic because 1) the incarceration rate for drug offenses is rising (the rates increased by twenty-one percent between 1995 and 2003), and 2) the prison expenditures are skyrocketing (the state and federal prisons are currently spending about eight billion dollars per year to incarcerate people who have been convicted of a drug crime).¹⁵

Research has caused policy-makers to realize that the War on Drugs is a failed policy that wastes state and federal money and causes many people to be incarcerated:

The tragedy of the War on Drugs is that this knowledge hasn't been heeded. We continue to treat marijuana as a major threat to public health, even though we know it isn't. We continue to lock up generations of teenage drug dealers, even though we know imprisonment does little to reduce the amount of drugs sold on the street. And we continue to

¹³ Robert Creamer, *Americans Can't Allow McCain to Continue Bush's Failed Policies in the "War on Drugs,"* THE HUFFINGTON POST, July 2, 2008, available at http://www.huffingtonpost.com/robert-creamier/americans-cant-allow-mcca_b_110388.html.

¹⁴ Ghoshray, *supra* note 11, at 314.

¹⁵ PHILLIP BEATTY, BARRY HOLMAN, & VINCENT SCHIRALDI, POOR PRESCRIPTION: THE COSTS OF IMPRISONING DRUG OFFENDERS IN THE UNITED STATES (2006).

spend billions to fight drugs abroad, even though we know that military efforts are an ineffective way to cut the supply of narcotics in America or raise the price.¹⁶

When creating the drug policy, President Reagan should have been more mindful of the saying “history repeats itself.” The alcohol prohibition was established to reduce crime, solve social problems, and reduce the tax burden created by prison, but it was ineffective.¹⁷ For instance, it 1) caused alcohol consumption to increase instead of decrease, 2) “made alcohol more dangerous to consume,” 3) increased crime, 4) overloaded the court and prison systems, 5) “took away a significant source of tax revenue,” and 6) greatly increased government spending.¹⁸ Prohibition “added to the problems it was intended to solve and supplanted other ways of addressing problems. The only beneficiaries of Prohibition were bootleggers, crime bosses, and the forces of big government.”¹⁹

The negative impact of Prohibition is similar to the negative impact caused by the War on Drugs. Because “Presidents Bush and Clinton continued the Reagan administration’s anti-drug policies,” the problems created by the War on Drugs have continued.²⁰ It is imperative to find a solution to decrease the negative effects caused by the War on Drugs.

¹⁶ Ben Wallace-Wells, *How America Lost the War on Drugs: After Thirty-Five Years and \$500 Billion, Drugs Are as Cheap and Plentiful as Ever: An Anatomy of a Failure*, ROLLING STONE, Dec 13, 2007, available at http://www.rollingstone.com/news/story/17438347/how_america_lost_the_war_on_drugs.

¹⁷ Mark Thornton, *Alcohol Prohibition Was a Failure*, 157 POLICY ANALYSIS, Jul. 17, 1991, available at http://www.cato.org/pub_display.php?pub_id=1017&full=1.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ Nunn, *supra* note 6.

III. Evidence of the Disproportionate Arrest Rates and Sentencing of African Americans

Arrests:

Elevated arrest rates of African Americans stem from subtle and covert acts of racial discrimination. They are subtle because when a police officer conducts a traffic stop of an African American, it is not obvious that the officer has done so because of racial profiling. To determine if a police officer has engaged in racial profiling, it is necessary to examine all of the people that the police officer has stopped. For example, if the police officer has stopped only black males, racial profiling becomes more apparent.

Dr. John Lamberth, of Temple University, conducted a comprehensive study of traffic stops on the New Jersey turnpike.²¹ His study revealed that “although African American drivers made up only [thirteen-and-a-half percent] of drivers and violated traffic laws at virtually the same rate as Caucasians, [forty-six percent] of the drivers police stopped were African American.”²² These disparities do not exist solely in New Jersey. Lamberth found similar results when he conducted the same study on I-95 in Maryland.²³ Professor David Harris found that in Ohio, African Americans were two-to-three times more likely to be ticketed than Caucasians.²⁴ The Detroit Free Press found that in Harper Woods, Michigan, African Americans, who made up only thirty-two percent of the city’s drivers, received forty-two percent of the city’s tickets.²⁵ These studies indicate that it is reasonable to assume that nationally, African Americans are stopped and ticketed more frequently than other races.

These more frequent stops contribute to African Americans’ higher arrest rates because once stopped, according to a Michigan State Police study, African Americans are three times more likely to be searched than Caucasian drivers.²⁶ More searches logically lead to

²¹ Moss & Korobkin, *supra* note 1, at 37.

²² *Id.*

²³ *Id.*

²⁴ *Id.* at 37-38.

²⁵ *Id.*

²⁶ Moss & Korobkin, *supra* note 1, at 38.

more frequent findings of controlled substances. “As long as police officers stop and search minorities in disproportionate numbers, they will issue more tickets to those drivers and find more drugs in their cars, even if African Americans and Hispanics are statistically no more likely to violate the law than Caucasian motorists.”²⁷

Sentencing:

In the 1980’s, Congress created harsh sentences for drug offenders when they enacted the “Mandatory Minimum Sentencing” Guidelines.²⁸ These Guidelines were created because people thought that the rehabilitation ideal (which allowed judges to determine the goals, the factors to be considered, the weight assigned to each factor, and the ultimate punishment in a defendant’s sentencing) was a failed model for criminal justice.²⁹ Reformers wanted to change the rehabilitation model because sentences were “based less on the law and more on the whims of individual judges.”³⁰ Senator Edward Kennedy desired to change the rehabilitation model.³¹ Although he did not have a problem with the rehabilitative aspect of the model, Kennedy did not like the unchecked judicial discretion that accompanied the model because it “was creating an environment in which minorities were given much higher sentences than their white counterparts.”³² His allegation was confirmed by a Congressional study which disclosed that there were “disparate sentencing practices for similarly situated defendants among federal judges.”³³

In response to the reformers, states dismantled their sentencing regimes in favor of mandatory minimum sentencing regimes.³⁴ Congress altered the nation’s sentencing goals to “deterrence (through certainty and severity) and incapacitation,” and created a United States Sentencing Commission that established the strict Guidelines.³⁵

²⁷ *Id.* at 39.

²⁸ THEVENOT, *supra* note 3, at 1.

²⁹ Gilles R. Bissonnette, “Consulting” *The Federal Sentencing Guidelines After Booker*, 53 UCLA L. REV. 1497, 1502 (2006).

³⁰ *Id.*

³¹ Edward M. Kennedy has served as a United States Senator for Massachusetts from 1962 to present.

³² Bissonnette, *supra* note 29, at 1503-04.

³³ Spencer, *supra* note 5, at 347.

³⁴ Bissonnette, *supra* note 29, at 1503.

³⁵ Spencer, *supra* note 5, at 348.

These guidelines were intended to greatly limit judicial discretion so that defendants would receive equal time for equal crimes (regardless of race).³⁶ “Judges [were required] to sentence [all] drug offenders — many of them first-time, nonviolent, low-level offenders — to long prison terms, frequently a minimum of 5, 10, or 20 years, without parole.”³⁷ Every defendant’s sentence was supposed to depend on the amount of drugs a defendant possessed or a defendant’s alleged involvement with an organization or gang.³⁸ The discrepancy between sentences of defendants of different races who were convicted of committing similar crimes should have been minimal because judges were required to “impose a sentence of the kind, and within the range of the Sentencing Guidelines.”³⁹ The only difference in sentencing should have been caused by the factors listed in 18 U.S.C. § 3553(a), which were intended to help a judge determine how to sentence a defendant within the Guidelines.⁴⁰ The factors in 18 U.S.C. § 3553(a) include:

- 1) The nature and circumstances of the offense and the history and characteristics of the defendant;
- 2) The need for the sentence imposed. . . ;
- 3) The kinds of sentences available;
- 4) The kinds of sentence and the sentencing range established [by the Guidelines];
- 5) Any pertinent policy statement issued by the Sentencing Commission...;
- 6) The need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and
- 7) The need to provide restitution to any victims of the offense.⁴¹

The factors did not allow a judge to sentence a defendant to less than what was prescribed by the Guidelines.⁴² They basically only

³⁶ *Id.*

³⁷ THEVENOT, *supra* note 3, at 1.

³⁸ *Id.*

³⁹ Bissonnette, *supra* note 29, at 1508.

⁴⁰ *Id.* at 1509.

⁴¹ *Id.* at 1507.

permitted a judge to sentence a defendant more harshly (especially if the defendant had a criminal history).⁴³ Sentencing a defendant more harshly is precisely what judges did.

Although Mandatory Minimum Sentencing Guidelines (hereinafter referred to as Federal Sentencing Guidelines) were written as a “race-blind” law, it is not. Two things that might have caused a racial discrepancy between defendants of different races are 1) defendants must be convicted of a crime in order for the Federal Sentencing Guidelines to come into effect, and 2) judicial discretion is exercised in a way that increased the sentences of African Americans. Since African Americans are convicted more frequently than Caucasians and other races (making up fifty-nine percent of persons convicted of drug offenses), African Americans are subjected to the Federal Sentencing Guidelines more frequently.⁴⁴ Judicial discretion to make sentences harsher causes convicted African Americans to receive harsher punishments. A 1996 study found that African Americans are incarcerated over eight times more frequently than Caucasians. Likewise, a second study showed that African American women are eight times more likely than Caucasian women to be sentenced to incarceration.⁴⁵ This may be why a study was able to demonstrate that although African American women make up only seven percent of California’s population, they make up thirty-three percent of California’s women inmates.⁴⁶ Similarly, harsher punishments may explain why a race and gender analysis of incarceration data in Oklahoma showed that “all females (by race) are within statistical proportions with the exception of black females.”⁴⁷ In addition to being incarcerated more frequently, African Americans receive lengthier sentences. A 1994 study found that the average maximum sentence for drug crimes for African Americans was sixty months, while the average sentence for Caucasians was fifty-one months.

⁴² *Id.* at 1509.

⁴³ *Id.*

⁴⁴ THEVENOT, *supra* note 3, at 4.

⁴⁵ Joseph Cudjoe & Tony Barringer, *More Than Mere Ripples: The Interwoven Complexity of Female Incarceration and the African-American Family*, 2 MARGINS 265 (2002).

⁴⁶ *Id.*

⁴⁷ *Id.*

In addition to causing racial discrepancies, the Federal Sentencing Guidelines created a fixed sentencing regime that resulted in 1) an increased average incarceration for non-violent crimes, and 2) an increased proportion of the population being incarcerated, relative to the general population. The 1992 case of Paulita Cadiz illustrates how all defendants' indicted for committing drug crimes have become the victims of the harsh sentences mandated by the Federal Sentencing Guidelines.⁴⁸ When Cadiz, a nineteen-year-old pregnant woman, was walking with her fourteen-year-old friend, a gentleman named Lazaro Delgado offered them a ride.⁴⁹ During the course of this ride, Delgado stopped the car and asked Cadiz to get out, go around the corner, meet a woman named Mersky, and bring Mersky back to the car.⁵⁰ Cadiz did as she was asked.⁵¹ Unfortunately, she and Delgado did not know that Mersky was an undercover agent for the Drug Enforcement Agency (DEA).⁵² Although Cadiz claimed she was an innocent participant, she was charged and convicted with engaging in a drug conspiracy and aiding drug dealers.⁵³ As a result, she was sentenced to ten years in prison despite her clean criminal history.⁵⁴ Her harsh sentence was a result of the Federal Sentencing Guidelines. In 1991, the United States Supreme Court upheld the constitutionality of harsh sentences when it decided that such sentences did not violate the Eighth Amendment's Cruel and Unusual Punishment Clause.⁵⁵

In 2006, the Federal Sentencing Guidelines lost some of their bite when the United States Supreme Court decided *United States v. Booker*.⁵⁶ In that case, the Court decided that the Federal Sentencing Guidelines violated the Sixth Amendment of the United States Constitution.⁵⁷ The Sixth Amendment states:

⁴⁸ Spencer, *supra* note 5, at 335-36.

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ Spencer, *supra* note 5, at 335-36.

⁵⁴ *Id.*

⁵⁵ *Id.* at 357. Spencer discusses *Harmelin v. Michigan*, 501 U.S. 957 (1991) (upholding a life sentence without the possibility of parole for the possession of 672 grams of cocaine). The Eighth Amendment states "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

⁵⁶ *U.S. v. Booker*, 543 U.S. 220 (2005).

⁵⁷ *Bissonnette*, *supra* note 29, at 1497.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district where in the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.⁵⁸

The Federal Sentencing Guidelines violated the Sixth Amendment because “they required a judge to enhance a defendant’s sentence based on facts that were neither found by a jury nor admitted by the defendant.”⁵⁹ To remedy the Constitutional violation, the Supreme Court decided that the Federal Sentencing Guidelines should be “effectively advisory” so that judges would be able to tailor a defendant’s sentence based on the facts of the case.⁶⁰ The Court held that since the Federal Sentencing Guidelines could only be advisory, judges must simply “consult the guidelines and take them into account at sentencing.”⁶¹ One expert claimed that “*Booker* granted the most amount of judicial discretion ever afforded to sentencing judges.”⁶² Despite this great discretion, judicial compliance with the Federal Sentencing Guidelines has only slightly declined since the 2006 ruling.⁶³

Although *Booker* was intended to mend the problems that were caused by the Federal Sentencing Guidelines, it has not done so. It is apparent that there was still a great racial discrepancy after the *Booker* holding; in 2006, twenty-three percent of federal inmates

⁵⁸ U.S. CONST. amend. VI.

⁵⁹ *Booker*, 543 U.S. 220.

⁶⁰ Bissonnette, *supra* note 29, at 1497.

⁶¹ *Id.*

⁶² *Id.* at 1499.

⁶³ *Id.* at 1500.

incarcerated for drug related offenses were African American, while only fifteen percent were Caucasian.⁶⁴ This could be because “the Court never explicitly explained how the Federal Sentencing Guidelines should be treated in an advisory system,” and the Court left terms like “consult” undefined.⁶⁵ The Court’s vague holding caused judges to refrain from changing their sentencing practices because they were unsure of how they should treat the Federal Sentencing Guidelines and uncertain about how far they could deviate from the Federal Sentencing Guidelines.⁶⁶ It is important to note that *Booker* may not be able to solve the problems addressed in this article. For instance, even if judges did follow *Booker* by employing their great judicial discretion, African American defendants would probably still receive harsher sentences (just as they did when judicial discretion was used before). Therefore, it seems that with or without the Federal Sentencing Guidelines, judicial discretion will lead to longer and harsher sentences for African Americans.

IV. The Negative Impact on the African American Community

The African American community is very close-knit and interconnected.⁶⁷ Therefore, incarceration has a ripple effect on individual members of the community. “For every mother that is in prison, another ten people (children, caretakers, grandparents, siblings and fathers) are directly impacted.”⁶⁸ The rippling effect caused by sentencing practices has helped produce a crime-incarceration cycle that is infecting each generation of the African American community. It has had an especially detrimental effect on African American youth because 1) it has forced them to grow up without at least one parent (due to long incarceration periods) and 2) it has failed to deter them from committing crimes because they feel impervious to the judicial system and its punishments. Sentencing practices have also had a harmful effect on the spouses of incarcerated persons and have been

⁶⁴ BUREAU OF JUST. STAT., U.S. DEP’T OF JUST., BULLETIN: PRISONERS IN 2006 25 (2007).

⁶⁵ Bissonnette, *supra* note 29, at 1517-21

⁶⁶ *Id.* at 1522-27

⁶⁷ Ghoshray, *supra* note 11, at 335.

⁶⁸ Chieko M. Clark, Comment, *Maternal Justice Restored: Redressing the Ramifications of Mandatory Sentencing Minimums on Women and Their Children*, 50 HOW. L. J., 263, 271 (2006).

devastating to the individual released from incarceration. Even after an inmate has been released from prison, the effects of incarceration are still evident. This section will explore the effects that incarceration has on the youth, the spouse of an incarcerated individual, the convicted felon, and the community as a whole.

Effect on Children—Growing Up Without a Parent:

Numerous children are forced to grow up without one (or both) parent(s) due to a lengthy incarceration. This is apparent by looking at the prison population. Of the prison population, more than eighty percent of women are mothers and more than sixty percent of men are fathers.⁶⁹ The children of these inmates “are apt to experience behavioral problems due to lack of contact with [at least] one of their parents, which frequently translates into future criminal activity.”⁷⁰ One study showed that children of incarcerated mothers suffer in adulthood by turning to drugs and alcohol, becoming homeless, becoming suicidal, and struggling with incapacitating depression or anxiety because of their childhood trauma.⁷¹ In comparison, the sons of incarcerated fathers exhibit aggressive, delinquent, and criminal behavior that is (sometimes) similar to the criminal behavior that was demonstrated by the father.⁷² Other studies show that children who have an incarcerated parent frequently experience feelings of depression and become rebellious as they are forced to live with other family members (if that is an option) or in foster homes.⁷³ This could be because once a child is removed from the parent’s home, the situation worsens as the child is then in a situation where it is much more likely that he or she will be abused, neglected, and sexually molested.⁷⁴ In addition to the personality and home-life changes mentioned above, the children of incarcerated parents can acquire a lackadaisical attitude toward school which results in a decline in their academic performance.⁷⁵ Statistics show that after a child’s mother is incarcerated, the child is twice as likely to attend an alternative school

⁶⁹ Justin Brooks & Kimberly Bahna, *It’s a Family Affair- The Incarceration of the American Family: Confronting Legal and Social Issues*, 28 U.S.F. L. REV. 271, 271 (1994).

⁷⁰ *Id.* at 272.

⁷¹ Clark, *supra* note 68, at 266.

⁷² Brooks & Bahna, *supra* note 69, at 281.

⁷³ THEVENOT, *supra* note 3, at 3.

⁷⁴ *Id.*

⁷⁵ Brooks & Bahna, *supra* note 69, at 281.

as a consequence of pregnancy, truancy, or various forms of violence.⁷⁶ Not only is the child more likely to attend an alternative school, but the child will probably perform poorly in that school as well. Studies show that seventy-five percent of children who have an incarcerated parent are at least one academic grade level behind.⁷⁷

A lack of education will typically lead to less employment opportunities. Less employment opportunities can lead to a life of crime because money is more easily obtained that way. A life of crime leads to more incarceration. Since incarcerating a parent for non-violent offenses (such as possessing an illegal substance) contributes to juvenile delinquency, legislatures should set more appropriate penalties for such offenses.⁷⁸

Effect on Children—Undeterred from Committing Crime:

Deterrence is one of the goals of the correctional system.⁷⁹ The deterrence theory suggests that “people can be deterred from committing crimes by both experiencing and witnessing punishment.”⁸⁰ Unfortunately, when it comes to the children who have an incarcerated parent, this theory does not hold true.⁸¹ Research has shown that these children are actually “more likely to commit crimes as a direct result of the separation from the incarcerated parent.”⁸² A child may not be deterred from committing crime because, in his or her opinion, crime is not appalling or negative. In Florida, a study was conducted to see how the children raised in families with incarcerated mothers reacted to incarceration.⁸³ This study revealed that these children are less likely to be ashamed of becoming incarcerated themselves because, in their opinion, incarceration is not particularly negative.⁸⁴ Not only is it not considered particularly negative, but it may provide the child with a way to justify his or her own criminal acts (and subsequent

⁷⁶ Cudjoe & Barringer, *supra* note 45, at 278.

⁷⁷ *Id.*

⁷⁸ *Id.* at 278-79.

⁷⁹ Brooks & Bahna, *supra* note 69, at 273.

⁸⁰ *Id.* at 275.

⁸¹ *Id.* at 276.

⁸² *Id.*

⁸³ Cudjoe & Barringer, *supra* note 45, at 279.

⁸⁴ *Id.*

incarceration) because the child feels as though he or she is no better than his or her already incarcerated mother.⁸⁵

It is important to note that even if a child does not have an incarcerated parent, it is likely that the child will still not be deterred from committing crime. Incarceration does not deter people and does not lower crime rates because 1) people know that the likelihood of getting caught is small, and 2) “prison conditions are not terribly threatening” to the people thinking about committing crime.⁸⁶ It is not threatening to these people because “some may not be socially isolated from family and friends while confined,” and others decide that “the food, shelter, clothing, health services, recreation and level of physical safety are an improvement” over the desperate life that they lived in the inner city.⁸⁷ As a result, the frequency of criminal acts grows just as steadily as the prison population does.⁸⁸

Despite a child’s reasons for committing a criminal offense, the juvenile court system does not take into account a child’s background. Once an African American child enters the judicial system, that child faces the same problem that African American adults have with the system. African American children are discriminated against at every stage of the judicial process, especially at the sentencing phase.⁸⁹ Although they make up only fifteen percent of the adolescent population, African American children account for twenty-six percent of the adolescents arrested, thirty-one percent of the children sent to court, thirty-two percent of the children found guilty (or delinquent) in juvenile court, forty percent of the children sent to detention, and fifty-eight percent of the juveniles sent to adult prison.⁹⁰ Additionally, they are forty-eight times more likely to be convicted and incarcerated for drug crimes, compared to the likelihood of conviction and incarceration for a Caucasian child in the

⁸⁵ *Id.*

⁸⁶ Spencer, *supra* note 5, at 367, 370.

⁸⁷ *Id.* at 370.

⁸⁸ Ghoshray, *supra* note 11, at 318. Ghoshray explains, “During 2006, the prison population grew at a faster rate than in the previous 5 years. The 2.8% increase in the number of prisoners under State or Federal jurisdiction was larger than the average annual growth rate of 1.9% from 2000 through 2005.”

⁸⁹ Moss & Korobkin, *supra* note 1, at 39.

⁹⁰ *Id.*

general population.⁹¹ Thus, the cycle is effectively continued as a new generation of African American youth become familiar with the judicial system.

Effect on the Non-incarcerated Parent:

The parent who is left behind as the caregiver for a child faces great hardship. In the blink of an eye, the abandoned parent is forced to become the sole provider who is responsible for meeting all of the financial, social, emotional, and physical needs of the child.⁹² The parent has to ensure all of these needs are met while dealing with the added behavioral and school problems the child is likely to experience.⁹³ All of these added responsibilities and the loss of a spouse to incarceration (which is said to feel like the death of a spouse), can lead the non-incarcerated parent to experience feelings of grief, fear, shame, anger, and confusion. The difficulties caused by the new situation are only amplified by a spousal relationship that typically becomes unstable, begins to fail, and results in divorce.⁹⁴

Effect on Released Convicted Felons:

While incarcerated, a felon receives “little incentive to achieve any rehabilitative goals such as acquiring a trade or improving his education” because most states have adopted “Truth in Sentencing” statutes which do not allow a defendant to become eligible for parole until eighty-five percent of his sentence has been served.⁹⁵ Since the parole board cannot assess rehabilitation and cannot take good behavior into account until the inmate has served eighty-five percent of his or her sentence, the inmate does nothing. Thus, incarceration leads to degradation as a felon fails to acquire any job skills or life skills in general.⁹⁶ An inmate may also choose to do nothing because he or she knows that, as a convicted felon, he or she will face great adversity after being released from prison, regardless of any skills that he or she acquires while incarcerated. This adversity stems from the fact that once a person is a convicted felon, he or she becomes stigmatized and unable to successfully reintegrate into society. The

⁹¹ *Id.*

⁹² Brooks & Bahna, *supra* note 69, at 282.

⁹³ *Id.*

⁹⁴ *Id.* at 283.

⁹⁵ Ghoshray, *supra* note 11, at 323.

⁹⁶ *Id.* at 334.

stigmatization makes reintegrating difficult because it has “an informal impact on employment prospects and child custody disputes,”⁹⁷ and bears on qualifications for jury service and the individual rights to vote and to hold office. Felons frequently lose the opportunity to obtain public and private housing, are denied student loans and, if convicted of a drug felony, are unable to receive public assistance.⁹⁸ For example, when a person is convicted of a drug felony, “the federal welfare statute requires states to deny TANF [Temporary Assistance for Needy Families] benefits and food stamps.”⁹⁹

It is difficult for a parolee or released felon to handle all of the penalties that accompany the “convicted felon” status. Studies show that the released felons who have been most successful at becoming productive and law-abiding citizens are those who return to their families, specifically to a spouse and children.¹⁰⁰ Unfortunately, as mentioned before, many relationships fail when a spouse is incarcerated and family ties are broken due to the felon’s long period of absence. Inmates also have a hard time establishing new family ties after being released from prison because people who were incarcerated have difficulty forming new relationships as they are distrusted by the community, especially women.¹⁰¹ In prison they do not experience the alienation which they experience when they are released into the free world.¹⁰² With no family to turn to, many released felons re-offend so that they can return to the life they know best: prison-life. This assertion is supported by studies which show that inmates who have lost family connections (possibly due to long periods of incarceration) have greater recidivism rates because they are more likely to reoffend.¹⁰³

⁹⁷ Gordon P. Fletcher, *Disenfranchisement as Punishment: Reflections on the Racial Uses of Infamia*, 46 UCLA L. REV. 1897, 1897-98 (1999).

⁹⁸ Amy E. Hirsch, *Bringing Back Shame: Women, Welfare Reform, and Criminal Justice*, 10 TEMP. POL. AND CIV. RTS. L. REV. 417, 417-18 (2001).

⁹⁹ *Id.*

¹⁰⁰ Brooks & Bahna, *supra* note 69, at 285.

¹⁰¹ Ghoshray, *supra* note 11, at 333.

¹⁰² *Id.* at 336.

¹⁰³ Brooks & Bahna, *supra* note 69, at 272.

Effect on the Community:

The negative stigma that attaches to released convicted felons extends to the neighborhood and community that the released person chooses to live in upon his or her release.¹⁰⁴ Businesses and higher income residents are deterred from moving into communities which house ex-felons, so the neighborhood's economic growth is stunted.¹⁰⁵

The parent-child incarceration cycles and convicted felon-failure cycles act as plagues on the African American community. These cycles must be acknowledged and addressed if the community and the judicial system are to succeed.

V. Solutions to Decrease the Disproportionately High Number of African American Arrests and Change the Harsh and Unsuccessful Sentencing Practices

Arrests:

Racial profiling has led to the high number of arrests of African Americans. Therefore, United States law enforcement personnel and state and local drug enforcement units¹⁰⁶ should be required to participate in educational programming that is aimed at eliminating racial profiling.

By eliminating racial profiling by law enforcement, the disproportionate number of African American arrests would be reduced, law enforcement agencies would be more respected, and more drugs could be found and removed from the streets. Law enforcement agencies would be more respected because African Americans' cynicism and mistrust of police would be reduced.¹⁰⁷ This mistrust is shown in a New York Times poll which stated that two-thirds of African Americans (compared to one-fourth of

¹⁰⁴ Ghoshray, *supra* note 11, at 336.

¹⁰⁵ *Id.*

¹⁰⁶ BUREAU OF JUST. STAT., U.S. DEP'T OF JUST., LAW ENFORCEMENT MANAGEMENT AND ADMINISTRATIVE STATISTICS, 2000: DATA FOR INDIVIDUAL STATE AND LOCAL AGENCIES WITH 100 OR MORE OFFICERS (2004). Local drug enforcement units exist in seventy-one percent of the state agencies with over one hundred officers and in eighty-seven percent of the local agencies with a county police department.

¹⁰⁷ Moss & Korobkin, *supra* note 1, at 41.

Caucasians) believed that they were treated less equitably by police.¹⁰⁸ The amount of drugs in the streets would also be reduced if all “suspicious persons” (including Caucasians) were searched as opposed to the targeted African Americans. Studies show that law enforcement is actually more likely to find illegal substances when searching Caucasians than when searching African Americans.¹⁰⁹

Sentencing:

Judges cannot be given too much discretion because, as Senator Kennedy was concerned with before, great discretion led to judges’ consciously or subconsciously punishing minorities more harshly. In the same way, Congress should amend the Federal Sentencing Guidelines so judges do not continue to voluntarily strictly follow and adhere to them because, as the Supreme Court of the United States determined in *Booker*,¹¹⁰ strictly following the Federal Sentencing Guidelines violates the Sixth Amendment of the United States Constitution. Both of these sentencing methods have had a disproportionate impact on African Americans. Congress should create a policy that merely “impact[s], rather than define[s], the case-by-case sentencing decisions.”¹¹¹ The Federal Sentencing Guidelines should not be eliminated because they “provide guidance to federal judges who sentence over sixty-five thousand defendants annually” and they “promote uniformity.”¹¹² Judicial discretion should not be eliminated because judges are supposed to have the power to make the actual sentencing decision.¹¹³ Therefore, this paper proposes that the legislature find a happy medium by amending the Federal Sentencing Guidelines in the manner set forth below. This way, the legislators are establishing the sentencing policy and the courts are effectuating the policy with their sentencing decisions.¹¹⁴

The legislature should amend the statute to require judges to 1) look at culpability factors, 2) sentence people who are found to be “less culpable” to a lesser sentence (focusing on sentences like

¹⁰⁸ *Id.* at 40.

¹⁰⁹ *Id.* at 41.

¹¹⁰ *Booker*, 543 U.S. 220.

¹¹¹ Spencer, *supra* note 5, at 378.

¹¹² Bissonnette, *supra* note 29, at 1500.

¹¹³ Spencer, *supra* note 5, at 378.

¹¹⁴ *Id.*

rehabilitation) than that which was required by the original Federal Sentencing Guidelines, and 3) only sentence defendants based on facts that were found by the jury or admitted by the defendant (to avoid the Sixth Amendment violation found in *Booker*).

Sentencing—Advantages of the Amendment:

Criminal laws function to 1) define and announce prohibited conduct to the community, 2) decide whether a prohibited action merits criminal liability, and 3) assess the seriousness of an offense by imposing a sentence on the defendant when liability is found.¹¹⁵ The statutes that prohibit the possession and distribution of illegal substances satisfy the first function of criminal law, and the proposed amendment satisfies the second and third functions. Judges, once required to assess culpability factors, will be obligated to determine if a prohibited action merits criminal liability (which satisfies the second function of criminal law). Some culpability factors may be so great that imposing criminal liability would be cruel and unusual punishment. After a judge determines whether or not a defendant meets a culpability factor (which would make the defendant less culpable), the judge is then required to assess the seriousness of the defendant's offense (in light of the culpability factor) and impose a sentence that is tailored to the defendant's particular situation (which satisfies the third function of criminal law). Thus, amending the Federal Sentencing Guidelines by adding culpability factors would satisfy the functions of criminal law.

In criminal law, a defendant may only be deemed criminally liable for prohibited conduct if the defendant engages in a criminal act (actus reus) and has a criminal mind (mens rea). To satisfy the actus reus requirement, a defendant must knowingly and voluntarily commit a prohibited act.¹¹⁶ To satisfy the mens rea requirement, a defendant must purposely and intentionally engage in the prohibited act.¹¹⁷ The amended statute's culpability factors would help a defendant assert that he or she did not have the required actus reus or mens rea to be held criminally liable for committing the crime. If a court found that a defendant has the required actus reus and mens rea

¹¹⁵ Paul H. Robinson, *A Functional Analysis of Criminal Law*, 88 NW. U. L. REV., 857, 857-58 (1994).

¹¹⁶ *Id.* at 862.

¹¹⁷ *Id.* at 863-64.

(despite the fact that the defendant met a culpability factor), the court could find the defendant criminally liable, but it would be required to impose a lesser sentence than the sentence originally required by the Federal Sentencing Guidelines. If the court found that the culpability factor that affected the defendant was so great that the defendant could not have had the necessary actus reus and mens rea, then the court would have to find that the defendant was not criminally liable.

For an example of how the proposed amendment would greatly change things, this article will consider the story of Deborah Defendant, a middle-aged African American woman who is raising two children on her own. One day, Deborah Defendant went to the County Health Department (which provides free services to persons who meet certain income criteria) to be tested for sexually transmitted diseases. After being tested, Deborah found out that she tested positive for the Human Immunodeficiency Virus (HIV). Unfortunately, Deborah did not have health insurance and her minimum wage job did not provide her with healthcare benefits. As a result, she could not afford the expensive medicines that she was prescribed to help slow down the virus's progress. Since the virus has not been slowed, within a few years the virus caused Deborah to develop chronic yeast infections, fever, bruises, lesions, and diarrhea that lasts for at least a month. Unable to relieve her pain with prescription medicines, Deborah began using marijuana, an easily obtainable controlled substance that helps her cope with the debilitating pain that the virus was causing. After becoming accustomed to using marijuana multiple times a day, Deborah realized it was important for her to purchase her prescription medicines. Therefore, she started searching for jobs that offer healthcare benefits. While driving to a job interview, Deborah was pulled over for speeding. The police officer searched her car and found her stash of marijuana. She was arrested for possession of an illegal substance.

Under the current actus reus and mens rea requirements, a court would most likely find that Deborah knowingly, purposely, intentionally and voluntarily possessed the illegal substance. As a result, the amount of marijuana she possessed would have caused her to be incarcerated for five years. Things might have turned out differently if the proposed legislative amendment to the Federal Sentencing Guidelines were adopted. If the proposed amendment

includes drug use for medicinal purposes in the list of culpability factors, Deborah might argue that her possession and use of the controlled substance was caused by a culpability factor. If the court recognizes that she was less culpable because she was self-medicating with the illegal substance, then the judge would be required to sentence her to a sentence that is less than the sentence originally required by the Federal Sentencing Guidelines.

The differences in the outcomes show that the legislative amendment would successfully alleviate many of the negative impacts that harsh sentencing has on the African American community. The negative impact would be lessened because a defendant may be able to completely avoid incarceration if the judge determines that, even though the defendant committed a “criminal act,” the defendant was less culpable (because of culpability factors).

Sentencing— The Culpability Factors:

The amended statute should include a list of culpability factors for judges to consider. Under 18 U.S.C. § 3553(a), judges are not able to consider, “among other things, a defendant’s education, mental or emotional condition, socioeconomic status, or race.”¹¹⁸ The Federal Sentencing Guidelines do not allow a judge to consider familial obligations because they are “not ordinarily relevant in sentencing determinations.”¹¹⁹ Quite to the contrary, these are the types of factors that should be considered when a defendant is attempting to assert that he or she should be held less culpable of committing a crime. The culpability factors to be considered by judges could also include circumstances such as: whether the defendant possessed and used illegal substances for medicinal purposes, whether the drug use was caused by past or present victimization, whether the defendant’s background (to determine if the defendant’s parent(s) were incarcerated when the defendant was a child), and whether the defendant has a family. The proposed amendment could introduce a laundry list of culpability factors for courts to consider, but this article will only discuss the first two culpability factors (use based on medicinal purposes and past victimization) in depth.

¹¹⁸ Bissonnette, *supra* note 29, at 1509.

¹¹⁹ Brooks & Bahna, *supra* note 69, at 291.

Drug-Use for Medicinal Purposes

One culpability factor could be whether a defendant asserts that he or she was self-medicating a diagnosed physical illness (like Deborah Defendant). This is because some illegal substances, particularly marijuana, can relieve symptoms that are caused by various diseases or by the treatment of those diseases.¹²⁰ Among other things, marijuana is said to alleviate analgesia, nausea and vomiting, chronic pain, wasting syndrome, loss of appetite, neurological disorders, and glaucoma.¹²¹

Another culpability factor could be whether a defendant asserts that he or she was self-medicating a diagnosed mental illness. A study showed that sixty-two percent of state prisoners with a mental health problem used drugs.¹²² In a personal interview, Randee Waldman, the Director of the Barton Juvenile Defender Clinic and Kids in Conflict Professor at Emory University School of Law, said that she represented a juvenile defendant who was charged with possession of a controlled substance. In preparation for trial, she sent that defendant to a child psychiatrist. After evaluating the child, the psychiatrist reported that the juvenile had a mental disorder. She described it to Waldman by saying, “there is basically a lot of noise inside of his head. There is a lot going on inside the boy’s brain, so it is really loud.” Apparently, marijuana was able to decrease all of the noise because it slowed down brain activity. This discovery allowed the juvenile court system to provide the boy with great rehabilitation services. The boy was placed in special education classes, was able to get medicine, and received counseling. The juvenile was self-medicating himself for a mental disorder that he was unaware of. This discovery shows that to zealously represent a client, defense counsel may need to have their clients undergo a physical and mental examination so the defense can determine whether or not to argue this culpability factor.

¹²⁰ DIV. OF NEUROSCIENCE AND BEHAV. HEALTH, INST. OF MED., MARIJUANA AND MEDICINE: ASSESSING THE SCIENCE BASE 137-38 (Janet E. Joy, Stanley J. Watson, Jr., & John A. Benson, Jr. eds., 1999).

¹²¹ *Id.* at 139-77.

¹²² BUREAU OF JUST. STAT., U.S. DEP’T OF JUST., MENTAL HEALTH PROBLEMS OF PRISON AND JAIL INMATES (2006).

The potential problem with taking medical reasons into account is that the court or legislature would have to determine what is, and is not, a medical reason that warrants drug use. For example, it would have to be determined whether “drug addiction” should be covered by the “drug-use for medicinal purposes” culpability factor. Drug addiction should be covered because the 1962 Supreme Court case of *Robinson v. California*.¹²³ In *Robinson*, the Defendant was searched, although he was not engaging in any illegal activity, by a police officer who had ten years of Narcotics Division experience. At trial, the officer testified that, during that search, he observed “scar tissue and discoloration on the inside of the appellant’s right arm, and what appeared to be numerous needle marks and a scab.”¹²⁴ The judge informed the jury that to convict the defendant, the State must show that he used narcotics, or was addicted to narcotics, while in the city of Los Angeles.¹²⁵ Subsequently, the jury found the defendant guilty and the defendant appealed.¹²⁶ The appeal reached the United States Supreme Court, which reversed the lower court’s decision. The United States Supreme Court concluded that 1) states may impose criminal sanctions for the “unauthorized manufacture, prescription, sale, purchase, or possession of narcotics within its borders” and 2) states may “establish a program [which may or may not require periods of involuntary confinement] of compulsory treatment for those addicted to narcotics.”¹²⁷ The Court went on to say that although a state has a right to impose various criminal sanctions regarding illegal substances, a state may only establish treatment programs for addicts.¹²⁸ Punishing a person for simply having an addiction is counterproductive:

If addicts can be punished for their addiction, then the insane can also be punished for their insanity. The addict is a sick person. He may, of course, be confined for treatment or for the protection of society. Cruel and unusual

¹²³ *Robinson v. California*, 371 U.S. 905, 905 (1962).

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Robinson*, 371 U.S. at 905.

punishment results not from confinement, but from convicting the addict of a crime.¹²⁹

The Court has called an addict a sick person, and has decided that being addicted to an illegal substance is not punishable. Further, since the Court has held state laws that criminalize narcotic addiction are unconstitutional (as a violation of the Fourteenth Amendment since they constitute “cruel and unusual” punishment prohibited by the Eighth Amendment), addiction should be added to the list of medicinal purposes which make a defendant less culpable. To avoid having too many or too few illnesses which meet the culpability factor requirements, the legislature would have to create a clearly defined list of what qualifies as a medical reason or the courts would have to do an analysis like the one done above for drug addiction.

Drug-Use Caused by Past or Present Victimization

If the defendant suffered from severe abuse, then such a traumatic experience should be considered and included in the list of culpability factors. An abused person is a victim, and a court should not punish a person who acts as a result of being victimized. A study stated that seventy-six percent of abused men and eighty percent of abused women used illegal drugs regularly.¹³⁰ Abuse is closely linked with drug use. Being incarcerated for using drugs in response to such abuse is unhelpful. The problem with this culpability factor is that a defendant would have to prove that he or she was abused and show that the abuse led him or her to use illegal substances.

Sentencing—If a Culpability Factor is Met:

If a defendant meets a culpability factor, judges would be required to assign that defendant to a lesser sentence than that required by the original Federal Sentencing Guidelines. If the judge finds that imposing a sentence would be appropriate despite the fact that a culpability factor is present, the judge would be strongly encouraged to sentence the defendant to rehabilitation instead of a short incarceration sentence. The United States needs to break away of its heavy reliance on incarceration because it is ineffective,

¹²⁹ *Id.*

¹³⁰ BUREAU OF JUST. STAT., U.S. DEP’T OF JUST., PRIOR ABUSE REPORTED BY INMATES AND PROBATIONERS (1999).

structurally unsustainable, and unable to accomplish most of the objectives of criminal punishments—deterrence, retribution, incapacitation, and rehabilitation.¹³¹ Many studies show that drug rehabilitation is better than incarcerating drug addicts because 1) drug addiction is a medical problem that needs treatment; it is not a criminal problem that requires punishment, and 2) rehabilitation is a more effective way to spend tax-payer dollars. For example:

The central fallacy of the “War on Drugs” is that drug addiction is not essentially a military or law enforcement problem. It is a medical problem. We’ve known for years that by far the most cost effective way of cutting drug use is through treatment and education. A recent study by the Justice Policy Institute found that investments in drug treatment and education are 10 to 15 times more effective at cutting drug use than the same amount spent on law enforcement aimed at drugs.¹³²

The RAND Corporation has also conducted studies which support the Justice Policy Institutes’ findings. When comparing rehabilitation services and prison, the RAND Corporation found that treatment is fifteen times more effective at reducing drug crimes.¹³³ Additionally, the RAND Corporation found that if funds were spent on treatment instead of incarceration, cocaine users would reduce their drug consumption by four times.¹³⁴

Rehabilitation efforts are becoming increasingly popular and are preferred over incarceration. For example, state courts in New York have decided (by court mandate) that “nearly all nonviolent criminals who are drug addicts be offered treatment instead of incarceration.”¹³⁵ Focusing on rehabilitation is beneficial because

¹³¹ Ghoshray, *supra* note 11, at 322.

¹³² Creamer, *supra* note 13.

¹³³ BEATTY, HOLMAN, & SCHIRALDI, *supra* note 15.

¹³⁴ *Id.*

¹³⁵ *Id.*

“New York’s Unified Court System would divert ten thousand defendants from prison or jail into treatment,” and would save taxpayers \$500 million a year.¹³⁶ This rehabilitation focus illustrates that incarceration should not be the standard sentence given to low-level drug offenders.¹³⁷

If a judge chooses to incarcerate a defendant, some of the problems associated with incarceration could be lessened if the escalating incarceration budget was spent providing rehabilitative services.¹³⁸ Services might include 1) creating a website that would help inmates acquire social and networking skills, 2) building support groups for families and communities impacted by incarceration, 3) transporting the families of inmates to visitation if transportation is a problem for the family, and 4) establishing a curriculum to help inmates grasp life skills, parenting skills, and family values.¹³⁹ All of these services would help inmates more easily reintegrate into society so that they will be less likely to re-offend.¹⁴⁰

Conclusion

To reduce the negative effects that racial profiling and harsh sentencing has had on African Americans, law enforcement personnel should be educated to refrain from racial profiling and Congress should amend the Federal Sentencing Guidelines by adding culpability factors so defendants may be sentenced less harshly. These steps can help the legal system achieve equality and justice for all.

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ Ghoshray, *supra* note 11, at 346.

¹³⁹ *Id.*

¹⁴⁰ *Id.*