crime Blumstein used data from the Federal Bureau of Investigation’s Uniform Crime Report of racial differences in arrest for violent crimes. Blumstein acknowledged that police exercise considerable discretion when making arrests. The majority of police-citizen encounters, even when a crime has been committed, do not result in arrest. But Blumstein argued that such discretion would be used rarely in cases of the most serious violent crimes reported to police, murder and non-negligent homicide, forcible rape, aggravated assault, and robbery. Blumstein compared the racial distribution of the population of state and federal prisons in 1980 to the U.S. racial distribution of arrest for serious violent crimes. He concluded that approximately eighty percent of racial differences in imprisonment were “warranted” based on the higher levels of involvement of African Americans in serious violent crimes, those offenses most likely to result in a prison sentence.

Blumstein is sometimes cited as evidence that there are not widespread racial biases in the American criminal justice system. It should be noted that Blumstein does not draw this conclusion. By his estimation fully twenty percent of the imprisonment differences between blacks and whites cannot be accounted for by racial differences in serious criminal violence. What Blumstein could not take into account is differences in criminal histories that might account for the higher levels of incarceration for blacks. If black offenders come before sentencing judges with more extensive criminal histories then perhaps more than Blumstein’s eighty percent warranted disparity might be explainable by this additional legally relevant factor. Absent evidence on criminal history we should not conclude that Blumstein has demonstrated that criminal justice processing is or is not tainted by racially disparate treatment.
A second national study by Patrick Langan (1985) replicated Blumstein's work with a very important difference. Rather than using arrest statistics to estimate differences between blacks and whites in criminal involvement he used reports from the National Crime Victimization Survey (NCVS). The NCVS is conducted annually by the Federal government. It is a survey of a large representative sample of the U.S. population. The survey's focus is on criminal victimization and characteristics of the offender and crimes that they report being the victim of, including observable characteristics of offenders. For face-to-face crimes, the NCVS asks those who report victimization what was the race of the person or persons who victimized them. In a substantial portion of events the victim cannot determine the race of the perpetrators. Langan used those cases where race was reported to measure black/white differences in criminal involvement. Obviously the reports of some of the victims will be wrong, but this methodology represents the best available opportunity to make this estimate without criminal justice bias (e.g. differential use of police discretion in making arrests).

Blumstein's method presumes that police will use limited discretion in making arrests for serious violent crimes. To the extent that this is the case, the error in his estimate that eighty percent of racial difference in imprisonment is warranted is minimal; if there is more discretion exercised than Blumstein presumes, then this estimate may overstate the fairness of criminal justice processing. Using the same kind of national comparison that Blumstein employed, substituting the NCVS based estimate for racial differences in serious criminal involvement, Langan produces an estimate of the proportion of racial difference that is warranted by higher levels of black criminal involvement that is roughly the same as that is reported by Blumstein.
While both Blumstein’s and Langan’s analyses are sound and well executed their focus at the national level potentially obscures important differences in how the races might be treated more locally. Kleck (1981) pulled together a number of studies that examined more local jurisdictions that were conducted by others who examined sentencing and race. Table 1\(^2\) is taken from Kleck’s paper. He found that in most of these locations there was not evidence of racially disparate treatment. Notably, seven studies report bias, and the results of four are ambiguous.

In 1994 Crutchfield, Bridges and Pitchford published a paper that replicated the work of both Blumstein and to a lesser extent Langan, and reconsidered the meaning of Kleck’s findings. What was different about this paper was that the authors followed Kleck’s lead in acknowledging the importance of looking not at the national level, but rather at states. They used Blumstein’s method to study the proportion of racial disproportionality in imprisonment in each state to determine how much of the black/white difference in each state was warranted, and what proportion was unwarranted by the measurable legally relevant factor of higher criminal involvement by blacks.

While a portion of their analysis approached the replication of Langan, a state by state replication is not possible because sufficient NCVS data are not available for each state.

Table 2\(^3\) is taken from the Crutchfield et al. (1994) paper. The first column reports the black/white imprisonment disparity. The figures represent the ratio of blacks to whites (e.g. nationally blacks are 6.8 times more likely to be in prison than whites).

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The second column lists the black/white violent crime disparity. These numbers indicate the odds of a black person being arrested in each state compared to a white person (nationally, blacks are 6.9 times more likely to have been arrested). The third column indicates the percentage of the imprisonment (column one) disparity that is “warranted” by the higher rates of violent crime involvement among blacks (column two). Nationally, on average 89.5 percent of imprisonment disparity is warranted. 4 One can see from this table that there are large differences in the extent to which higher (than for whites) incarceration rates can be explained or justified by higher levels of black arrest for violent crimes. Or in Blumstein’s terms, states vary in the extent to which disproportionate incarceration of African Americans is warranted by higher levels of criminal involvement for the crimes most likely to result in a prison sentence. The range is from Minnesota, which has a very high level of racial disproportionality in its prisons (the black to white imprisonment ratio is 20.9 to 1), but the black to white arrest ratio is even higher (24.29 to 1). This indicates that the state of Minnesota is actually incarcerating fewer African Americans that would be expected on the basis of black and white violence arrest rates in that state. This should not be interpreted to mean that blacks are “getting a break” in Minnesota. The data are insufficient for drawing this particular conclusion. At the bottom of the range is New Hampshire. There only fifteen percent of racial disproportionality in imprisonment is “warranted” by higher arrest rates for violent crimes among blacks.

In these analyses Washington State does not compare well to the national average. The racial disproportionality in Washington prisons when these data were collected was

4 This percentage is higher than Blumstein’s 80 percent because this national average is not weighted for population sizes of the individual states.
9.28 to 1. That is, an African American in Washington State was slightly more than nine
times more likely to be in prison than a white American in the state. But, the ratio of
black to white arrest for violent offenses was only 3.72 to 1. This means that
substantially more than one half of Washington State’s racial disproportionality cannot be
explained by higher levels of criminal involvement as measured by violent crime arrest
statistics. When Washington State Legislators became alarmed because Christenson
reported that the state led the nation in the over incarceration of blacks their concern was,
strangely, both misplaced and appropriate. Christenson failed to take into account higher
levels of criminal involvement among the black population, and when this is done
Washington does not lead the nation. But even when differential involvement is
considered the State of Washington cannot appear to justify the high incarceration rate of
blacks compared to that of whites on the basis of higher violent crime involvement by the
former.

Clearly states—or perhaps even more, local jurisdictions—are the best level at
which to examine the extent of both warranted and unwarranted racial disparities in
imprisonment. To not do so runs the risk of masking important differences within the
states. One need only consider Minnesota and Washington to make this point clear. The
former appears to under-incarcerate African Americans and the latter over incarcerates
African Americans based on each state’s violent crimes arrest rates. When both are
combined in a national-level analysis, some canceling occurs and one ends up with an
overall unwarranted disparity of about eighty percent, yet the reality for the treatment for
blacks and whites in the two states is very different.
Crutchfield et al (1994) stressed another point that is illustrated in the Kleck (1981) table. The tendency of many researchers has been to study racial differences in sentencing. Kleck finds that most places do not exhibit differences in sentencing by race, but in other places such differences appear to occur. Crutchfield et al. draw from this the possibility that racial differences in how cases are handled or processed may vary from jurisdiction to jurisdiction. That is, in one place there may not be discrepancies in sentencing, but we do not know if there are differences in how the police, prosecutors, or parole boards handle cases. In another jurisdiction blacks may be treated more harshly at sentencing, but reasonably at other decision points in the local criminal justice system. And yet in another jurisdiction no differences are observable at all. Consequently, in order for us to gain a good and accurate picture of how race does or does not affect the processing of cases, researchers should study multiple jurisdictions and they should examine multiple decisions points in the criminal justice process.

In 1987 William Wilbanks published a provocatively titled book, The Myth of a Racist Criminal Justice System. Wilbanks does not present original research in this monograph. Instead he sets out to prove by reviewing the extant literature that the American criminal justice system is not racist. Unsurprisingly that is the conclusion that he draws. There are several things that are problematic about his thesis and the execution of his analytic review. First, while I am not as familiar with the empirical literature prior to the 1980s as I am that which has been published since that time, I know of no empirical research that was published in a peer reviewed scholarly journal that asserts that the criminal justice system is “racist.” Certainly the literature that came after that date, and in particular the studies of Washington State, have steadfastly refused to make
this assertion. Instead, studies point to racial differences in criminal justice processing, which cannot be explained by legally relevant factors (e.g. offense seriousness, offender’s criminal history), as “troubling,” or worthy of concern.

Second, Wilbanks uses a strangely narrow definition of racism. He asserts (1987, p 27) that because conceptions of racism are so varied “that it should be abandoned in favor of the terms prejudice (the attitude or belief) and discrimination (the behavior).” He essentially restricts his definition of discrimination to the intentional discriminatory actions of individuals. This is certainly one form of discrimination, but social scientists before and since Wilbanks have acknowledged that we should distinguish between individual expressions of prejudice and acts of discrimination, versus what can be called institutional or structured racism. This latter form, ignored by Wilbanks, may occur without the intentional acts of individuals. Systems can bring about racially disparate impacts on people or groups without individual actors intending to do so. In the review below there will be numerous examples of this occurring.

Third, Wilbanks (1987) makes a distinction between statistical significance and substantively meaningful differences. The former can occur when there may be small to large effects based on race that are highly unlikely to have occurred by chance. The latter is when the size of such a difference is large enough to matter according to the subjective determination of some observer. The standards for statistically significant differences are broadly accepted by the scientific community. The substantive difference that Wilbanks advocates will vary from observer to observer. If for example we are considering the probability of being found guilty and find that African Americans are two or three percent more likely to be found guilty than are whites after taking into account all legally
relevant factors, this may be statistically significant, but Wilbanks might conclude using a subjective standard that such a small effect is not substantial evidence of meaningful disparate treatment. I would suggest that even if the effects of racially disparate treatment are small they will be very, very important for the individual affected, and the accumulation of such differences will be important and meaningful to that person's racial or ethnic group.

It is not surprising that Wilbanks comes to the conclusion that the system is not racist. He does not demonstrate that there are not individuals acting in discriminatory ways; most scientific methodology is not designed to ferret out such behavior. This does not mean that institutional or structural arrangements do not result in racial disproportionality in criminal justice system processing because Wilbanks' definition excluded reasonable consideration of this form of discrimination. It also does not mean that there are no differences in how whites and members of racial or ethnic minorities are handled in criminal justice processing, because Wilbanks does not consider small differences to be consequential.

An important methodological issue that too few studies have adequately taken into account is "selection bias." Selection bias is a methodological problem that may occur when nonrandom or meaningful factors occur prior to the point that is being studied. To the extent that these factors affect who is being studied, then the results are contaminated by selection bias. An easy example of this is when a researcher studies racial differences in sentencing without taking into account that several stages in the criminal justice system have taken place prior to the sentencing stage; decisions that are made at these earlier stages determine who is "selected" for sentencing. That is, the
sample that is “selected” for study at sentencing is biased because of earlier decisions. If no racial differences are found at sentencing, perhaps it is because cases were sorted by, for example, prosecutors’ decisions of who and what to charge. Correcting for selection bias is not difficult if researchers have data for decisions earlier in the criminal justice process. Data from each earlier stage can be used to create a “hazard rate,” which measures the probability that a case would be passed on to the latter stage. By entering this hazard rate into analyses along with the other variables that the researcher is using to study a subsequent decision point, they are controlling for (or adjusting for, or taking into account) selection bias. By doing this the researcher can have confidence that the results are not contaminated by selection bias.

To return to the earlier example: when studying racial differences in sentencing, the researcher would include available legally relevant factors (e.g. offense seriousness and defendants’ criminal history), other factors (e.g. defendants’ race, type of attorney, etc), and a hazard rate (the probability that a case would have come through the criminal justice process to the sentencing stage). The researcher could then interpret the results for both the legally relevant factors and the other factors without fear that the results might be simply a product of selection bias. Few studies adjust for selection bias, presumably because the researchers do not have data on the prior decision points. When this is so the results of a study should be considered with extreme caution, and the results should be given less weight than studies that adjust for selection bias.

The studies that I have reviewed thus far are aggregate studies of differences in levels of imprisonment. Obviously these rates are a function of sentencing and release, and even these two decisions are made in the context of a system that renders a series of
decisions affecting individual cases. These studies are valuable, but they are limited in the extent to which they can tell us how fair criminal justice processing is in the U.S. or in individual states. To do this, the processing of individual cases need to be studied. Fortunately a number of such studies have been conducted in Washington State.

**Racial Disparity in the Criminal Justice System of Washington State**

To date there have been studies of racial differences at nearly all of the decision points of criminal justice processing in Washington State. Klement and Siggins (2001), Lovrich and his colleagues (Loverich, Gaffney, Mosher, Pickerill and Lutz, 2002; Lovrich, Gaffney, Mosher, Pickerill, and Smith, 2003), Mosher (2003), and Beckett and her colleagues have studied police agencies (Beckett, 2004; Beckett, Nyrop, Pfingst, and Bowen, 2005). Hewitt (1977) and Crutchfield, Weis, Engen, and Gainey (1995) studied prosecution decisions. Bridges (1977) examined bail decisions. Fernandez and Bowman (2004) studied Latino sentencing. Crutchfield, Weis, Engen, and Gainey (1993) conducted a study of exceptional sentencing (a procedure allowed by Washington State law that permits judges to sentence above or below the sentencing range in the name of justice). Crutchfield and Bridges (1986) studied sentencing, but in doing so considered earlier decision points. Engen, Gainey, and Steen (1999), studied specifically drug case handling by prosecutors and judges at sentencing. Also, Bridges and his colleagues have completed several studies of race and the juvenile courts in Washington. I will review each study of adults in the state's criminal justice system chronologically within each sentencing point, so the order will be studies of police, prosecutors (including the bail study), sentencing, and then other studies such as those of juvenile case handling.
Police Studies

Washington State studies of race and the police grew out of two areas of concern, differentials in drug enforcement and racial profiling. Klement and Siggins completed a study for the Kennedy School at Harvard University, and Beckett completed a study sponsored by the Washington Defender Association’s Racial Disparity Project, on drug enforcement in Seattle. The Washington State Patrol (WSP) commissioned a series of studies that were conducted by Lovrich and his colleagues to examine racial profiling by troopers of the WSP. Mosher completed a study for the Vancouver, Washington police department of racial profiling in police stops.

Klement and Siggins (2001) used qualitative (observational) methodology to study how drug enforcement patterns in Seattle might be related to race. While this study is of one jurisdiction, it is important to note that a large proportion of the minority population of Washington State resides in the City of Seattle or in the surrounding county, King County. Also, some may be concerned about the “scientific quality” of qualitative research, but this methodological approach has long been recognized as one of the best, if not the best, means of assessing police behavior. Landmark research of the police was conducted using observational techniques as early as mid-1960s (Piliavin and Briar, 1964).

Klement and Siggins state that they were “not looking for racial bias, racial profiling, intentional discrimination within the Seattle Police Department.” Yet they did find that there is a relationship between race and enforcement practices. This relationship, they conclude, is in large measure due to the police department’s focus on observable street level drug markets. Street marketing in Seattle has a much more
“minority flavor” than does the general population. The city’s minority percentage is relatively small despite it being the most diverse jurisdiction in the state. Approximately 8.5 percent of the population is black, roughly 16 percent is Asian (both Asian American and Asian immigrant) or Pacific Islander, about 5 percent is Latino, and less than one percent is Native American. According to Klement and Siggins, Seattle’s street level drug markets are heavily composed of African American and Latino sellers. These sellers market much of the crack cocaine sold within the city and tend to be from the lower social classes. Whites are actively involved in drug trafficking in Seattle, but their marketing tends not to take place on city streets, but away from the eyes of law enforcement, in homes, restaurants and clubs.

Klement and Siggins found that this “geography of markets” is exacerbated by two additional factors; the reactive nature of enforcement and the artificial distinction between “dealers” and users. Business owners and residents call the police when visible drug activity threatens their interests, which is more often linked to street markets. This has long been especially the case in the Pioneer Square section of downtown, the Denny Regrade area, and around the buildings that house city offices and the county courthouse (a small park that abuts the courthouse has long been a gathering place for the homeless and is suspected for harboring drug dealers as well). Pioneer Square is a nightclub and gallery section that draws substantial middle class patronage. Klement and Siggins mention gentrification as a force leading to increased calls for enforcement. Since their research, gentrification processes have become even more pronounced. The development of Belltown, formerly a rundown flop area, into a trendy restaurant, nightclub and condominium area, and the gentrification of the Central District, the historic heart of
Black Seattle, have brought middle and upper class citizens into contact more frequently with street dealers who have long sold in these locations. These increased contacts result in more calls for patrols, arrest, and strict enforcement by police, and bring Seattle Police Department officers into more contact with the street dealers who are disproportionately black and Latino.

The artificial distinction between drug dealers and drug users, in combination with the focus on street level markets, means that more non-whites will be arrested for, and face the more onerous penalties that have been established, for sales. Most street level drug sellers are users, frequently selling just enough product to satisfy their own habit. They tend not to be the crass, cool, predatory, entrepreneurial characters of movies or our imaginations.

Lovrich, Gaffney, Mosher, Pickerill, and Smith (2003) is essentially an interim report for the larger Washington State Patrol (WSP) funded study that this research team subsequently completed, which is reviewed below. Here they review the relevant literature, complete a thorough examination of available data, collect and analyze some new data, and assess data needs for the larger study. I will review some of the important findings resulting from these early analyses.

The WSP apparently completed an in-house analysis of their data to assess racial profiling by troopers. Loverich and his colleagues complete more sophisticated multivariate analyses of the WSP data. They report, “when other standards for rates of citizen contact such as statewide DUI BAC testing data and statewide FARS data and incident-specific contextual factors such as census demographics for smaller geographic areas (WSP Districts or APAs) and the seriousness and number of violation noted during
traffic stops are considered, most apparent racial and ethnic disparities are either eliminated or greatly reduced” (2003, p 2 of Executive Summary). Autonomous patrol areas are comparable to counties in most of the state, but several of the larger counties are split into multiple APAs and it appears that some counties with small populations are combined into a single APA. They conclude that they do not find evidence of systematic statewide racial profiling in traffic stops. While they observed some racial differences in some locations, they interpret the data to mean that these differences are eliminated or reduced when they take offense seriousness and the number of violations into account. Note that they do not report that all racial disparities in stops are eliminated by these legal factors.

Loverich et al. (2003) do find evidence of racially disparate rates of the issuance of citations and vehicle searches. While the former is not germane to this review, the latter is because disparate searches can lead to racially disparate filing of felony charges. The researchers also report that these differences too are reduced when legally relevant factors are considered, but that they are not fully eliminated; thus these results seem to this reviewer to provide evidence of unwarranted racially disproportionate handling by troopers of the WSP. Native Americans were more than twice as likely to be searched as whites, African Americans were more than seventy percent more likely, and Hispanics more than fifty percent more likely to be searched than whites (Loverich et al, 2003, p 103).\footnote{These estimates are taken from Table S-6 of the Loverich et al. report. These are conservative interpretations of their multinomial logit coefficients. Depending on how the research team conducted their analyses these estimates may be considerably higher than these conservative estimates.} The conclusions of Loverich et al. do agree with this reviewer’s interpretation of their results. They write, “There are simply too many remaining problems in the databases and possible effects from variables not considered in these analyses to support
a statement that the statistical disparities witnessed in these data are the result of
discrimination in the use of law enforcement authority” (2003, pp109-110). Essentially
in this report they are looking to their ongoing study to more completely answer
questions of the role of race, if any, in the enforcement practices of the WSP.

Lovrich, Gaffney, Mosher, Pickerill, and Pratt (2005) is the final report in the
series completed by these Washington State University scholars for the WSP. They used
various traffic stop data sets (e.g. number of stops, stops resulting from radar or aircraft),
accident data, search data, survey data taken from the general public, and focus group
(with troopers and sergeants of the WSP) data. Essentially they find little evidence of
state wide profiling in traffic stops by the WSP, but some important caveats are in order.
First, they begin by using census data for APAs for baselines to determine if drivers of
different racial or ethnic groups are stopped disproportionately. The appropriate
baselines to be used in racial profiling studies are an ongoing debate among researchers.
Essentially the problem is that we cannot know if the racial distribution in a residential
area is the same as the racial distribution of drivers. For instance, if an ethnic group has
an unusually low average age, a disproportionate share of the population is composed of
young people under legal driving age; their census population statistics will overestimate
the number of drivers from this group. In such a circumstance if the proportion of stops
for that group equaled their proportion in the population they are actually being pulled
over disproportionately by police. In Washington State another problem for researchers
on this topic is the relatively small minority populations and their concentrations in select
areas. Finally, it is quite likely that members of racial and ethnic minority groups in
Washington probably drive fewer miles on interstate highways than do whites because
these groups are disproportionately lower class and live mostly in urban areas. Consequently they are less likely to own cars, are less likely to be driving to work, driving to vacations and weekend getaways, and probably make fewer shopping trips to malls. So, they are probably less likely to be driving the highways of even the high minority areas of the state where the WSP patrol. They are less “at risk” of being profiled. Loverich et al. do state, “It is also important to note that certain areas of the state (particularly the Interstate-5 corridor running from the Canadian border to the Oregon border) patrolled by the WSP have a high proportion of out-of-state drivers, and it is probable that these drivers are more likely to be members of racial minority groups than resident in-state drivers” (2005 pp 11-12). This researcher believes that just the opposite is the case. The corridor of which they speak runs from one area populated by a nearly all white population, Canada, to another very white population state, Oregon (i.e. with significantly smaller minority populations than Washington), so there is little if any reason to believe that the racial composition of out of state I-5 drivers will be more likely to be of racial minority groups than in-state drivers. Likely the opposite is the case.

To the extent that I-5 drivers and highway drivers in general, are in smaller proportion than residential minority populations, the standard of what is considered “problematic profiling” probably should have been less than the five percent over population standard that Loverich et al. used. Loverich et al.’s (2005) report indicates that there is not evidence of substantial statewide differences in the treatment of drivers based on race, but their data indicate that APAs where more people of color live seems to show some disparate treatment based on race.
More germane to the issue at hand is Loverich et al.'s analysis of search data. It is searches conducted by the WSP that potentially lead to felony charges, which might result in disenfranchising convictions. They find that race, along with age, sex, and several legal factors, is a significant factor in predicting searches, particularly those that they classify as "low discretion searches." The research team is more confident in these data than in data that were used for the 2003 study. These results are similar, but the racial differences in searches are not as dramatic as they appeared in the earlier study. Nevertheless, even after legally relevant variables such as offense seriousness and the number of violations are taken into account, minority drivers are significantly more likely to be searched than white drivers. Native Americans are twice as likely to be searched for low discretion searches, blacks are twenty percent more likely, and Hispanics are approximately ten percent more likely to be searched than whites in low discretion searches. All of these odds increase for high discretion searches (Loverich et al., 2005, p 56). Based on focus group data the research team concluded that this is not evidence of systematic bias, but rather the use of race in efficient policing. This researcher’s experience with interviewing law enforcement personnel is that they routinely report that the behavior of officers can be justified as good policing rather than as racially problematic. It is little wonder that troopers and sergeants who participate in focus groups can “explain” why members of racial minorities are significantly more likely to be searched, even after legally relevant variables are taken into account. It is not clear to this researcher that such “explanations” are consistent with the data reported by Loverich et al., which indicates that blacks and Latinos have lower “hit rates” for these searches.

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6 As was the case in interpreting the results of the earlier Loverich et al (2003) study of the WSP, these interpretations of the multinomial logit analyses are purposely conservative.
(this is based on bivariate data analyses which may obscure more complicated, nonracial explanations). Lower hit rates mean that having searched members of these groups; they are less likely to find contraband than in searches of other groups—that is, less efficient policing. Loverich et al. point out that there is some substantial missing search data that could not be included in their analyses which could call into question their results, but they also assert that Washington State likely has the best search data available to study race and searches.

While Loverich et al. give the WSP a clean bill of health, this may be somewhat premature. Also the WSP do not routinely patrol those areas where people of color in the state are most at risk. So even if Loverich et al.'s results are accepted as presented, this only indicates that the WSP, the police department in the state with minimal contact with minority populations, is only minimally using racial profiling.

Mosher (2003) completed a review of data collected by the Vancouver Washington Police Department. The department voluntarily collected data on the perceived race of individuals stopped for traffic violations between April 2002 and March 2003. The data do not include measures of offense seriousness or the official record of those stopped, so Mosher could not take these important factors into account in assessing the reasonableness of the observed patterns.

Mosher did not find evidence suggesting broad racial profiling. Black motorists are stopped slightly disproportionately, but it is not at all clear that the differences are either substantively or statistically different. For the purpose of the current report, because our interest is in felony arrests and convictions, Mosher's analysis of searches and seizures is most important. He is only able to look at percentage differences between
the races and does not offer significance tests for observed differences. Among those stopped for traffic violations by the Vancouver Police Department, African Americans are nearly twice as likely to be searched as whites, and Hispanics are nearly three times more likely to be searched. Regarding seizure of items, searches of whites were the mostly likely to result in seizure (18.4 percent), then Hispanics (15.4 percent) and then blacks (7.1 percent). Asians and “others” who are searched at about the same rates as whites experienced no seizures during the study period. These two findings suggest that blacks and Hispanics are at greater risk for searches that could lead to felony charges, but since these searches are less productive than searches of whites, it is likely that minorities are being placed at this greater risk for no good police purpose.

**Beckett, Nyrop, Pfingst, and Bowen (2005)** is a study that was published in the journal *Social Problems*. This paper expands and extends Beckett’s initial study of drug enforcement patterns of the Seattle Police Department (SPD), which was completed for the Defender Association’s Racial Disparity Project (Beckett, 2004). Professor Beckett is preparing a report on her police research; consequently the current report will only briefly comment on this the broader of her works on this topic.

Beckett and her colleagues use multiple data sources (e.g. urinalysis of arrestees, surveys at needle exchange programs, police reports, direct observation of drug markets) to see if there are racial disparities in drug arrest by the SPD and to examine various explanations for any observed disparity. The focus of this study is the use and arrest for possession of serious drugs which are publicly believed to be dangerous; heroin, methamphetamine, ecstasy, powder cocaine, and crack cocaine. Possession of these drugs is more likely to result in felony conviction and incarceration than marijuana.
Beckett et al. (2005) find that black and Latino arrests for possession are disproportionate and white arrests for possession are significantly lower than their proportion among users. They then tested the capacity of several "race neutral" explanations for the racial disparity in Seattle drug arrests—police focus on outdoor markets, police efficiency, crack is most damaging, crack is associated with violence—and find that these explanations do not explain the observed racial disparities. Beckett and her colleagues did find that the focus on crack is the most significant cause of racial disparity in Seattle drug arrest. It should be noted that their estimation, developed from the combined use of several data sources, is that the number white users of crack cocaine in Seattle are approximately the same as the number of black users.

While Klement and Siggins (2001) attribute some of racial disparity that they observed while studying SPD enforcement to the Department's focus on outdoor drug markets, Beckett et al. disagree. They write, "In sum, while the focus on outdoor markets does worsen racially disparate arrest outcomes, the impact of the focus on outdoor drug activity is not as significant as the focus on crack, and the risks associated with obtaining drugs outdoors appear to be shaped by race" (2005, p. 30).

Rather than concluding that racial disparities are an unintended byproduct of race neutral attempts by police to control dangerous drugs, Beckett et al. conclude that a racialized conception of dangerous drug use underlies arrest disparities: "law enforcement policies and practices are predicated on the assumption that the drug problem is, in fact, a black and Latino one, and that crack, the drug most strongly associated with urban blacks, is 'the worst'" (2005, p 32). Their analysis of the data they assembled refutes both of these assumptions: whites are as likely to use crack in Seattle
as non-whites, and hospital data and a growing literature refutes the notion that crack is
close than heroine, methamphetamine, and perhaps some other substances (e.g. alcohol).

Summary of Police Studies

There is not evidence of broad of racial profiling in the State of Washington, but
there are substantial reasons to believe that Native Americans, blacks and Latinos are at
elevated risk that cannot be justified by differential involvement in crimes that are likely
to lead to arrests. That evidence is in the findings of Mosher (2003) and Loverich et al.
(2005) that police stops of Native Americans, blacks and Hispanics are more likely to
result in searches, and in Klement and Siggins’ (2001) and Beckett et al.’s (2005)
findings that drug enforcement patterns disparately affect these groups in ways that
cannot be justified by drug use or distribution patterns.

What are not included among these studies are statewide investigations of
policing and race, or research on how offenses beyond drug possession and distribution,
and traffic offenses, might be associated with race and ethnicity. This is especially
important because we know that the use of police discretion can make a very large
difference in producing racial disparity in later stages of the criminal justice process. For
example, evidence of the importance of police recommendations in bail decisions will be
reported below. Later in this report a study by Crutchfield (2004) will raise questions of
the validity of the notion that racial arrest for violent crimes is a good aggregate proxy for
racial differences in the actual commission of serious offenses. What we can conclude
from the limited extant studies of policing in Washington State is that there is credible
evidence that there are significant racial disparities that are not fully warranted by race or ethnic differences in illegal behavior.

Prosecutors’ Studies

Hewitt (1977) produced the first multivariate analysis of Washington State criminal justice processes that this reviewer has been able to uncover. It is a study of 504 felony convictions in King County. He found that only the sex of the defendant remained as a statistically significant “individual resource” (and not race, ethnicity, or income) in sentencing after other relevant factors were included in the analyses. Among those other factors he included are: offense, prior record, weapon of violence, bail, and prosecution and probation presentence recommendation. Among these additional factors that “explain” away the effects of other individual resources are actions at decision points prior to sentencing where subsequent research suggests the effects of race and ethnicity come into play (e.g. bail decisions). Also, this research does not take into account the problem of selection bias that was described above. Conceivably, sentencing differences based on individual resources may have come into play at earlier stages in the criminal justice processing, such as at arrest and in bail decisions, leaving a narrowed, select group at sentencing among whom sentences are rendered relatively “fairly” (see page 11 above).

Crutchfield, Weis, Engen, and Gainey (1995) is the final report for a study of prosecutor discretion in the King County Prosecuting Attorney’s Office. The study was sponsored by the Washington State Minority and Justice Commission. The study took place in King County for two reasons: first the Washington State Sentencing Reform Act
(SRA) of 1981 mandated that prosecutors throughout the state develop written standards for charging and plea dispositions and the King County Prosecuting Attorney's Office was the first to develop such standards. It was the opinion expressed by members of the Commission that King County had the most well-developed standards. Second, the Prosecuting Attorney allowed the research team to come into the office, and directed his staff to cooperate with and support the research effort. King County has the largest minority population in the state and contains the state's most diverse city, Seattle, so it is an opportune location in which to complete a study of racial and ethnic disparities in the prosecution of criminal cases.

Three data sources were used for this study: data from King County's automated database (PROMIS), case files for a sample of approximately 500 cases filed in Superior Court during 1994, and interviews with deputy prosecuting attorneys and members of the defense bar.

Crutchfield et al.'s (1995) major finding is that even with well-developed standards there were observable racial differences in case processing. These differences were modest but statistically significant. Whites are less likely to have charges filed than minorities (60% of white cases filed compared to 65% of minority cases). These significant differences persist even after legally relevant characteristics, such as offense seriousness, offenders' criminal histories, and weapons charges, are taken into account. Bail was recommended for blacks (compared to being released on their own recognizance--ROR) more often than for whites. This finding was explained in part when the research team considered "police recommendations" in the analyses. If the police recommendation is to not ROR a defendant, then the Prosecutor's Office usually
follows this recommendation when making their recommendation to the court, and judges nearly always follow the latter’s recommendation. The amount of bail was largely determined by the type of and severity of offense, and the defendant’s criminal history.

No differences in dispositions were observed by race (this is a comparison of those charged—this adjust or controls for the effect of selection bias), but whites were more likely to have pled guilty and blacks were slightly more likely than whites to have been found guilty in a jury trial. There are no racial differences in the likelihood of the prosecuting attorney’s office’s recommendations to confine (this is a comparison of only those convicted), but there are racial differences in the recommended length of confinement, even after legal factors have been taken into account. Blacks are recommended to spend about one half of a day more for each day that a white defendant is recommended to be confined in prison. Deputy Prosecuting Attorneys (DPAs) indicated that this is likely due to the higher probability of the former seeking a jury trial.

One of the standards that are applied in the office is that prosecutors recommend to judges a sentence at the bottom of the standard sentencing range for defendants who plead guilty and at the top of the standard range for those found guilty in a jury trial. Crutchfield et al. could not statistically test this hypothesis, but it is a plausible explanation for the longer sentence length recommendations for African American defendants.

There are no racial differences in recommendations for Community Supervision once legal factors are taken into account. However, African Americans were much less likely to be recommended for an alternative sentence (75% less likely than for whites). In summary, Crutchfield et al. found that in spite of the presence of standards for the use
of discretion by DPAs, black defendants are less likely to be released on their own
recognizance, more likely to receive higher rates of confinement than whites, less likely
to have their sentence converted to alternative sentences, and more likely to receive
longer sentences. To some extent these differences can be accounted for by members of
the staff following police recommendations on pre-trial release, and perhaps also because
African Americans are less likely to plead guilty, thus availing themselves less often to
the lower sentence length recommendations. But these explanations do not completely
explain observed racial differences.

In response to the previous study the Washington State Minority and Justice
Commission sponsored a research project to study racial disparities in bail and pre-trial
release. Bridges (1997) completed that study. The initial intent was to complete a
statewide analysis of the setting of bail and pre-trial release, but the study team found that
insufficient data existed to conduct such an analysis. The cost of collecting original data
for a state wide study prohibitively exceeded the project budget. The only county where
data sufficient for the study were routinely collected was, again, King County so the
study was complete there.

Bridges and his colleagues collected data on 1,658 cases that were drawn from all
felony defendants in King County between 1994 and 1996. They analyzed these cases by
studying legally relevant factors that are mandated by law to be used in making bail
decisions and social characteristics, including sex and the race and ethnicity of
defendants. The research team also conducted interviews with twenty criminal justice
officials, primarily judges, prosecutors, and defense attorneys.
Bridges' major finding was that offense seriousness and the prosecuting attorney's recommendation are major factors determining who is released on their own recognizance and on the amount of bail. Bail ranged between $500 and $1,000,000, with a median of about $10,000. Offense seriousness is obviously a legally relevant factor. Even after controlling for both the extant offenses of defendants and the prosecutor's recommendation, Bridges found significant racial differences. He wrote, "...race and gender influenced the likelihood of pre-trial release and the amounts of bail required, above and beyond the prosecuting attorney's recommendations, whether the case involved a serious crime and other factors. Thus, minority defendants and men were less likely to be released on their own recognizance than others even after adjusting for differences among defendants in the severity of their crimes, prior criminal records, ties to the community and the prosecuting attorney's recommendation" (1997, p 7). Bridges did not conclude that this is definitive evidence of racial bias. He acknowledged that it is possible that qualitative differences in offenses that are not discernable with the available data might explain the observed racial and ethnic differences.

The interviews that the research team conducted with criminal justice officials and defense attorneys are illuminating. Judges and DPAs expressed concern about the observed differences. They explained some of the difference as the "unintended effects of cultural differences among defendants" (Bridges, 1997, p 9). Three explanations came up repeatedly in interviews: first, community differences in law enforcement practices within the county probably contribute to racial disproportionality in release outcomes; second, intensified enforcement and drug offense prosecution is probably a contributing
factor; and third, the regionalization of the county criminal justice system may negatively affect minority defendants (Bridges, 1997, p 10).

Regarding community differences, DPAs who were interviewed described a pattern where “East Side” (the suburbs east of Lake Washington) police departments are more likely to identify and release suspects rather than transporting them to either the King County Jail in downtown Seattle or to the regional facility at Kent. They did this because of the time and distance investment of officers to transport suspects from their jurisdictions to these facilities. On the other hand, officers of the Seattle Police Department, because of the proximity of the jail, are less likely to identify and release those whom they arrest. Unfortunately for minority suspects, the greatest statewide concentration of both residents who are people of color and of nonwhite arrestees is within the City of Seattle. This geographical segregation, when combined with different practices for different departments, may explain a portion of racial differences in arrest according to interviewed DPAs.

The racial disparity effect of increased intensity of drug law enforcement that was described in interviews conducted by the Bridges research team is consistent with the results of the Klement and Siggins (2001) and Beckett et al. (2005) papers that were reviewed above. Also interesting are DPAs’ attribution of the centrality of community pressures on law enforcement as an important element, given Beckett et al.’s subsequent finding that this is not the case. Although the Bridges interviews were conducted prior to the study by Beckett and her colleagues it is likely that the view expressed by one DPA is still held by many criminal justice actors:

Without question, in any major urban area and particularly, in Seattle, the police make intentional undercover, highly concentrated
efforts in the downtown corridor, or wherever it may be, to arrest dealers....And, unfortunately, for whatever reason, a lot of it involves either Black or Hispanic individuals. The overwhelming majority of them are either Black or Hispanic. But [the police] are responding to a lot of pressure from the community to try to do something about these areas, wherever they may be. But what I am saying is that I don’t think that same focus is involved in burglars or forgery or whatever (quote in Bridges, 1997, p 10).

The third factor mentioned by interviewees to explain the observed racial disproportionality in release decisions was the regionalization of the County’s criminal justice system. In large measure this equates to the opening of the Regional jail and court facility in Kent Washington. Kent lies southeast of Lake Washington, fifteen to twenty miles south of the King County Courthouse and County Jail in downtown Seattle. Interviewees suspected that the transporting of defendants between the facilities, appearances in court via teleconferencing, and the difficulty of defense attorneys moving between the facilities, may negatively influence decisions for minorities in the system.

Bridges (1997) notes that defendants getting out of jail pre-trial is a very important factor because release can lead to more lenient dispositions later: lighter sentences, deferred prosecutions, and even acquittals. To the extent that minorities are disadvantaged in pre-trial release, this has real potential for contributing to disparity in felony convictions and in longer periods of imprisonment for people of color.

**Summary of Prosecutors’ Studies**

The three studies that have been identified were all completed in King County, Washington because of the presence of adequate data and the willingness on the part of the prosecuting attorney to have his office be the site for research. King County has the largest concentration of minority residents, so it is fortunate that it is the location of the extant research. Unfortunately, we cannot know from these studies what happens in the
prosecution of cases in the other thirty-eight counties in the state, some of which (Pierce, Spokane, Yakima, and Franklin) have substantial minority populations within their borders. Also Bridges, Crutchfield and Simpson (1987) found in a study of imprisonment rates in Washington counties that those with smaller minority populations were likely to produce larger racial disparities among those that they send to the state Department of Corrections’ facilities.

All three studies report that legally relevant factors such as offense seriousness and offenders’ criminal histories are important determinants of decision outcomes during prosecution. Hewitt (1977) finds no significant racial differences in case outcomes after these and other factors that he considers to be legally relevant have been taken into account. Crutchfield et al. (1995) and Bridges (1997) do find significant racial differences even after taking legally relevant factors into account. Two very important differences distinguish the earlier study from the latter two. First, Hewitt in no way takes into account selection bias, while the others are studies of process that better address this problem, but they too cannot address section bias resulting from discretionary decisions by police when making arrests. Racial differences that were observed in prosecution do not include the effects of earlier disparities that may have taken place because of police practices or enforcement policies. A second difference between Hewitt and Crutchfield et al. and Bridges is the former’s long list of factors that explain away the initial racial differences observed. All agree on the appropriateness of offense seriousness, offenders’ criminal history, and additional factors such as the use of a weapon in the commission of crimes. In fact the 1981 Sentencing Reform Act codifies the use of these in determining appropriate sentence lengths for those found guilty. Hewitt, though, includes bail
decisions and prosecutors’ recommendation in his list of factors while the more recent
studies found both of these to be locations of problematic racial differences that could be,
but were not observed to be, explained away by any measurable legal factors.

These studies found no “smoking gun” where officials are intentionally
disadvantaging minority defendants. But in a state with statutorily dictated standards for
rendering sentencing decisions, researchers have found that racial disparities can be
observed in earlier stages (than the more frequently studied sentencing process) of the
criminal justice process.

**Court and Sentencing Studies**

The largest portion of the racial disparities studies of the adult criminal justice
system that have been completed in Washington State have focused on sentencing
outcomes. This is likely due to concerns about racial disproportionality that were
observed in the state’s prisons. The initial study was conducted by Crutchfield and
Bridges (1986), and it focused on processes that began at the filing of felony charges at
arrest and tracked cases to the custody of the Washington State Department of
Corrections. Crutchfield, Weis, Engen, and Gainey (1993) conducted a study of
“Exceptional Sentences.” Engen, Gainey, and Steen (1999) studied charging and
sentencing for drug offenses (because one of their foci was charging decisions this study
could have been included among the prosecution studies above). Additionally,
Fernandez and Bowman (2004) examined the sentencing of Latino defendants in
Washington and Ohio.
The Crutchfield and Bridges (1986) study was commissioned by the Washington State Legislature in response to concerns raised by Christenson’s (1980a,b) initial publications, which asserted that the state led the nation in the over incarceration of African Americans. The Crutchfield and Bridges study included analyses of racial imprisonment patterns across states (findings of that portion of the study were published as Bridges and Crutchfield, 1988 and Crutchfield, Bridges, and Pitchford, 1994, which was reviewed above), analyses of patterns across Washington State counties (findings from that portion of the study were published as Bridges, Crutchfield and Simpson, 1987, which was cited above), and analyses of a sample of 889 felony arrests drawn from five counties with substantial minority populations: King, Franklin, Pierce, Spokane and Yakima. This latter portion of that study, because it focuses on racial and ethnic disparities in the processing of cases, is the focus of this segment of this report.

In addition to the three quantitative analytic portions of this study, Crutchfield and Bridges also interviewed law enforcement officials, prosecutors, defense attorneys (including public defenders), and judges. Those interviews shaped some of the interpretation of data and portions of them were used in Crutchfield (2004), which will be discussed below.

It is important to recognize that the sample of cases for this project was drawn from cases that were sentenced before the implementation of the State’s Sentencing Reform Act. When the study was commissioned the first cases under the reforms were just making their way through the system. Analytically the sample had to be drawn from cases that had completed processing in the counties from which they had been sentenced. At the conclusion of this section I will report on the speculations made by Crutchfield
and Bridges about the differences that the legal change might have made in the study’s outcomes. The major findings of the analyses of the 889 felony arrests are: (1) racial differences in case outcomes could not be accounted for by taking into account legally relevant factors (offense severity, criminal history of the offender, and use of a weapon in the commission of the offense); (2) Racial disparities in the processing of criminal cases can be observed in different decision points in different counties within the state; and (3) interviews with criminal justice actors uncovered direct racial prejudice among some, but more frequently the research team found evidence of more subtle, less obvious racially prejudiced attitudes.

Importantly, the analyses of the effects of race and ethnicity on each stage of criminal justice processing included a “hazard rate” to take into account selection bias. Results here can be interpreted without the problem of failing to take into account effects of prior decisions, except the police decision to arrest. At all stages of processing the research team found that offense characteristics were significant predictors of processing outcomes and at select points in the process defendants’ criminal history or their ties to the community affected the outcome. In the analyses of charging decisions, Crutchfield and Bridges wrote: “…race and ethnicity are associated with the outcomes of charging decisions: 1) in three of the five counties in crimes involving less serious violent offenses, 2) in Yakima, in crimes involving serious nonviolent offenses, and 3) across the five counties, in crimes involving less serious violent offenses for defendants with prior criminal records and those without community ties” (1986, p. 21). The research team found that “race had a pronounced effect in only one county” in pretrial detention. “Blacks in Yakima were more likely than Whites to be detained pretrial after other
factors were considered” (p. 22). Plea negotiations too were affected in some counties by the race of defendants: “…Black defendants detained pretrial and Hispanics charged with less serious types of violent offenses were less likely to plead guilt to crimes than other defendants” (p. 24). Finally regarding sentencing, “…race and ethnicity were important factors in sentencing decisions, particularly in Franklin and King Counties, along with type of legal representation, prior record and ties to the community” (p 25).

The second major finding, that patterns of disparity appear at different decisions points in different counties, is supported by their same set of findings. In different jurisdictions race or ethnicity may be related to differential decision making that cannot be accounted for by considering observed legally relevant factors at varied points in the criminal justice process. For example, black defendants were not disadvantaged in pretrial decisions in four of the studied counties, but they were in Yakima County, and race and ethnicity were found to be statistically significant factors in other decisions in Franklin and King County, but not in the other three. It is important to remember that these patterns are observed after taking into account selection bias. That is the, analyses have already taken into account racial differences that may or may not have occurred at preceding decision points.

As described above the research team interviewed criminal justice practitioners as a part of the study. These interviews are described in Crutchfield’s (2004) paper, which will be discussed below. The research team interviewed one law enforcement official who expressed what can only be described as problematically stereotypic views of Latinos (Crutchfield, 2004, pp 36-37). Fortunately few such expressions have been uncovered in interviews that have been conducted for this and other studies. What is
more frequent are statements such as the one expressed by a judge that indicated that
cultural differences between white jurists, and presumably others in the criminal justice
system, and black defendants, can account for some of the observed racial disparities in
case processing (Crutchfield, 2004, pp. 35-36).

In designing this study the research team was very cognizant of members of the
legislature and the general public's concern for what might be the state of racial and
ethnic differences after the Sentencing Reform Act (SRA). While completion of the
study in a timely fashion required examining cases that were sentenced before the act, the
research team focused their examination of legal factors on those specified by the
Sentencing Act, criminal offense, criminal history, and aggravating factors such as the
use of a weapon in the commission of the crime. While it cannot be known that the
results reported by Crutchfield and Bridges (1986) are the same as would be found in a
post SRA sample of cases, this study design hopefully limited the effects of sentencing
patterns in the different time periods.

The Washington State Minority and Justice Commission sponsored a study by
Crutchfield, Weis, Engen, and Gainey (1993) of the use of Exceptional Sentences in
the state. Exceptional Sentences were created in the Washington's SRA. SRA created
standard sentencing ranges for all offenses that are determined by the combination of the
seriousness of the offense (set by the Sentencing Guidelines Commission and based on
the Revised Code of Washington) and the offenders' criminal history. Exceptional
Sentences are sentences either above or below the standard range. Judges are empowered
to give an Exceptional Sentence in the interest of justice if the standard range is believed
to be either too short or too long. Sentences above the standard range are referred to as
aggravated exceptional sentences (AES); those below the standard range are mitigated exceptional sentences (MES). There were concerns after the implementation of the SRA that too many exceptional sentences were being given by judges and that there was the potential for unwarranted disparity. Sentencing rules were amended requiring that judges provide written justification for all exceptional sentences in an attempt to curb the use of this option, and to minimize their disparate use based on non-legal factors. The Minority and Justice Commission’s intent in sponsoring this study was to evaluate the use of exceptional sentences after these changes to the SRA were implemented.

The research team found that Exceptional Sentences are used rarely (4% of cases). As was the case in the Bridges and Crutchfield, study this project report concluded that the relationship between race and ethnicity is complex, and how cases are handled varies from county to county. Some of the observed patterns in racial disparity in the use of exceptional sentences are exacerbated by the concentration of minority residents in select counties. This means that the relatively high use of these sentences in a few counties that have high minority populations produces the apparent state disparity. That is, a few counties use these sentences more for minority and majority defendants but because they sentence more minority cases than most other counties, a state wide disparity is created.

These analyses examined exceptional sentences taking into account the seriousness of the offense, offenders’ criminal history, and legally specified aggravating factors (e.g. the use of a weapon in the commission of crimes). Crutchfield et al. (1993) also found that black defendants are less likely to receive aggravated sentences than whites in general, but they are more likely to receive an AES for the most serious
offenses. Hispanics are more likely to receive AES. Statewide, whites, Hispanics, and
Native Americans are most likely to receive AES. Hispanics are the least likely and
Native Americans the most likely to receive mitigated sentences. While blacks are not
likely to receive AES, there did appear to be evidence that they are more often sentenced
higher in the standard sentencing range than are white defendants. The research team
took note of this finding but did not explore it more because it was beyond the scope of
the project.

The research team analyzed the reasons provided by judges for giving exceptional
sentences. They found that the reasons that judges give for imposing sentences outside of
the standard range appear to be related to the race and ethnicity of defendants but no clear
pattern could be observed. They found that the most common reasons given referred to
offenders’ personal characteristics or behavior that reflected their “blameworthiness,” and
damages that were such that the judge felt the standard range did not provide adequate
punishment.

The bottom line conclusion is that Hispanic defendants are significantly more
likely to be sentenced above the standard sentencing range and the least likely to benefit
from sentences below that range. Black defendants are more likely to receive AES when
they have been convicted for the most serious crimes, even after the offense seriousness
has been taken into account.

In a reanalysis and extension of the above study Engen, Gainey, Crutchfield, and
Weis (2003) considered not only what are formally defined as exceptional sentences by
Washington State, but several structured alternative sentences that are available to judges.
Examples of these sentences are Alternative Sentence Conversion and the First-Time
Offender Waiver (FTOW). Key findings are that minority offenders are less likely to receive alternative sentences below the standard range but that, as was the case in the earlier analysis, race and ethnicity are inconsistently related to sentences above the standard range. Further, white offenders, females, older offenders, and those who plead guilty are more likely to be sentenced below the standard range (Engen et al., 2003, p 121). The researchers argue that this pattern is consistent with arguments that minority offenders, males and young offenders are perceived as more blameworthy and/or dangerous (p 122).

Engen, Gainey, and Steen (1999) completed a study of drug prosecution that was also supported by the Washington State Minority and Justice Commission. This is a study of charging and sentencing in King, Pierce, and Yakima Counties. These counties have some of the state’s most diverse populations. The research team studied the cases of people convicted of drug offenses in these three counties to see if there were racial differences in changes in charging (e.g. reduction to drug possession for someone initially arrested for drug delivery) and differences at sentencing. In the preliminary stages of their work, Engen et al. (1999) report that they found race and ethnicity differences in charging decisions, but the differences that they found are explained when legally relevant factors are considered. They do find that charges are routinely changed between initial charging and conviction, but that these do not appear to be related to race or ethnicity.

In order to obtain a more informed view of these processes, Engen and his colleagues also collected and analyzed case file data for a sample of 294 whites blacks, and Hispanics who were convicted of a drug offense. With this portion of their research
they were able to track individual cases of these convicted felons from charging to sentencing. They found some race differences in charging decisions but these differences were not statistically significant. One of their findings, where racial differences were statistically significant, was not in the ordinarily expected direction. They found that minorities, African Americans and Latinos, are significantly less likely to be convicted of delivery than whites (they found this pattern in their analysis of those initially charged with delivery).

The research team also interviewed a sample of prosecutors, judges, members of the defense bar, and others in each of the three counties. These people generally believe that there are not real race differences in how drug cases are handled. They do think that there are differences in behavior which lead to the appearance of differences. That is, they express the belief that minorities are more likely involved in drug delivery and in drug use, resulting in differences in charging and sentencing decisions. Notably several interviewees disagreed, expressing the belief that enforcement patterns and racial profiling in arrest affect minorities more harshly.

This reviewer has several concerns with this study. First the research team conducted its study by looking at what happened in the case processing of people convicted of drug felonies. This is what researchers refer to as a censored sample, because it does not include people whose charges were dropped completely, reduced to misdemeanors, who were diverted, and who were acquitted. Examining just those convicted (and in appreciation of the difficulties that faced the research team this reviewer recognizes that these are likely the only cases that were available to analyze) is a classic example of not taking into account selection bias. Both the large group of
convicted felons that they examined and the sample of 294 cases that they were able to more closely study constitute biased samples that do not allow us to conclude that no important race differences occur in charging or sentencing of drug cases in these three counties. Second, the research team is correct on the importance of being able to track actual cases (their sample of 294), but it is possible that the racial differences that they observed that did not achieve statistical significance because of their relatively small sample of cases. Had the sample been larger it is quite possible that small differences in the handling of white, black, and Latino cases may have been statistically significant. Finally, we should note that most of those interviewed by the research team expressed belief that racial and ethnic differences in case processing were simply reflective of higher levels of drug use and delivery by minorities. This belief is not supported by the data that Beckett et al. (2004) gathered and discussed. Beckett’s and her colleagues’ conclusion from their analyses supports the view of that small group of people interviewed by Engen et al. who believed that drug enforcement patterns fall more harshly on minorities.

The most recent study by Fernandez and Bowman (2004) is a comparison of the handling of the drug cases of Latino defendants in Washington and Ohio. The authors set out to study how the political environment (liberal vs. conservative) in counties affected the outcomes of cases where Latinos were charged with drug offenses. They used the distribution of voting within counties in each state to measure how conservative or how liberal counties were relative to other counties in each state. Because Washington is a state that frequently has citizen initiated referendums, the researchers could use the vote distributions for these initiatives as indicators of county political climates. This study has
some methodological problems, in the opinion of this reviewer, but the bottom line is they find only limited disparity, but they do find that in Washington Latinos are less likely to be given the statutorily established drug offender sentencing alternative (DOSSA), which frequently requires less incarceration time, in conservative counties (measured by using counties’ vote for a medical marijuana initiative) and where the Latino population is largest. This latter pattern was also observed in Ohio counties. This reviewer believes that the methodological problems (no control for selection bias and questionable operationalization of “conservative” and “liberal” counties) suggest that we take with caution both the finding of limited ethnic differences, and the ethnic differences that Fernandez and Bowman do report.

Summary of Court and Sentencing Studies

This group of studies has found important racial and ethnic differences in the processing of criminal cases in Washington State. A not inconsequential amount of these differences can be explained by including legally relevant factors, such as the seriousness of offenses, the criminal histories of offenders, and legislatively established aggravating factors such as the presence of a weapon in the commission of a crime. But even when these legally relevant factors have been taken into account, racial and ethnic differences have been repeatedly observed in the processing of felony cases in Washington State. The study which had the most expansive examination of criminal justice decision points, Crutchfield and Bridges (1986), examined cases that were processed prior to implementation of the SRA, but the results of that study are for the most part consistent with those of the other studies that were conducted after implementation.
This group of studies found statistically significant race and ethnic differences in case handling in the Washington State criminal justice system. These differences appear in different decision points in different jurisdictions of the state. Some of these differences appear to be small, but this reviewer concludes that these small differences in what a person is charged with, whether they are released pre-trial, if they are convicted, and what sentence is given, are important to the individuals processed and they add up to collectively being more important for minority communities within the state.

Recent National Studies of Racial Disparity in Criminal Justice Processing

Since the earlier articles written by Christenson (198a, b) and Blumstein (1982) a voluminous literature reporting on studies of racial disparity in criminal justice processing has been published. Some of that literature reports that significant racial differences in how cases are handled are found but in other studies differences are not observed. In some jurisdictions racial disparity can be observed at one decision point in criminal justice processing, but not at other decision points within the same jurisdiction. Scholars find that in different jurisdictions disparity may appear at different places in the criminal justice process. Essentially the research that has appeared affirms the conclusions of Crutchfield et al. (1994): racial disparities exist in some jurisdictions, and when they can be observed the decision point in the process where unwarranted differences occur can differ from jurisdiction to jurisdiction. An important finding from this collective research is that precisely when and how race and ethnicity affect criminal justice processing in the U.S. is complex.

The brief review of studies not conducted on Washington State that is presented in this section supplements the review that began this report, but here the focus is on
research that has been published in very recent years. This recent literature too reports seemingly contradictory results, yet it confirms that we cannot conclude that race and ethnicity no longer affect the processing of felony cases.

Demuth and Steffensmeier (2004b) studied the processing of cases in urban courts using Bureau of Justice Statistics data. They found that both Hispanic and black defendants received harsher sentences than did whites after legally relevant factors were taken into account. Hispanics were particularly disadvantaged in drug cases and blacks in property crime cases. The same researchers also conducted a study of pretrial release in the 75 most populous counties in the U.S (Demuth and Steffensmeier 2004a). Here they studied the effects of race, ethnicity and gender and found that white women were the most likely to be released pretrial and Hispanic males were the least likely to be released. They concluded Hispanics (both men and women) and African Americans men and women were adversely affected because many more of them were unable to post bail. Turner and Johnson (2003) also studied bail decisions, but in a rural Nebraska county. They did not observe that race had a direct effect on pretrial release, but that there was a statistically significant interaction between race and offense seriousness in these decisions. That is, while overall minority status did not affect bail in this county there were observable racial differences in cases where the offense was more serious.

Several studies of racial and ethnic patterns in arrest were reported in the literature. In a recent study of Chicago neighborhoods Kirk (2005) found that racial and ethnic differences in arrest can largely be accounted for by some groups' heavier involvement in crime. But Kirk also reports that those living in economically disadvantaged neighborhoods, and in places where there is more physical disorder, are
more likely to be arrested even after neighborhood crime rates are taken into account. Kirk found that crime, neighborhood disadvantage and disorder cannot fully explain racial and ethnic differences in arrest. Munoz, McMorris and DeLisi (2005) found that Hispanics in a rural Nebraska county were arrested more often and charged with more misdemeanors than others, and that this has important implications for the development of criminal records that potentially influence later criminal justice outcomes. In a broader study of arrest for rape, robbery and assault in seventeen states, D’Alessio and Stozenberg (2003) found no racial differences in arrest that could not be explained by higher levels of violation among minority people. The same researchers, along with an additional colleague (Eitle, D’Alessio, and Stolzenberg 2002), reported that overall arrest rates are shaped by the racial nature of crime in jurisdictions. Where the black-on-white crime rate was high the arrest rates for African Americans tended to be higher. But, the black-on-black crime rate (the most frequent pattern of black crime) had no affect on arrest rates. Where blacks more frequently victimize whites African Americans’ arrests are higher, but where they victimize other blacks, arrest rates are not appreciably higher. Taken together, one can interpret these studies to indicate that arrests are affected by crime seriousness, but they are also influenced by the racialized nature of crime and victimization. Similarly, Holcomb, Williams and Demuth (2004) found that homicides where the victim was a white female were more likely to result in the imposition of death sentences than for other gender-race dyads. In summary, this literature continues to report mixed findings, but one can conclude that a substantial literature reports that unwarranted racial disparities can be observed at some critical junctures of criminal justice processing in some jurisdictions.
Thus, while the literature is mixed, one cannot reasonably conclude that our system of justice is racially and ethically neutral. A segment of Mitchell’s (2004) doctoral dissertation attempted to sort through the reported contradictory findings regarding race, ethnicity and the criminal justice system. He used a meta-analysis technique (this approach quantifies the results of a large number of studies to facilitate the search for common patterns and discrepancies and allows a researcher to explain these patterns) to search for the sources of inconsistencies in the extant literature on racial disparities in the criminal justice system. Mitchell found that minorities are sentenced more harshly than whites after taking into account legal factors. He concluded that these results are statistically significant but statistically small, though not necessarily “substantively small.”

Scholars have recently examined how political context may influence criminal justice practice. This is not a new scholarly direction; Adamson (1983, 1984) published papers that detailed the development of the convict lease system in the post Civil War South. Convict lease systems, which allowed companies and plantation owners to “rent” prisoners from the state, developed to buttress the racial caste system that emerged during the post Reconstruction period and to provide labor (usually black but not exclusively so) for dangerous industries (e.g. mining and railroad construction). Recent studies of political influences on criminal justice practice have been conducted using sophisticated quantitative analytical techniques. Helms and Jacobs (2002) studied 337 jurisdictions in seven states and found that African Americans and males receive longer sentences in conservative political environments (where law and order presidential candidates got more votes). They conclude that their results indicate that punishment is an intensely
political process. Jacobs and Kleban (2003) studied thirteen industrial democracies and found that nations with more internal racial conflict had higher levels of imprisonment. Behrens, Uggen, and Manza (2003) were interested in the development of felony disenfranchisement laws because such laws “dilute the voting strength of racial minorities.” They conclude that states with large minority populations and large minority prison populations have historically developed felony disenfranchisement laws the earliest.

The State of Washington has also commissioned studies of racial disparity in juvenile court processing (Department of Social and Health Services; Washington State Minority and Justice Commission). These studies have reported results comparable to those observed in adult court, except that the nature of the juvenile courts gives more opportunity for “inappropriate decision making” to influence the process (see Hsia, Bridges, and McHale 2004 for a useful review of this research). A good example of how disparity can happen in juvenile courts is described by Bridges and Steen (1998). They analyzed the texts of juvenile probation officers’ presentence reports. They found that language used to describe juveniles tends to fall into two categories, where the fault for bad behavior is internal to the person (bad person explanations), or where the fault is external to the juvenile (bad circumstances explanations). Nonwhite offenders tended to have external “typifications.” When this language is used to explain violations there is a tendency towards defining the person and their situation as amenable to treatment, rehabilitation and successful control. Minority offenders were more likely to have both external and internal explanations applied to them, and far more frequently internal typifications were used in describing them. Internal typifications suggest less
amenability to successful treatment and rehabilitation which Bridges and Steen believe leads to more punitive sentences.

Racial and ethnic disparities in the juvenile courts do not ordinarily lead to felonies unless defendants’ cases are sent to adult court for trial. Nationally, this practice has increased in recent years and this has not been seen as a positive change for minority juveniles (Harris, 2005).

Hill, Bailey, Hawkins and Farrington (2005) are in the process of completing a study of juvenile arrests in Seattle. They are examining a sample of approximately 800 people who are now thirty years old. University of Washington researchers began collecting data on this group, that was then identified as “at risk,” when they were in elementary school, and have periodically interviewed them in the intervening years. A portion of those interviews ask questions about each person’s self reported delinquency. The research team also searched Washington State juvenile court data bases to identify court contacts for members of their sample. In the current analysis Hill et al. are studying racial differences in arrests while members of the sample were between thirteen and eighteen years of age. The research team has found that blacks who self report that they have engaged in delinquency are significantly more likely to have been arrested and to have made a court appearance than white juveniles who self report delinquent behavior (the research team adjusted for different frequencies and severity of offending). Importantly, they also find that “at risk” black youth who do not self report engaging in delinquent acts have a significantly high probability of having been arrested. For “at risk” African American youth, it does not appear that avoiding criminal involvement protects them against contact with the juvenile justice system.
Causes of Racial and Ethnic Disparities in Criminal Justice Processing

There are two recognized means by which ethnic disparities in criminal justice processing might occur: through individual acts of discrimination by criminal justice actors, and as a result of institutional or social structural arrangements. The first, individual acts of discrimination, might occur through willful, conscious behavior, or as a result of reactions that an individual criminal justice actor may not be consciously aware of. Institutional or structural arrangements can cause disparity, not because criminal justice actors actively discriminate but because the way the system “does business” may disadvantage people of color. The primary objectives of most of the studies of Washington State’s criminal justice system focused on institutional or structural arrangements that might result in racial disparities in treatment. Included in some of these studies were interviews that suggest problematic individual behaviors (Crutchfield 2004). Our limited ability to establish the causes of the observed racial disparities in criminal justice processing is reviewed below.

The studies of the WSP and the Vancouver, Washington police department might have revealed agency-wide patterns that would be produced by discriminatory acts of officers. In the former study the researchers (Loverich et al., 2005) concluded, based on the results of focus groups with members of the WSP, that racial and ethnic disparities in searches were not the result of discriminatory decisions of troopers. This interpretation can neither be refuted nor verified with the data collected. That higher rates of searches of minorities who are stopped for traffic violations do not yield higher rates of arrest for more serious offenses, nor more contraband seizure, should call into question the notions
expressed by focus group members that higher rates of searches of minorities are justified as an enforcement efficiency. Similar racial patterns of search and contraband seizure were observed by Mosher (2003) in Vancouver.

Crutchfield and Bridges (1987), Crutchfield et al. (1995), Bridges (1995), and Engen et al. (1999) included interviews of criminal justice actors. Generally the products of these interviews were similar to the focus group observations of Loverich et al. (2005). Criminal justice officials (police, prosecutors, and judges) believe that racial differences in the processing of defendants can be explained by case characteristics (e.g. offense seriousness, weapons enhancements) or legally recognized offender characteristics (e.g. the defendant’s criminal history). Defense attorneys, however, more likely ascribed observed racial differences to discriminatory treatment of racial and ethnic minorities.

As described above, these studies routinely took offense and legal offender characteristics into account so these justifications (of racially disparate handling) by criminal justice actors are suspect, because these factors were already taken into account in the analyses.

Crutchfield (2004) reported comments from interviews conducted for the 1987 study (Crutchfield and Bridges, 1987) by two actors that suggest how conscious beliefs can lead to racially disparate treatment. A police official displayed stereotypic conceptions of Latinos when responding to an interviewer’s question by saying “they naturally like their music” (Crutchfield and Bridges, 1987). One may reasonably expect that if that official readily accepts that stereotype, he and perhaps even those he supervises might also accept other stereotypes, such as Mexicans are more likely to be drug curriers or most African Americans have a higher probability of being involved in criminal behavior. An officer with such beliefs may be more likely to institute
unwarranted searches of minorities stopped for traffic violations, or may be less likely to exercise police discretion to not make an arrest in street encounters.

A judge interviewed for the study, who expressed a belief in racial and ethnic equality, reported that she sometimes made courtroom decisions in reaction to African Americans' expression of cultural style. Justifying her behavior, she said, "What else can I do when they come in my courtroom with that macho, jive ass stuff" (Crutchfield, 2004, pp 35-36). This negative reaction, when perceptions of cultural patterns enter criminal justice decisions, is similar to observations made by Bridges and Steen (1998) when they observed that the "typifications" of behaviors by probation officers in presentence reports disadvantaged minority juveniles and benefited whites in subsequent decisions. The behavior of the quoted judge and the probation officers whose reports Bridges and Steen studied may not be picked up as discriminatory behavior in the quantitative studies, but their unconscious racially biased attitudes and resulting behavior may manifest themselves in racially disparate handling of cases.

The research of Anthony Greenwald and his colleagues provides evidence of even more subtle mechanisms that may lead to unconsciously biased perceptions of minority defendants (c.f. Greenwald, Oakes, and Hoffman 2003). Greenwald has developed a method of detecting what he refers to as "implicit bias." Implicit biases are conceptions that we hold of others that we are not aware of. These views truly reside at the subconscious level, and Greenwald and his colleagues have been able to observe them in lab experiments. Instruments developed by Greenwald can measure negative reactions and associations with people of color that the person participating in the study is unaware of. His work finds that both whites and blacks can have such reactions. To the extent
that police officers, probation officers, judges and other criminal justice actors hold such bias, they may be acting in ways that negatively affect minorities they come into contact with, without even being consciously aware of their bias and resulting discrimination. This is precisely why people such as Wilbanks (1987) can report that increasing the number of black criminal justice officials does not change black and white patterns in case processing. In a society where race is such a central part of social life, even black criminal justice actors may have unconscious biases not substantially dissimilar from those of their white counterparts.

Structural causes of racial and ethnic disparity in criminal justice processing are those social forces that exist not because of either the willful or unconscious acts of individuals, but because of societal, systemic or institutional practices. An example of a societal level force that contributes to the observed ethnic disparities is the continuing racial residential segregation of the U.S. (Massey and Denton, 1993). Bridges (1997) and Crutchfield 2004) noted that suburban police departments are less likely to incarcerate some of those they arrest because of the geographic distance to the King County Jail in downtown Seattle. The largest concentration of people of color in Washington State is in the City of Seattle. So this practice, which is not conspiratorially designed to disadvantage minority people who are arrested, does in fact disadvantage them because of the confluence of persistent residential segregation and police practices.

Beckett and her colleagues (2004, 2005) point to systemic practices that disproportionately affect blacks and Latinos in the local (Seattle) war on drugs. The Seattle Police Department’s focus on crack cocaine enforcement and outdoor markets in areas of the city where more minority drug dealers sell causes far more arrests of people
of color than are warranted by estimates of the actual racial and ethnic distribution of
drug dealers. When this is combined with culturally embraced beliefs in the
“dangerousness” of crack and racialized conceptions of the drug problem it leads to
considerably more arrests and prosecutions of blacks and Latinos.

Crutchfield and Bridges (1987) and Bridges (1997) pointed to a good example of
an institutional practice that contributes to racial disparity in criminal justice processing.
Until recently Washington Court Rules (Rule 3.2) specified that judges take the following
into account in making bail decisions:

In determining which conditions of release will reasonably assure
the accused’s appearance and noninterference with the administration of
justice, and reduce danger to others or the community, the accused’s
employment status and history and financial condition; the court shall, on
the available information, consider the relevant facts including but not
limited to: the length and character of the accused’s residence in the
community; the accused’s family ties and relationships; the accused’s
reputation, character and mental condition; the accused’s history of response
to legal process; the accused’s criminal record...” (quoted in Bridges 1997,
pp 16-18)

Though presumably not designed to disadvantage minorities the implementation of these
this rule had that consequence. African Americans, Native Americans and Latinos are
more likely to be economically disadvantaged, have less stable employment, experience
more family disruptions, and have more residential mobility. Focusing on such factors
meant that people from these ethnic groups were less likely to be released on their own
recognizance than whites, which as noted earlier places them more at jeopardy for being
found guilty and receiving longer sentences.

Both the acts of individual criminal justice actors and the social structural sources
of racial disproportionality should be seen in the context of a society where racial
opportunities and disadvantages are the norm and not the exception, even at the
beginning of the twenty first century. A brief review of relevant literature on this topic is below.

**Continuing Forms of Racial and Ethnic Disadvantage in American Society**

There is considerable evidence that racial and ethnic minorities suffer from disadvantages in other spheres of American life, as well as the documented criminal justice system disparities. These disadvantages negatively affect life chances and in some instances increase the likelihood that people of color will come into contact with the criminal justice system.

Education is defined by most Americans as a critical resource that facilitates upward mobility, but contrary to what many believe the Brown vs. Board of Education decision and the passage of civil rights laws has not resulted in the erasure of important racial and ethnic disparities. In his book *Savage Inequalities* Jonathan Kozol (1991) describes observable inequalities, many thought not all of which are a consequence of minority students' higher concentrations in under funded, over challenged urban school systems. According to Kozol, the quality of education for urban inner city students, who are disproportionately minority, is inferior. He documents persistent, large per student funding gaps between many suburbs, especially wealthy ones, and inner city schools. Using Department of Education statistics Jargowski, Desmond, and Crutchfield (in press) document the same problem, and link the disparity to increased crime problems in inner city neighborhoods. Dworkin (1987) reports that the inner city schools where most African American and Latino students are educated more frequently have dated textbooks, limited school supplies, fewer computers, and more burned-out teachers. The
U.S. Department of Education (1995) also reports that inner city students are more likely to be taught by uncertified teachers or instructors who did not major in the subject that they are teaching. Nevertheless, the high school dropout difference between blacks and whites has declined in recent decades as more African Americans remain in school, but Latinos continue to have higher dropout rates than either blacks or whites (Jenks, 1991). Interpreting the dropout patterns along with evidence of continuing educational quality disparity, we have to conclude that current generations of African Americans are on average getting more education, but not necessarily better education (in comparison to that received by whites). Mickelson (1990) concludes that while education is a basis for upward mobility for whites, that does not appear to be the case for minorities.

There are substantial racial and ethnic differences in health as well. Minorities more frequently live without health care insurance. In 1995, 85.9 percent of whites had either private or public (e.g. Medicaid) health insurance, while only 79 percent of blacks and 66.7 percent of Latinos were covered, and as a consequence minorities are less likely to receive inoculations and are more frequently treated in emergency rooms (Dworkin and Dworkin, 1999). The latter is systemically more expensive, but for patients it frequently means little or no follow-up care.

In America, one’s life chances are profoundly affected by where one lives. While levels of racial residential segregation have decreased in recent years, the U.S. remains a very racially segregated society (Charles, 2000). Continuing residential segregation negatively affects the education, employment, and economic circumstance of minorities in general, but especially of African Americans (Massey and Denton, 1993). For example, Flippen (2004) found that the returns to home ownership were lower for blacks
as well as Hispanics in large measure because their properties are more frequently in segregated communities. Further, these patterns of segregation are a result of continued, purposeful discrimination (Massey and Denton, 1993; Fischer and Massey, 2004).

Substantial employment and economic inequality continues to exist. African Americans are nearly twice as likely as whites to be unemployed (even after taking educational differences into account), and are also much more likely to be living in poverty (Dworkin and Dworkin, 1999, pp. 190-191). Economic differences are a consequence of the combination of historic racism and contemporary trends such as deindustrialization and the consequent emergence of an urban underclass (Wilson, 1987), and continued residential segregation (Massey and Denton, 1993). Both of these forces harm employment prospects for black job seekers.

There is also evidence that it is not just historic discrimination, but also current employment discrimination that disadvantages minorities. Pager (2003) conducted an audit study where she had matched pairs (on personal characteristics and resumes) of African American and white job applicants attempt to secure interviews for advertised jobs. White applicants were significantly more likely to receive offers of interviews. Also, she considered the effects of criminal records on these applicants and found that white applicants with a criminal record were more likely to be offered interviews than African Americans with NO criminal history. Pager is currently conducting a similar study where she examines these same patterns with white, black, and Latino men. The preliminary results indicate that Latino men do not suffer discrimination to the extent that African American job applicants do, but they are significantly less likely to be interviewed than an identically qualified white applicant (2005).
Pettit and Lyons (2005), using data from the Washington State Department of Corrections, have studied the long term consequences of incarceration and find that having been imprisoned substantially reduces the occupational opportunities and incomes for all inmates, but especially for African Americans. Taken with Pager's results, the Pettit and Lyons (2002) findings indicate that imprisonment is the punishment that keeps on punishing.

Observed employment inequalities are one of the reasons for higher levels of criminal involvement by minorities. Anderson (1999) reports that the lack of occupational opportunity underlies the emergence of destructive, violent street cultures that foster criminal behavior. Sullivan (1989) studied three communities and found that youth from the most occupationally and economically disadvantaged neighborhoods were more likely to become involved in crime, including drug marketing. Crutchfield (1995) reports that the combination of high unemployment and employment in low wage unstable jobs are significant reasons for higher criminal involvement among young adult African Americans and Latinos.

Finally, a few words are in order on the most recent national research on racial inequalities in the U.S. criminal justice system. Blumstein, whose earlier work (1982) established the "gold standard" for research on this topic when he reported that 80 percent of black and white differences in rates of incarceration could be accounted for by higher violent crime involvement by African Americans, is again studying these patterns. This work is not yet published, but Blumstein reports that more than 80 percent of racial differences are warranted when the focus is on violent crimes, but far less then that,
perhaps even lower than 60 percent, when drug offenses are considered. This is especially noteworthy since the very substantial national increase in imprisonment (three times as many people incarcerated since 1980), has largely been driven by the War on Drugs. If the findings from Blumstein's current research hold, then far less of the black/white differences in imprisonment will be warranted than we previously thought.

Finally, Crutchfield (2004) raised questions about the use of race specific arrest rates to estimate racial differences in criminal involvement. Using results of victims' reports of the characteristics of offenders from the National Crime Victimization Survey, and racial specific violent crime arrest data, Crutchfield examined the correspondence of these alternative measures of the racial distribution of criminal offending in twelve cities. Ideally, there should be strong correspondence between the two measures, but this correspondence varies greatly from city to city, and it appears that it may be in cities with more substantial racial inequalities in other spheres that there is less correlation between the alternative measures. That is, in jurisdictions where the social environment may be less fair to minorities, using race specific arrest rates to estimate racial differences in actual criminal involvement may overstate minority criminality, and consequently overstate the portion of any observed racial disparity in incarceration that is "warranted." This raises the troubling possibility that the observed racial and ethnic disparities that have been observed in Washington State criminal justice processing may actually be conservative estimates of actual differences in treatment.

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7 These preliminary results were described to this reviewer by Professor Albert Blumstein of Carnegie Mellon University during conversations in June and August, 2005.
Summary and Conclusions

Nationally, concern that people of color are treated more harshly by the criminal justice system, from arrest through sentencing to post-release outcomes, continues to cause scholars to study this issue. The research that has been published or reported in other forums generally has found mixed results. Overall we have to conclude that the race and ethnicity of individuals continues to matter in the U.S. when people face the risk of arrest and throughout the processing of the criminal cases that follows these arrests. But this is not a simple matter. Researchers report that they find racial and ethnic disparities in some jurisdictions but not in others. Where evidence of unwarranted disparate treatment is found, it appears at different decision points in the criminal justice process. Also, how race and ethnicity play a part in criminal justice processing is a complex phenomenon, requiring careful study, planning and sometimes subtle interpretation of results. It is probably the case that the combination of the complexity of the issue, the unevenness of disparities across jurisdictions, and variability in the methodological and interpretative care of results that produces what may first appear to be inconsistent results. This reviewer’s interpretation of the extant literature is that racial and ethnic disparity is not a problem in every jurisdiction in the U.S., but that it is a substantial problem in criminal justice processing generally. And research that has focused on Washington State makes it clear that racial and ethnic disparity in the handling of cases is a substantial problem here.

There is considerable evidence that being a person of color in the U.S. at the end of the twentieth and the beginning of the twenty first centuries means that one remains disadvantaged in important social spheres of American social life. Given the observable
extent of these disadvantages in education, employment, health care and housing, it
would be surprising if we did not find that the criminal justice system, like institutions in
these other spheres, treats people of color more harshly than whites. The evidence is
quite clear that minority Americans continue to face greater risk in many jurisdictions
when pulled over by the police and in facing the bar of justice.
References:


Table 1. Empirical Studies of Racial Discrimination and the Death Penalty

<table>
<thead>
<tr>
<th>Study</th>
<th>Jurisdiction(s)</th>
<th>Time Period Covered</th>
<th>Dependent Variables</th>
<th>Variables Controlled</th>
<th>Race Relationship Significant?</th>
</tr>
</thead>
<tbody>
<tr>
<td>Murder:</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Mangum (1940)</td>
<td>N. Carolina</td>
<td>1909–1938</td>
<td>Executed/commuted</td>
<td>None</td>
<td>Yes</td>
</tr>
<tr>
<td>Johnson, G. (1941)</td>
<td>N. Carolina</td>
<td>1933–1959</td>
<td>Sentence</td>
<td>None</td>
<td>Sentence, yes/no; exec./commuted, no</td>
</tr>
<tr>
<td>Garfinkel (1949)</td>
<td>N. Carolina</td>
<td>1930–1940</td>
<td>Executed/commuted</td>
<td>Degree of Homicide</td>
<td>Yes/No*</td>
</tr>
<tr>
<td>Johnson, E. (1957)</td>
<td>N. Carolina</td>
<td>1909–1954</td>
<td>% executed, admissions to death row</td>
<td>None</td>
<td>Yes</td>
</tr>
<tr>
<td>Bersting &amp; Schroeder (1960)</td>
<td>Cleveland</td>
<td>1947–1953</td>
<td>Death sentence/other</td>
<td>Degree of Homicide</td>
<td>No</td>
</tr>
<tr>
<td>Bridge &amp; Mozure (1961)</td>
<td>Ohio</td>
<td>1950–1959</td>
<td>Executed/commuted</td>
<td>None</td>
<td>Yes</td>
</tr>
<tr>
<td>Wolfgang et al. (1962)</td>
<td>Pennsylvania</td>
<td>1914–1938</td>
<td>Executed/commuted</td>
<td>Felony/Nonfelony, type of counsel?</td>
<td>Felony, yes; Nonfelony, no</td>
</tr>
<tr>
<td>Bedau (1964)</td>
<td>New Jersey</td>
<td>1907–1960</td>
<td>Executed/commuted</td>
<td>Felony/Nonfelony</td>
<td>No</td>
</tr>
<tr>
<td>Wolf (1964)</td>
<td>New Jersey</td>
<td>1938–1961</td>
<td>Death sentence/life imprisonment</td>
<td>Felony/Nonfelony</td>
<td>No</td>
</tr>
<tr>
<td>Bedau (1965)</td>
<td>Oregon</td>
<td>1903–1964</td>
<td>Executed/commuted</td>
<td>No</td>
<td>No</td>
</tr>
<tr>
<td>Judson et al. (1969)</td>
<td>California</td>
<td>1938–1966</td>
<td>Death sentence/other</td>
<td>Prior record, occupation, characteristics of offense, and others</td>
<td>No</td>
</tr>
<tr>
<td>Rape:</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Johnson, E. (1957)</td>
<td>N. Carolina</td>
<td>1909–1954</td>
<td>% executed, admissions to death row</td>
<td>None</td>
<td>No</td>
</tr>
<tr>
<td>Florida Civil Liberties Union (1964)</td>
<td>Florida</td>
<td>1958–1964</td>
<td>Death sentence/other</td>
<td>None</td>
<td>Yes</td>
</tr>
<tr>
<td>Partington (1965)</td>
<td>Virginia</td>
<td>1908–1963</td>
<td>Death sentence/other</td>
<td>Type of rape</td>
<td>Yes</td>
</tr>
<tr>
<td>Wolfgang &amp; Reidel (1973; 1975)</td>
<td>6 Southern States*</td>
<td>1945–1963</td>
<td>Death sentence/other</td>
<td>Contemporaneous offense/no contemporaneous offense</td>
<td>Yes</td>
</tr>
</tbody>
</table>

* There were no significant differences between black killers as a group and white killers as a group, but when offender/victim racial relationship was examined, blacks who killed whites were found to have received significantly more death sentences than the other three groups.

* Data were gathered on 11 states, but published results refer only to 6 states for some tables, 5 for other. 3 for yet other tables. Reidel has informed the author that the data for this study were partially destroyed in a fire, accounting for the fragmented data analysis. The 1973 study is simply an analysis of a subset of the data analyzed in the 1973 study; therefore, the two are treated as a single study.

* Not controlled for simultaneously.
### Table 2: Racial Disparities in Attorney Client, 1959 and Racial Disparities in Arrest for Violent Crime, 1972

<table>
<thead>
<tr>
<th>Region</th>
<th>Black Male Arrest</th>
<th>Black Male Employment</th>
<th>Black Male Employment Explained by SES Disparity</th>
</tr>
</thead>
<tbody>
<tr>
<td>North</td>
<td>3.20</td>
<td>4.88</td>
<td>8.85</td>
</tr>
<tr>
<td>South</td>
<td>4.31</td>
<td>6.17</td>
<td>15.08</td>
</tr>
<tr>
<td>Midwest</td>
<td>3.45</td>
<td>5.12</td>
<td>13.05</td>
</tr>
<tr>
<td>West</td>
<td>2.99</td>
<td>4.23</td>
<td>11.06</td>
</tr>
<tr>
<td>Overall</td>
<td>3.29</td>
<td>4.88</td>
<td>8.85</td>
</tr>
<tr>
<td>Southwest</td>
<td>3.30</td>
<td>4.95</td>
<td>10.09</td>
</tr>
<tr>
<td>Pacific</td>
<td>3.28</td>
<td>4.84</td>
<td>8.85</td>
</tr>
</tbody>
</table>

*a: States with less than 25 Black families or more than 50,000 Blacks in the racial category. Data not available for Vermont or Wyoming.*
Expert Report

by

Alec Ewald, Ph.D.

I. Case.

Farrakhan, et al. v. Washington
No. CV-96-06-RHW
U.S. District Court
Eastern District of Washington
Judge James H. Whaley

II. Introduction and professional qualifications.

I have been retained as an expert by counsel for the Plaintiffs in the above captioned litigation. I have prepared this report pursuant to Federal Rule of Civil Procedure 26(a)(2)(B).

I am a Visiting Assistant Professor of Political Science at Union College. I received my Ph.D. in political science at the University of Massachusetts in February of 2005. A detailed record of my professional qualifications and scholarly achievements is set forth in the attached curriculum vitae, including a list of all publications I authored within the last ten years, awards, and professional activities.

This report summarizes my analysis of Washington state’s felony disenfranchisement law.

Article VI, Section 3 of the Washington State Constitution provides that “all persons convicted of an infamous crime... are excluded from the elective franchise.” Furthermore, people convicted of felonies who have completed their sentences remain ineligible to vote until they have obtained certificates of discharge under Section 9.94A.637 of the Revised Code of Washington. As I understand state law, in some cases, such certificates are issued upon notification of the sentencing court by the Department of Corrections that the individual in question has completed all aspects of his sentence. In other cases, the state Indeterminate Sentence Review Board and the state Clemency and Pardons Board may restore voting rights.

Under the Voting Rights Act (VRA), one factor that can help demonstrate that a voting qualification brings about an impermissible denial of voting rights on account of race is “whether the policy underlying the state or political subdivision’s use of such voting qualification, prerequisite to voting, or standard, practice or procedure is tenuous.”\(^1\) I am asked to provide my expert opinion as to whether Washington’s disenfranchisement policy is tenuous.

III. **Summary of opinions.**

Based on my research, I have reached the following opinions.

1. U.S. courts have looked at disenfranchisement law from various perspectives, but no court has faced this question directly before.

2. Automatic disenfranchisement following a felony conviction is a tenuous policy. I detail reasons for this below, but the fundamental reason is straightforward: the law neither pursues nor achieves a practical purpose.

3. The long historical tradition of disenfranchisement for crime, and support for the policy which can be found in the writings of various political philosophers – both of which I have documented and analyzed in detail in my academic work – do not render the policy sound today. Many practices we would now consider foolish, benighted, or simply unwarranted can claim a similar pedigree, including most restrictions on the franchise.

4. Since I am asked here to evaluate a policy also in place in other jurisdictions, and since Washington state has not clearly identified the policy’s purpose, it is both appropriate and necessary for me to assess arguments advanced elsewhere in support of disenfranchisement. First, particularly when it is an automatically-applied “collateral consequence” of conviction, disenfranchisement fails to achieve penal purposes or objectives.

5. Disenfranchisement fails to achieve regulatory or political purposes.

6. Many other countries have apparently determined that the policy of disenfranchisement for crime serves no purpose. Where courts have inquired into the policy, governments have failed to demonstrate that disenfranchisement is necessary to address any social need or problem.

7. Disenfranchisement is a counterproductive policy, since voting is an inherently conservative thing to do. At critical moments in the history of American suffrage, proponents of expanded voting rights have made this point.

8. Striking evidence of the policy’s disproportionate racial impact intensifies the need to ask what important objective Washington state’s disenfranchisement law pursues.

IV. **Elaboration and basis for opinions.**

1. *U.S. courts have looked at disenfranchisement law from various perspectives, but no court has answered this question directly before.*

2. **Automatic disenfranchisement following a felony conviction is a tenuous policy.** I detail reasons for this below, but the fundamental reason is straightforward: the law neither pursues nor achieves a practical purpose.

Merriam-Webster defines “tenuous” as “having little substance or strength: flimsy, weak.” ²

An inquiry into whether a challenged policy and its justifications are “tenuous” should pose simple questions: Does the policy aim to improve or correct a specific social problem? Does it plausibly link means and ends? Does the state clearly articulate the policy’s aim and purpose?

Though “tenuous” is a reasonably popular adjective in American legal decisions – usually employed simply to mean “weak” – few cases define the term “tenuous” in the context of the V.R.A. One decision which does so is *Mississippi State Chapter, Operation Push v. Allain.*³ In that decision, election practices were “tenuous” if they were “not related to any compelling state interest, although motivated by economic and practical considerations,” or serving “no legitimate or compelling state interest.” Another election practice was not held to be tenuous, since it was “rationally related to the state’s interest....”⁴

In another recent decision, the Ninth Circuit affirmed a district court’s finding that Blaine County, Montana, offered “tenuous” justifications for selecting county commissioners in at-large elections.⁵ In assessing whether the given justifications were tenuous, the district court apparently engaged in simple evaluation of the purposes and functions of the county commission, as well as other forms of local government.⁶

The state of Washington does not identify any specific problem its disenfranchisement policy is designed to address or rectify. In fact, in this case, evaluating how good the state’s interest is – that is, whether the state’s interest is rational,

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⁴ Mississippi State Chapter, Operation Push, at 1266, 1267, 1268.
⁶ Id. at 914.
legitimate, important, or compelling – actually appears to be a secondary question. For I do not believe the state has yet identified any interest at all that it seeks to achieve with this policy. This strongly suggests that the policy is indeed tenuous.

I base this judgment on the Washington’s response to plaintiff’s interrogatories in this case, as well as my review of other public documents and materials, including the Washington constitution, statutes and bill reports, and the state’s on-line elections materials. The state’s response to plaintiff’s interrogatories is the most important source. When asked whether “your office maintain[s] that an important governmental interest is served by disqualifying from voting those individuals convicted of felony offenses,” Washington gave this response:

“The legislature has determined that the disenfranchisement of felons who have not completed all terms and conditions of their judgments and sentences limits the participation in the political process by those who have proven themselves unwilling to abide by the laws that result from that process.”

This sentence is really just a restatement of the policy, and does not explain what interest it purports to serve. The phrase “limits the participation in the political process” is another way of saying “disenfranchise.” And the phrase “those who have proven themselves unwilling to abide by the laws that result from that process” is another way of describing “felons.”

In other words, this response states a tautology – not a conclusion based on premises, and certainly not a clear statement of a governmental interest, “important” or otherwise. Moreover, I find no support for this language in the bill reports and statutes supplied by Washington state in its response to Document Request No.9. These documents simply describe the state’s disqualification and restoration procedures. Finally, to the extent that it does express an implicit, abstract reasoning behind the policy, that reasoning may be that the policy withholds political influence from some citizens because of those citizens’ ideas about the current laws. As I explain in (5) below, this is not a legitimate interest.

3. The long historical tradition of disenfranchisement for crime, and support for the policy which can be found in the writings of numerous political philosophers – both of which I have documented and analyzed in some detail in my academic work – do not render the policy sound today. Many practices we would now consider foolish, benighted, or simply unwarranted can claim a similar pedigree, including most restrictions on the franchise.

Washington’s disenfranchisement policy is a creation of the nineteenth century, when virtually any restriction of the suffrage was presumed to be legitimate. As a federal court ruling from that period put it, if it wished to, the state could declare “that no person should vote until he had reached the age of thirty years, or after he had reached the age of

7 Plaintiffs’ First Interrogatories and Requests for Production of Documents Propounded to Defendant Sam Reed and Objections and Answers Thereto, p. 8.
fifty, or that no person having gray hair, or who had not the use of all his limbs, should be entitled to vote.”

Historian Alexander Keyssar offers comprehensive explanation of the arguments behind old American laws barring from the polls men without the right amount of property, blacks, and women, among others. Defending such laws was relatively easy: exclusion was the norm, and nothing beyond a philosophical abstraction was required.

By contrast, discussion of American voting rights in the late twentieth century—in constitutional provisions, statutes, judicial rulings, and the pronouncements of political figures—shares the explicit or implicit premise that today the state must show what interest it aims to accomplish by any restriction of the suffrage.

Moreover, that a political philosopher such as Locke or Montesquieu spoke kindly of a policy does not make that policy sound or attractive today. Locke, for example, did not believe that people who broke the law should lose some rights, while retaining others. Instead, he wrote that all law breakers “may be destroyed” and “may be treated as beasts of prey.” For his part, Montesquieu argued against the secret ballot, believing that all voting in a democracy must be public so that the “lower classes” would feel “the gravity of eminent personages.”

Oliver Wendell Holmes once argued that “[i]t is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.” I certainly do not believe the state of Washington here engages in “revolting” reasoning. But as I have indicated above, in assessing whether a policy is tenuous, one should simply ask what problem it is intended to address. Stating that the policy is old—or that support for it can be found in political theory texts written three hundred years ago—does not make that question go away.

4. Since I am asked here to evaluate a policy also in place in other jurisdictions, and since the state of Washington has not clearly identified the policy’s purpose, it is both appropriate and necessary for me to assess arguments advanced elsewhere in support of disenfranchisement. First, disenfranchisement fails to achieve penal objectives, particularly since it is an automatically-applied “collateral consequence” of conviction.

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8 United States v. Anthony, 24 F. Cas. 829, 830 (C.C.N.D.N.Y. 1873).
9 Alexander Keyssar, The Right to Vote: The Contested History of Democracy in the United States (2000), at 5-6, 8-12, 22-23, 46-50 (arguments for the property test); 54-59, 328-329, 351-355, 368-377 (arguments for restriction of suffrage based on race); 191-193, 208-209 (arguments against women’s suffrage).
As indicated above, I do not believe the state of Washington has articulated, either in documents provided for this case or elsewhere, whether its purposes in disenfranchising people with felony convictions are penal or regulatory— that is, whether its disenfranchisement law aims to punish offenders, or to protect the public from their votes. Authors, advocates, and observers on various sides of this issue have divided over whether the sanction is properly understood as penal or regulatory. I treat both approaches here, beginning with the penal aspect of the policy. Penal justifications of disenfranchisement are not persuasive.

a. Disenfranchisement may have a punitive nature.

Those who have sought to describe and evaluate American disenfranchisement law—in courts and legislatures, academic publications and the media—have disagreed over whether the sanction is penal in its purpose and character. Laws disenfranchising people with criminal convictions are typically located not in the penal codes, but in state constitutions—as in the state of Washington—and suffrage statutes. The U.S. Supreme Court has said that disenfranchisement is “a nonpenal exercise of the power to regulate the franchise.” Some lower U.S. courts have agreed.

Others, however, assert that disenfranchisement policies are indeed punitive. In its brief for the Second Circuit’s 2005 consideration of Muntaqim v. Coombe, the state of New York referred to its legislature’s “recognition that felony disenfranchisement is a form of punishment.” Numerous authorities, both inside and outside government, have agreed. Historical sources suggest that many disenfranchisement laws were designed with punitive purposes. For example, the Missouri Supreme Court, surveying the history of criminal disenfranchisement in that state, found that the legislature clearly treated the sanction as a “part of the punishment” for specified crimes throughout the nineteenth century. Historian Alexander Keyssar writes of criminal disenfranchisement law that “the punitive thrust clearly was present for much of the nineteenth century.”

One federal judge recently called disenfranchisement “the harshest civil sanction imposed by a democratic society,” an “axe” by which a citizen is “severed from the body politic and condemned to the lowest form of citizenship.” And some prominent

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15 See Green v. Board of Elections, 380 F.2d 445, 450 (1967), holding that disenfranchisement “is not a punishment”; and Washington v. State, 75 Ala. 582, 585 (1884) holding that disenfranchisement is “imposed for protection [of the ballot box], and not for punishment.”
17 State ex rel. Barrett et al., Board of Election Commissioners, v. Sartorious, Judge, 175 S.W. 2d 787, 788 (1943).
18 Alexander Keyssar, The Right to Vote: The Contested History of Democracy in the United States (2000), p. 163. See also The Equal Protection Clause as a Limitation of the States’ Power to Disenfranchise Those Convicted of a Crime, 21 Rutgers L. Rev. 297, 309-310 (1967), which argues that historically “the original purpose in depriving the criminal of certain civil rights appears to have been to ostracize and degrade him in the eyes of the community—a form of further punishment.”
advocates of the policy argue frankly that "not allowing criminals to vote is one form of punishment."

While the state of Washington has not identified punitive purposes served by its disenfranchisement policy, then, it remains important to assess potential penal justifications of the sanction.

b. As a "collateral consequence" of a criminal conviction, disenfranchisement fails to function as an "expressive" punishment.

The first reason disenfranchisement fails as a penal policy is that as a "collateral" consequence of a felony conviction, it is invisible in the courts. It appears that disenfranchisement is very rarely, if ever, discussed by the prosecution, the defense, or the bench during the trial and sentencing of criminal offenders.

As the American Bar Association (ABA) recently defined collateral sanctions, they are "legal penalties, disabilities or disadvantages that are imposed upon a person automatically upon that person's conviction for a felony, misdemeanor, or other offense, even if not included in the sentence."

As one authority observes, "collateral consequences may take effect without judicial consideration of their appropriateness in the particular case, without notice at sentencing that the individual's legal status has dramatically changed, and indeed without any requirement that the judge, prosecutor, defense attorney or defendant even be aware that they exist." Indeed, the ABA's new standards and recommendations for imposing collateral consequences constitute implicit but powerful evidence that such sanctions are generally neither discussed during trials nor explained at sentencing.

This fact seriously undercuts arguments for the policy's penal efficacy.

One such argument -- implicit in some defenses of disenfranchisement -- is that the sanction could serve as an "expressive" punishment, communicating society's esteem for the ballot. Some forms of punishment, advocates of "expressive" or "shaming" penalties

point out, clearly demonstrate society’s “moral condemnation.”24 But because it is
imposed automatically and silently on broad classes of offenders and lacks any
significant public dimension, disenfranchisement fails to express anything of substance.
The policy may effect private alienation of the politically-aware offender. But the theory
of expressive punishment emphasizes how penalties speak to the public.

c. Disenfranchisement fails to achieve any of the four standard purposes of
punishment: incapacitation, deterrence, rehabilitation, and retribution.

As a group of leading criminologists recently argued in federal court,
disenfranchisement “does not serve any legitimate goal of punishment.”25 Incapacitation
— preventing an offender from repeating his transgression — may be a plausible reason for
a disenfranchisement policy covering only those who break election laws. But in
Washington, as in other states, it is likely that almost all offenders “incapacitated” at the
ballot box are convicted of non-electoral crimes.26 The case for deterrence is not
persuasive: it is hard to imagine the man not deterred from crime by the prospect of a
long prison sentence who would stay his hand for fear of losing the ballot.27

Rehabilitative goals — seeking to minimize the chances that those under criminal
supervision will re-offend after release — direct us towards policies and programs that
educate those under criminal supervision and prepare them to act as law-abiding,
productive citizens.28 Allowing them to vote is one way to pursue those goals, at almost
no cost and at no risk to the public. The desire for retribution is clearly one of the
primary reasons Americans deprive offenders of their liberty, but it is not a catch-all
category which can justify any penalty. Specifically, blanket disenfranchisement is
vulnerable to proportionality criticisms, since it is imposed on such a broad range of
offenders;29 bears no relationship to the security needs of the prison; and may not have
any retributive effect at all on the many members of the offender population already
estranged from political life. The automatic, invisible way in which Washington imposes
disenfranchisement adds to such criticisms.

“shaming penalties unambiguously express condemnation and are a feasible alternative to imprisonment for many offenses.” Id. at 594.
25 En Banc Brief Submitted on Behalf of Certain Criminologists as Amici Curiae in Support of Appellants and in
26 Nora V. Demleitner, Continuing Payment on One’s Debt to Society: The German Model of Felon
Disenfranchisement as an Alternative, 84 MINN. L. REV. 753, 793 (2000).
27 For a detailed examination and rejection of the deterrence argument for disenfranchisement, see En Banc Brief
Submitted on Behalf of Certain Criminologists as Amici Curiae in Support of Appellants and in Support of
28 The Muntaqim criminologists’ brief contends that disenfranchisement impedes rehabilitation. See En Banc Brief
Submitted on Behalf of Certain Criminologists as Amici Curiae in Support of Appellants and in Support of
29 For summary of the proportionality critique, see En Banc Brief Submitted on Behalf of Certain Criminologists as
Amici Curiae in Support of Appellants and in Support of Reversal, Muntaqim v. Coombe, U.S. Court of Apppeals
What these four purposes have in common is that all of them aim to reduce crime. Totally absent from the historical, scholarly, and legal literature of laws disenfranchising offenders—and from current debates over the policy—is the claim that imposing the sanction reduces crime. To my knowledge, no one has ever even attempted that argument.

5. Disenfranchisement fails to achieve regulatory or political purposes.

Again, the state of Washington has not indicated whether its purpose in disenfranchising people convicted of crime is punitive, political, or of another character entirely. However, since a few "regulatory" or "political" justifications for disenfranchisement—that is, reasons which do not rely on the sanction having any punitive effect at all—recur in defenses of the policy, it is important to evaluate those justifications here. I conclude that each of the common "regulatory" rationales fails, for the simple reason that none explains how disenfranchisement protects or strengthens American democracy.

a. Removing political influence from a class of people because of a theory about their political preferences is a misguided and illegitimate purpose.

Some defenders of disenfranchisement argue that convicts and former inmates should be barred from the polls because they might vote—presumably in concert—to weaken the criminal law, forming "an anti-law enforcement voting bloc."30 As Justice Thurgood Marshall put it in a dissenting opinion, the theory is that offenders would vote in a way "subversive to the interests of an orderly society."31

Though this rationale anchors the well-known decision Green v. Board of Elections,32 it is an unpersuasive justification for disenfranchisement, on several levels.

32 Green v. Board of Elections, 380 F.2d 445 (2d Cir. 1967). In Green, Judge Henry Friendly wrote that

"it can scarcely be deemed unreasonable for a state to decide that perpetrators of serious crimes shall not take part in electing legislators who make the laws, the executives who enforce these, the prosecutors who must try them for further violations, or the judges who are to consider their cases.... A contention that the equal protection clause requires [a state] to allow convicted mafiosi to vote for district attorneys or judges would not only be without merit but as obviously so as anything can be.

Green, p. at 451-52. Prominent legal scholarship identifies Friendly’s Green opinion as the best example of the “asserted state interest” in “prevent[ing] felon bloc voting that brings about harmful changes in the law.” See AfS. Johnson-Parris, Felon Disenfranchisement: The Unconscionable Social Contract Breached, 89 VIRGINIA L. REV. 109, 122 (2003). See also Thomas J. Miles, Felon Disenfranchisement and Voter Turnout, 33 J. LEGAL STUD. 85, 120 (2004). Miles cites Green as the best articulation of the argument that disenfranchisement is necessary because of felons who might "use their votes to retaliate against the authorities who convicted them or to weaken the substance and administration of the criminal law." Pamela Karlan describes Green as a case which allowed disenfranchisement of offenders “because they would vote to change existing criminal laws.” Pamela S. Karlan,