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INSTITUTIONALIZED, LEGAL RACISM: HOUSING SEGREGATION AND BEYOND

DEBORAH KENN^{*}

I. INTRODUCTION

A. Racism in the United States

About a year ago, a friend and I went in to a diner for breakfast. It wasn't very crowded; maybe four tables were occupied. We sat close to a table where four African Americans were seated. My friend and I are both Caucasian. The waitress, also white, came over and asked if we wanted coffee. On her way back from getting us coffee, a heated exchange occurred between the waitress and the four African American customers. The customers got up and left the diner. When the waitress came over to serve us the coffee she confided in us that the four African American customers were angry that she had served us first. When I responded that they had been there first, she said, "They're always complaining about something." My friend and I looked at each other, paid for the coffee, and left the diner after explaining to the waitress that we weren't comfortable with the service either.

I left the diner with deep feelings of anger and sadness. The outrage that I felt at how the African American customers had been treated was magnified ten-fold by the stark realization that racism exists to such a visible degree on a person-to-person basis in our society. I have been studying and writing about housing segregation, its causes and continuance, for years. I know that the systemic problem of housing segregation could not be perpetuated without the racist complicity of individuals throughout our nation. I have always wanted to kid myself, though, that housing segregation stems from a time when the power brokers of our country were doing the majority of the populace's bidding, and it is now perpetuated due to the slowness of systematic change, not because the majority of our nation still wants our leaders to maintain the racist status quo.

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My white skin enables me to continue my intellectualization without having to *feel* the racism in our society on a day-to-day basis. As racism becomes more and more institutionalized in our society, white people become more able to be indifferent to the problem at best, and, at worst, more able to express their racism openly and act upon it without consequence. I try to be aware of my white privilege on a day-to-day basis, but this, too, seems an intellectual exercise, one I can choose to undertake or not.

On that day walking out of the diner, I could no longer kid myself. Individual and institutional racism originally caused systemic housing segregation and individual and institutional racism is the reason why the problem has not gotten any better.¹ In fact, racial segregation is worse now than when there were laws, policies, and practices that formally instituted separation of the races.² Legislative and governmental attempts at reversing the historical patterns of housing segregation have failed, and our country suffers from the greatest separation of the races at any time in its history.³ This physical separation of the races has devastating effects on society as a whole, not the least of which being that it reinforces prejudicial stereotypes and biases. The vicious cycle continues: racism causes segregation and segregation reinforces racist attitudes and beliefs.⁴ The more the races remain segregated, the less likely we are to understand and accept one another, let alone want to live near each other.⁵ This phenomenon damages our

¹ See Nancy A. Denton, *The Persistence of Segregation: Links Between Residential Segregation and School Segregation*, 80 MINN. L. REV. 795, 811 (1996); Alex M. Johnson, Jr., *How Race and Poverty Intersect to Prevent Integration: Destabilizing Race as a Vehicle to Integrate Neighborhoods*, 143 U. PA. L. REV. 1595, 1610 (1995); Richard H. Sander, *Housing Segregation and Housing Integration: The Diverging Paths of Urban America*, 52 U. MIAMI L. REV. 977, 1010 (1998); Joe R. Feagin, *Excluding Blacks and Others From Housing: The Foundation of White Racism*, 4 CITYSCAPE: J. POL'Y DEV. & RES. 79, 79-80 (1999).

² See JAMES A. KUSHNER, GOVERNMENT DISCRIMINATION: EQUAL PROTECTION LAW AND LITIGATION §§ 9.1-9.6 (2000); Johnson, *supra* note 1, at 1608; Paul Jargowsky, *Metropolitan Restructuring and Urban Policy*, 8 STAN. L. & POL'Y REV. 47, 48 (1997); Meredith Lee Bryant, *Combating School Resegregation through Housing: A Need for a Reconceptualization of American Democracy and the Rights it Protects*, 13 HARV. BLACKLETTER J. 127, 135 (1997).

³ See KUSHNER, *supra* note 2, § 9.1. See also John Goering and Gregory Squires, *Guest Editors' Introduction*, 4 CITYSCAPE: J. POL'Y DEV. & RES. 1, 6 (1999).

⁴ See Sander, *supra* note 1, at 1010. See also John Powell, *Segregation and Educational Inadequacy in Twin Cities Public Schools*, 17 HAMLINE J. PUB. L. & POL'Y 337, 396 (1996); Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 369 (1987); John O. Calmore, *Critical Race Theory*, Archie Shepp, and *Fire Music: Securing an Authentic Intellectual Life in a Multicultural World*, 65 S. CAL. L. REV. 2129, 2144 (1992); KUSHNER, *supra* note 2, § 9.2.

⁵ See Lawrence, *supra* note 4, at 369; Calmore, *supra* note 4, at 2144; George C. Galster, *The Evolving Challenges of Fair Housing Since 1968: Open Housing, Integration, and the Reduction of Ghettoization*, 4 CITYSCAPE: J. POL'Y DEV. & RES. 123, 124 (1999). See also Goering and Squires, *supra* note 3, at 12; Feagin, *supra* note 1, at 83, 85-86.

society as a whole and particularly devastates the "non-majority" portion of our population since the balance of power weighs against them. This imbalance of power causes the misunderstanding, nonacceptance, and fear of the other that has real consequences in terms of distribution of and access to resources. As stated by Professor John Yinger:

After all, discrimination grows out of a complex system in which the social and economic disparities that are the legacy of past discrimination result in stereotypes and prejudice, which, in turn, give landlords and real estate brokers an incentive to discriminate. Moreover, residential segregation, which is a product of current and past discrimination, limits the access of protected classes to good schools and jobs, thereby perpetuating social and economic disparities, and creates an environment in which inter-group distrust and hostility can thrive.⁶

To break down the emotional, psychological, economic, and political barriers between the races, the physical barriers must be broken down.

The legislative branch of government continues to spin its wheels in breaking this cycle of racism. The Fair Housing Act,⁷ borne of the Civil Rights era and heralded as combating discrimination, remains ineffective in addressing the institutionalized racism that perpetuates the systemic problems of housing segregation.⁸ In the words of fair housing law expert Professor Kushner: "Thus, while cultural apartheid, the legacy of legal apartheid, remains the reality in America, housing remains the most segregated aspect of American life and the greatest failure of the civil rights revolution."⁹ It may even be opined that the Fair Housing Act presents a smoke screen behind which lawmakers can hide, pretending the consequences of our racism are being dealt with, while in truth the separation of races remains unchallenged.

Legislating against individual acts of racial discrimination remains ineffective in combating individual discrimination. More importantly, it accomplishes practically nothing in regard to addressing the problem of systemic housing segregation in this country. As stated by James H. Carr of the Fannie Mae Foundation:

We generally think of segregation as an outcome of discrimination. Indeed,

⁶ John Yinger, *Sustaining the Fair Housing Act*, 4 CITYSCAPE: J. POL'Y DEV. & RES. 93, 100 (1999).

⁷ 42 U.S.C. § 3601 (1999).

⁸ See Johnson, *supra* note 1, at 1595; John O. Calmore, *Racialized Space and the Culture of Segregation: Hewing a Stone of Hope From a Mountain of Despair*, 143 U. PA. L. REV. 1233, 1253 (1995) ("Its primary strength is as an antidiscrimination law that serves individual middle-class claimants."); Bryant, *supra* note 2, at 135. The current ineffectiveness of the Fair Housing Act goes beyond the initial deliberate ineffectiveness of the Act, which was passed into legislation in 1968 without any substantial enforcement mechanisms. See Goerig and Squires, *supra* note 3, at 11.

⁹ KUSHNER, *supra* note 2, at 1050-51.

discrimination is one of the most powerful enforcers of segregation. But while discrimination promotes segregation, segregation promotes discrimination. Policies that aim only to end current discriminatory actions will not fully end segregation. As long as individuals are motivated to segregate, they will find means to achieve their goal.¹⁰

The racist status quo continues in the wake of ineffective legislative and inadequate institutional efforts that have racist effects without being overtly racist.¹¹ The individual racism that fueled historical segregation remains a powerful force today and, coupled with legally mandated racism, has caused the seemingly intractable force of systemic housing segregation.

To achieve equality of opportunity in this nation, the problem of systemic housing segregation must be affirmatively and aggressively reversed. There can be no hope of a reversal of the effects of housing segregation without bold measures designed to remedy the institutional racism that continues unabated.¹² Professor Feagin argues that:

Systemic racism in the United States is a four-centuries-old system that denies African-Americans and other people of color many of the privileges, opportunities, freedoms, and rewards that this Nation offers to White Americans. The unjust enrichment of Whites and unjust impoverishment of Blacks, created by the first generations of White Americans, have been maintained now for about 15 generations.¹³

Many institutions conspire in perpetuating systemic housing segregation and maintaining the racist status quo. After presenting a brief history of housing segregation in the United States, this article will examine the most pernicious of those institutions: white privilege, school segregation, the criminal justice system, and the institution of property and wealth ownership. It will then suggest measures to address and reform the recalcitrant racism existing in each of these institutions. Dismantling of the institutional racism diminishes the power of the individual forces of racism.

¹⁰ James H. Carr, *The Complexity of Segregation: Why it Continues*, 64 VITAL SPEECHES 627, 627 (1998).

¹¹ See Richard Thompson Ford, *The Boundaries of Race: Political Geography in Legal Analysis*, 107 HARV. L. REV. 1841, 1844 (1994) ("Today's laws and institutions need not be explicitly racist to ensure that this state of affairs continues – they need only to perpetuate historical conditions.").

¹² See Calmore, *supra* note 4, at 2206 ("Nonetheless, in a post-civil-rights America, a focus on present legal rights to secure equality of opportunity and to counter discrimination is simply too narrow to be of any significant help."); John A. Powell, *An Agenda for the Post-Civil Rights Era*, 29 U.S.F. L. REV. 889, 910 (1995).

¹³ Feagin, *supra* note 1, at 80.

B. *Housing Segregation in the United States*

It is now well-established and indisputable that housing segregation as we know it today remains the result of deliberate and systematic racist programs and policies of the federal government, assisted in its institutional racism by the banking, real estate, and insurance industries.¹⁴ The current patterns of housing segregation began to develop after the turn of the twentieth century. At the turn of the last century, residential living patterns were just as racist but not as visibly or problematically segregated by race as they would quickly become.¹⁵ By the 1930s, through deliberate and state-sanctioned acts of racial zoning, restrictive covenants, and public works projects, the segregation of blacks in inner city neighborhoods was becoming the norm.¹⁶ "By the 1940s, when scholars began to measure segregation systematically, black segregation was an accomplished fact; virtually every substantial city in the United States had a black/white dissimilarity index measure of .85 or more."¹⁷ The institutionalization and perpetuation of this blatantly discriminatory housing segregation was made complete by the federal government in complicity with the realtors, bankers, insurance agents, and appraisers. Professor Nancy Denton, tireless researcher and expert on housing segregation in the United States, states the problem and its perpetuation this way:

A host of private, public, and governmental actors deliberately created residential segregation. The real estate industry, banks, appraisers, and insurance agents translated private prejudice into public action ultimately sanctioned by the federal government in Federal Housing Administration (FHA) loan policies and the federal highway program. As a result, the post-World War II suburban growth was for whites; blacks remained in the cities.¹⁸

In fact, just as school desegregation requirements were going into effect as a result of *Brown v. Board of Education*,¹⁹ the federal government began subsidizing and supporting white families in their desire to leave urban school districts. Both the Veterans Administration and the Federal Housing Administration, whose

¹⁴ See *id.* at 81-83; Nancy Denton, *Half Empty or Half Full: Segregation and Segregated Neighborhoods 30 Years After the Fair Housing Act*, 4 CITYSCAPE: J. POL'Y DEV. AND RES. 107, 111 (1999).

¹⁵ See KUSHNER, *supra* note 2, at 1063 ("America was integrated at the turn of the century when Southern whites desired dispersal of blacks as a means of white self-protection and urbanized whites desired black workers to have easy access to the workplace."). See also Denton, *supra* note 1, at 802.

¹⁶ See Bryant, *supra* note 2, at 130; Yinger, *supra* note 6, at 93; DOUGLAS S. MASSEY & NANCY A. DENTON, *AMERICAN APARTHEID* 31 (1993) (racial isolation of African Americans in Chicago grew from 10% to 70% from 1900 - 1930; in Cleveland, from 8% to 51%; in New York, from 5% to 42%; in St. Louis, from 13% to 47%).

¹⁷ Sander, *supra* note 1, at 983.

¹⁸ Denton, *supra* note 1, at 803.

¹⁹ 347 U.S. 483 (1954).

mortgages subsidized the white flight that occurred after World War II, practiced overt acts of racial discrimination in their lending practices.²⁰ The timing and location of federally subsidized highways, suburban developments, and racially discriminatory federal mortgage subsidies after the Supreme Court decision in *Brown* were no coincidence.²¹

The laws and programs that ensued over the next four decades, enacted under the guise of fighting discrimination and combating segregation, were ineffective in accomplishing those purposes. The Model Cities program, legislated into existence as part of President Johnson's War on Poverty, actually exacerbated the situation by requiring its low-income participants to reside in the cities.²² Similarly, the Section 8 program of the Housing and Community Development Act of 1974 is now infamous for its inability to alleviate the historical patterns of housing discrimination despite its express intent to do so.²³ The Community Development Block Grant program, also created in the 1970s, and the 1990 HOME program enacted under the Cranston-Gonzalez National Affordable Housing Act both contain the fatal flaw of allocating funds for community and housing development only in "revitalization areas," perpetuating already existing residential patterns.

Historically encouraged and subsidized by the major players in the housing development arena, housing segregation is now entrenched fully in the demographics of the nation's metropolitan areas.²⁴ The historical patterns of housing segregation are perpetuated, not only due to maintenance of the status quo, but also in a deliberate fashion, through racially discriminatory zoning, racially disparate appraisal systems, insurance redlining, mortgage lending discrimination, and restricted federal funding.²⁵ In the words of Professor Feagin:

For the first 350 years of colonial and U.S. development, the residential segregation of African-Americans by Whites was governmentally and legally imposed in most areas where African-Americans resided. After the 1968 Civil Rights Act became law, this residential separation became more informal, but the pattern remained. Current residential and other segregation flows directly out of past segregation, which was legally enforced at some point in time in all States of the North and South. Today, spatial-residential controls are still part of a system

²⁰ See Deborah Kenn, *Paradise Unfound: The American Dream of Housing Justice for All*, 5 B.U. PUB. INT. L.J. 69, 85 (1995); MELVIN L. OLIVER AND THOMAS M. SHAPIRO, *BLACK WEALTH/WHITE WEALTH: A NEW PERSPECTIVE ON RACIAL INEQUALITY* 39 (1995).

²¹ See Denton, *supra* note 1, at 804; KUSHNER, *supra* note 2, at 1065.

²² See Kenn, *supra* note 20, at 86.

²³ See *id.* at 87 ("[I]mplementation of the Section 8 program has actually reinforced the boundaries between suburbs and cities, black and white.").

²⁴ See JOHN YINGER, *CLOSED DOORS, OPPORTUNITIES LOST: THE CONTINUING COSTS OF HOUSING DISCRIMINATION* 110 (1995).

²⁵ See Florence Wagman Roisman, *The Role of the State, The Necessity of Race-Conscious Remedies, and Other Lessons from the Mount Laurel Study*, 27 SETON HALL L. REV. 1386, 1396 (1997).

of racial oppression. Using informal real estate controls, Whites maintain effective segregation spatially by keeping their residential areas mostly or entirely White.²⁶

C. *The Impact of Racism and Housing Segregation on Access to Resources*

We are far from facing our racism as a nation and constructively creating successful solutions to the problem of institutional racism. In fact, bold measures that further institutionalize racism while fueling the fires of individual discrimination and prejudice remain the norm. The enactment of half-hearted, doomed-to-failure measures to stem discrimination against individuals of color,²⁷ is coupled with whole-hearted measures to capitalize on the systemic isolation caused by housing segregation by further marginalizing a whole segment of our population. As stated by Professor John Calmore, "Perhaps the most dangerous form of oppression, marginalization, marks people as nonessential, expendable as '[a] whole category of people is expelled from useful participation in social life and thus potentially subjected to severe material deprivation and even extermination.'"²⁸ This marginalization is accomplished by continually denying minorities access to opportunities enjoyed by the majority and by causing an even more diabolical segregation by imposing greater rates of incarceration and stiffer criminal sentences on people of color.²⁹

The systemic effects of racism have caused and maintain high rates of poverty among people of color,³⁰ unequal access to quality education, jobs and housing,³¹ and a blatantly discriminatory criminal justice system.³² "Segregated minority

²⁶ Feagin, *supra* note 1, at 81.

²⁷ See, e.g., Fair Housing Act, 42 U.S.C. § 3601 (1999).

²⁸ Calmore, *supra* note 8, at 1269 (quoting IRIS M. YOUNG, JUSTICE AND THE POLITICS OF DIFFERENCE 53 (1990)).

²⁹ See discussion *infra* Part IV.

³⁰ African Americans continue to be poor at a higher rate than whites. In 1999, the poverty rate was 23.6% among African Americans, 22.8% among Latinos, and 10.4% among Asian Pacific Americans as compared to 7.7% among whites. See U.S. Census Bureau, *Poverty 1999* <<http://www.census.gov/hhes/poverty/poverty99/pv99est1.html>> (last modified Oct. 3, 2000).

³¹ See, e.g., Mayor Paul Schell, *Building a City of Choices: From Anti-Discrimination to Pro-Diversity*, 10 STAN. L. & POL'Y REV. 239, 239 (1999); John A. Powell and Marguerite L. Spencer, *Remaking the Urban University for the Urban Student: Talking about Race*, 30 CONN. L. REV. 1247, 1247 (1998) (discussing the history and recent trend of limiting minority access to education). See also Denise C. Morgan, *What is Left to Argue in Desegregation Law? The Right to Minimally Adequate Education*, 8 HARV. BLACKLETTER J. 99, 101 (1991) (arguing that even if the U.S. government is unwilling to recognize many other substantive affirmative obligations to its citizens, it must provide them with adequate education); John Yinger, *supra* note 6, at 93, 97 ("Scholars have long recognized that housing discrimination limits access to schools and jobs."); Denton, *supra* note 14, at 110.

³² See discussion *infra* Part IV.

communities have been historically impoverished and politically powerless."³³ The isolation of communities of color from mainstream society is undeniable.³⁴ The crowning achievement of that isolation and the racism that caused it becomes the opportunity to blame the individual victims for the out-of-control societal forces. In the words of Professor Calmore: "[w]hereas in the late 1960s most in society were inclined to attribute poverty to societal causes that overwhelmed personal responsibility, most are now likely to blame the poor themselves for their poverty."³⁵ Living in concentrated poverty, without access to quality education and self-supporting jobs, people of color are blamed for their inability to take advantage of the economic resources that are out of their reach, but easily available to the majority population.³⁶ As stated by Professor Charles Lawrence in analyzing the "stigma theory," "Labeling blacks as inferior denies them access to societal opportunities; as a result, inadequate educational preparation, poverty of experience, and insufficient basic necessities limit their ability to contribute to society, and the prophecy of their inferiority is fulfilled."³⁷

Nowhere is this self-fulfilling racist prophecy more evident than in our criminal justice system. Isolating the racial "other" from mainstream society has been accomplished by housing segregation. The differences between "us" and "them" become highlighted and the powerful *us* can blame the powerless *them* for all of society's ills, foremost among them, crime. Then the powerful proceed to criminalize behavior that occurs more frequently among the powerless, enforce laws selectively in the isolated communities, and impose heavier criminal penalties on the powerless. The result is, of course, what we suspected all along – "those" people are the criminal element in society!³⁸

³³ Ford, *supra* note 11, at 1844.

³⁴ See Powell, *supra* note 4, at 344 ("It cannot be overemphasized that African Americans are more than segregated, they are spatially isolated from mainstream America. Racial isolation carries extreme social consequences, excluding blacks from contact with mainstream social networks and institutions, while creating an adverse social climate in the 'ghetto' thus erected.").

³⁵ Calmore, *supra* note 8, at 1248.

³⁶ See Margalynne Armstrong, *Privilege in Residential Housing* in *PRIVILEGE REVEALED: HOW INVISIBLE PREFERENCE UNDERMINES AMERICA* 50 (Stephanie M. Wildman ed. 1996) ("The staggering unemployment figures for inner city neighborhoods reflect a vicious cycle whereby the neighborhoods provide little work and the low-income populations are too poor to move closer to areas where work can be found."). See also Jargowsky, *supra* note 2, at 48 ("Residential segregation is a major component of a self-reinforcing cycle of discrimination that results in and perpetuates large racial and ethnic disparities in educational and labor market outcomes."); Powell, *supra* note 4, at 395 ("When minority students are excluded from mainstream educational resources and opportunities they get the message of exclusion from the larger society. Their attachment to school performance and the labor market declines accordingly.").

³⁷ Lawrence, *supra* note 4, at 351.

³⁸ See Calmore, *supra* note 8, at 1240 ("As a result, prospects for residential integration grow increasingly dim because the white fear of crime and the association of crime with

Racism has a strong impact on the daily lives of all people in the United States. It affects where we live, work, and play; with whom we associate; with whom we become friends; how our kids learn to get along with each other, to name but a few impacts. Racism speaks volumes about who we are as a people, how we treat each other, and what we will allow in terms of how others are treated. The marginalization of a whole segment of our society negatively affects us all. "Racial segregation, like all other forms of cruelty and tyranny, debases all human beings — those who are its victims, those who victimize, and in quite subtle ways those who are mere accessories."³⁹

The first step in reversing this marginalization must be reversing the effects of housing segregation and providing people with true choices in where they live. Providing opportunities for all people to choose where they live begins with examining the racist institutions in our society that are maintained by our racism and contribute to housing segregation. Before solutions to the problem of housing segregation can be proffered, our racist institutions must be held up to the light, dismantled, and rebuilt upon principles of true equality. This article will now examine those institutions and make recommendations for institutional reform in exploring how our nation can reverse the effects of housing segregation.

II. THE INSTITUTION OF WHITE PRIVILEGE

A. *White Privilege – Its Invisibility and Insidiousness*

Of all the institutions that maintain and perpetuate racism in our society, white privilege remains the most insidious. It unassumingly invades every aspect of our lives, lurking invisibly throughout our culture. Despite its enormous power, few white people acknowledge its existence, unconsciously reaping the benefits and advantages from membership in a privileged group, without even the need for awareness.⁴⁰ White privilege derives its power from the invisibility of whiteness.

blackness become primary reasons for whites to maintain segregation, through exclusion of blacks from their neighborhoods and reluctance to move into settings where blacks already reside."); Denton, *supra* note 14, at 113; Galster, *supra* note 5, at 124.

³⁹ Calmore, *supra* note 8, at 1233 (quoting Kenneth B. Clark, *Epigraph* to DOUGLAS S. MASSEY & NANCY A. DENTON, *AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS* xi (1993)).

⁴⁰ See Stephanie M. Wildman & Adrienne D. Davis, *Language and Silence: Making Systems of Privilege Visible* in CRITICAL RACE THEORY: THE CUTTING EDGE 577 (Richard Delgado ed. 1995) ("Whites do not look at the world through a filter of racial awareness, even though whites are, of course, a race. The power to ignore race, when white is the race, is a privilege, a societal advantage."); Barbara J. Flagg, "Was Blind, But Now I See": *White Race Consciousness and the Requirement of Discriminatory Intent*, 91 MICH. L. REV. 953, 957 (1993) (describing the ability of whites not to recognize their whiteness as race as the "transparency phenomenon"). See also Calmore, *supra* note 4, at 2221 ("White racism results, in part, from cultural conditioning that reinforces and in turn is reinforced by the

Whiteness is not viewed as race; the "problem" of race relations is always about the "other," the black, or other person of color.⁴¹ Professor Patricia J. Williams explains it as follows:

Perhaps one reason that conversations about race are so often doomed to frustration is that the notion of whiteness as 'race' is almost never implicated. One of the more difficult legacies of slavery and of colonialism is the degree to which racism's tenacious hold is manifested not merely in the divided demographics of neighborhood or education or class but also in the process of what media expert John Fiske calls the 'exnomination' of whiteness as racial identity. Whiteness is unnamed, suppressed, beyond the realm of race. Exnomination permits whites to entertain the notion that race lives 'over there' on the other side of the tracks, in black bodies and inner-city neighborhoods, in a dark netherworld where whites are not involved.⁴²

The treachery of white privilege is its ability to masquerade as normalcy, the powerful cunning with which it assumes the identity of the status quo.⁴³ Professors Wildman and Davis have pointed out that:

Examining privilege reveals that the characteristics and attributes of those who are privileged group members are described as societal norms – as the way things are and as what is normal in society. This normalization of privilege means that members of society are measured against characteristics held by those privileged. The privileged characteristic comes to define the norm.⁴⁴

The defining of normalcy by the experiences and attributes of white people, places whites at a considerable advantage as they conduct their everyday lives in mainstream society. Having defined what is normal and mainstream, a system of rewards and punishments based on one's adherence to normalcy is preserved.

particular actions of interest groups. Institutional arrangements are organized and manipulated by power holders in our political economy with the aim of securing maximum social control and selective privilege.").

⁴¹ See Wildman & Davis, *supra* note 40, at 577.

⁴² PATRICIA J. WILLIAMS, *SEEING A COLOR-BLIND FUTURE: THE PARADOX OF RACE* 6-7 (1997).

⁴³ See John O. Calmore, *Close Encounters of the Racial Kind: Pedagogical Reflections and Seminar Conversations*, 31 U.S.F. L. REV. 903, 917 (1997) ("While Whites often think of racism as putting others at a disadvantage, they seldom acknowledge the corollary – that it puts them at an advantage. Moreover, the bundle of white-privilege advantages is often assumed by Whites to be 'neutral, normal, and universally available to everybody.'"). See also Dorothy E. Roberts, *The Priority Paradigm: Private Choices and the Limits of Equality*, 57 U. PITT. L. REV. 363, 384 (1996) ("The priority paradigm benefits whites not only because white people's choices are privileged, but also because black people's choices are devalued.").

⁴⁴ Wildman & Davis, *supra* note 40, at 574.

Behaviors and characteristics that maintain the status quo and perpetuate the privilege are rewarded as meritorious in society, while behaviors and characteristics (i.e., those of the disadvantaged groups) that do not mirror those of the privileged group are punished. Furthermore, as explained by Professors Wildman and Davis, the leap from privilege to merit is particularly insidious:

Members of the privileged group gain many benefits by their affiliation with the dominant side of the power system. This power affiliation is not identified as such. It may be transformed into and presented as individual merit. Achievements by members of the privileged group are viewed as meritorious and the result of individual effort, rather than as privileged.⁴⁵

And, of course, the reverse then becomes truth among the privileged group: behaviors not conforming to the expectation of normal are devalued, at best, punished as aberrant, at worst. The racism that allows white people to define and think about themselves as superior, the racism that maintains white privilege, allows—in fact, encourages—white people to define everyone else as inferior.⁴⁶ As explained by Professor Lawrence, the perpetuation of racist attitudes becomes self-rewarding for white people:

Thus, the preservation of inaccurate judgments about the out-group is self-rewarding. This is particularly so when prejudiced judgments are made in a social context that accepts and encourages negative attitudes toward the outgroup. In these cases, the group judgment reinforces and helps maintain the individual judgment about the out-group's lack of worth.⁴⁷

Even racial discrimination becomes normalized. Blatant acts of discrimination are infrequent nowadays. The subtle, unobvious instances of discrimination can be ignored by all but those discriminated against.⁴⁸

Housing segregation is an integral element in this process by being the visible

⁴⁵ *Id.* at 575. See also Calmore, *supra* note 4, at 2219 ("Cultural bias sets standards for performance in terms of the tendencies, skills, or attributes of white America, and it is against these standards that all other groups are measured. Poor performance by the members of these groups is translated into inferior capacity that represents general group traits. A second, related fundamental cultural bias is the practice of dominant society giving more value and status to areas in which white people excel or find interest than to those areas in which people of color have excelled or demonstrated aptitude or interest."); Armstrong, *supra* note 36, at 59-60.

⁴⁶ See Calmore, *supra* note 4, at 2131 ("As many whites experience competitive advantage and relative prosperity over blacks, they are encouraged to believe in an imagined cultural superiority that, in turn, reinforces their conviction—like that of nineteenth-century missionaries—that our blackness is a condition from which we must be liberated.").

⁴⁷ Lawrence, *supra* note 4, at 337.

⁴⁸ See Goering & Squires, *supra* note 3, at 5.

manifestation of how different groups are valued by society.⁴⁹ As stated by Professor Lawrence:

We live in segregated neighborhoods because whites have believed that living with or close to blacks lowers their own status. Where one lives is an important index of one's status in our culture, and to live in proximity to those who are looked down upon is to be looked down upon oneself. . . . If our culture interprets a decision to exclude blacks from a neighborhood as evidence of blacks' continued untouchability, that decision becomes part of the system of mutually reinforcing racial stigma that denies blacks the status of full humanity.⁵⁰

This visible representation of societal worth gets reinforced in reality by housing segregation's influence on the access to resources so necessary to maintaining or denying privilege. One's ability to flourish economically is dependent on one's ability to access quality education, housing and employment. In restricting a whole segment of society's ability to take advantage of economic resources, the people with privilege and power ensure the continuance of an unequal distribution of resources, ultimately maintaining their own power and privilege at others' expense and disadvantage. Thus, the racism that isolates black people also ensures their group poverty. The political, economic, and legal systems in this country aggressively protect white people's privilege of leading lives that depend on a segment of the population being poor, while ignoring the distress of the people living in poverty. The residential isolation of poor people caused by decades of unbridled racism makes it easy for white people to not see the consequences of their actions.⁵¹

The legal system in our country functions to maintain the status quo of white privilege and the power structure in our society that supports and encourages white privilege.⁵² In its attempt at neutrality, the legal system protects privilege by ignoring its existence; nonfeasance becomes malfeasance.⁵³ The United States Supreme Court ensures the perpetuation of white privilege and power. The many rulings of the Supreme Court requiring discrimination to be intentional before it becomes actionable presuppose the continuance of white supremacy unchecked by our legal system.⁵⁴ In other words, our legal system maintains segregation and

⁴⁹ See Lawrence, *supra* note 4, at 367-68; Feagin, *supra* note 1, at 85 ("Residential segregation has many symbolic implications beyond housing separation, for it stems directly from the racist ideology of superior and inferior racial groups. Racial superiority and inferiority are graphically and geographically manifested through the exclusion of African-Americans from White neighborhoods.").

⁵⁰ Lawrence, *supra* note 4, at 367-69.

⁵¹ See Armstrong, *supra* note 36, at 51 ("When protecting privilege is elevated above the goal of racial equality, the consequence is residential segregation.").

⁵² See Roberts, *supra* note 43, at 366; Wildman & Davis, *supra* note 40, at 574.

⁵³ See *id.*

⁵⁴ See *Washington v. Davis*, 426 U.S. 229, 240 (1976) (Burden is on plaintiff to trace the

discrimination.⁵⁵ As stated by Professor Lawrence: "The intent requirement is a centerpiece in an ideology of equal opportunity that legitimizes the continued existence of racially and economically discriminatory conditions and rationalizes the superordinate status of privileged whites."⁵⁶

B. Challenging White Privilege

Challenging the racist status quo requires exposing the values of dominant society and the definitions of normalcy upon which the law relies.⁵⁷ This challenge will inevitably lead to a level of discomfort for white people while the concepts of normalcy and whiteness are deconstructed, examined in the light, and understood as a racial identity that has become blind to the oppression it causes.⁵⁸ We need only remind ourselves that the discomfort we feel at accepting our whiteness as a racial identity and acknowledging our role in the racial problems of this country, is infinitesimal compared to the extreme deprivation, violence, and emotional and physical torture perpetrated upon blacks and other people of color throughout our history. This acknowledgement will mean recognizing our invisible privilege as an inherent part of the racial tension in this country and knowing we are holding on to it only at the expense of others. Challenging the racist status quo does not require accepting blame for our abominable history in the treatment of blacks and other people in this country, although some of us are willing to acknowledge our indirect

"invidious quality of a law claimed to be racially discriminatory... to a racially discriminatory purpose"); *Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265 (1977) ("Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause."); *Griffin v. Breckenridge*, 403 U.S. 88, 102 (1971) (plaintiff must demonstrate "intent to deprive of equal protection, or equal privileges and immunities"); *Mobile v. Bolden*, 446 U.S. 55, 66 (1980) ("[O]nly if there is purposeful discrimination can there be a violation of the Equal Protection Clause of the Fourteenth Amendment."); *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979) ("Discriminatory purpose' . . . implies more than intent as volition or intent as awareness of consequences. It implies that the decisionmaker . . . selected . . . a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group."); *McCleskey v. Kemp*, 481 U.S. 279, 297-99 (1987). See also *Columbus Bd. of Educ. v. Penick*, 443 U.S. 449, 464 (1979), *Castaneda v. Partida*, 430 U.S. 482, 493 (1977), *Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471, 481-82 (1997).

⁵⁵ See *Armstrong*, *supra* note 36, at 61-62.

⁵⁶ Lawrence, *supra* note 4, at 387. See also Derrick A. Bell, *After We're Gone: Prudent Speculations On America in a Post-Racial Epoch*, 34 ST. LOUIS U. L.J. 393, 396 (1990) ("... continues to echo through contemporary judicial decisions in which the measure of racial relief granted is determined less by the character of harm suffered by blacks, and more by the degree of disadvantage the relief sought will impose on whites.").

⁵⁷ See Calmore, *supra* note 4, at 2160.

⁵⁸ See Calmore, *supra* note 43, at 919. See also Wildman & Davis, *supra* note 40, at 577 ("Whites do not look at the world through a filter of racial awareness, even though whites are, of course, a race. The power to ignore race, when white is the race, is a privilege, a societal advantage.").

complicity in this past.⁵⁹ It does, however, mean accepting responsibility for the maintenance of the way things are due to our fear of letting go of any power and privilege. Changing the course of this nation's racial problems requires an acknowledgment of the detriment our white privilege causes others and a desire to treat each other equally and more kindly as a nation and as a people. We need to strive for an equalization of power that strikes a just balance of rights and privileges between whites, blacks, and other races.⁶⁰ Most importantly, as expressed by Professor powell:

The key to this focus is understanding that racial discrimination and economic deprivation are not only oppressive, but they are also structural and institutional. Without characterizing oppression as structural, and without developing an agenda that is oriented toward destabilizing and disturbing this structure, any formal or individual progress will be largely rendered impotent by the greater institutional mechanisms.⁶¹

As we address the structural and institutional problems of racism, our legal system and all other systems that support the continuation of the racist status quo must work from both ends of the spectrum, concentrating on eliminating domination as well as its consequence, subordination.⁶² Institutions that support, encourage, and implement laws, policies, and practices that establish social justice, a fairer distribution of power and privilege, and an end to oppression must replace our racist institutions.

III. THE INSTITUTION OF PUBLIC EDUCATION

A. *The Problems with Public Education*

The institution of public education maintains and reinforces white privilege throughout the country. The inequality and racism inherent in our nation's system of public education are a direct result of our residential patterns of housing segregation. School segregation has been the natural outcome of housing segregation.⁶³ School and housing segregation are intrinsically related. The manner in which public education is funded, coupled with the structural nature of public school districts dividing suburban and city districts, maintains and perpetuates

⁵⁹ See Calmore, *supra* note 43, at 919.

⁶⁰ See powell, *supra* note 13, at 907-08 ("Anti-subordination, then, necessitates race-specific policies intended to redress the subordination of racial minorities.").

⁶¹ *Id.* at 910.

⁶² See *id.* at 906. See also Wildman & Davis, *supra* note 40, at 577 ("Anti-discrimination advocates focus only on one half of the power system dyad, the subordinated characteristic, rather than seeing the essential companionship between domination that accompanies subordination and privilege that accompanies discrimination.").

⁶³ See Feagin, *supra* note 1, at 84.

school segregation. The way public education is funded also serves to further the entrenchment of housing segregation in our society. To break this vicious cycle, the public school system needs to be radically revamped and structurally changed.⁶⁴ Professor Peter Salsich argues:

One of the most important factors leading to a decision about where to live is the quality of the schools that one's children would attend. If the schools are poor, the desirability of housing in the neighborhood declines. Correspondingly, if people are unwilling to live in a particular area, it is unlikely that sufficient tax and personal resources will be available to improve the schools. So, improvement of the two go hand in hand.⁶⁵

The system of financing public education prevalent in our nation serves as a glaring example of the broader phenomenon of those in power using power to advance only their own well-being, not caring about the powerless. Education is related to income. The people with the educational opportunities that provide them with the ability to access financial resources, and who have the appropriate skin color, can buy property in the suburbs. They can afford the suburban property taxes, which then go to fund the schools and give their children the educational opportunities to provide them with the ability to access financial resources, buy property in the suburbs, etc.⁶⁶ Funding public education with income from local property taxes and financing school districts that are segregated between city and suburb and between rich suburb and poorer suburb assures inequitable distribution of resources in public education.⁶⁷ This inequity becomes compounded by the fact that affluent suburbs are, in general, better able to financially support their school districts. As stated by Professor Kushner: "The green of fiscal support has

⁶⁴ See Diana M. Pearce, *Deciphering the Dynamics of Segregation: The Role of Schools in the Housing Choice Process*, 13 URB. REV. 85, 98 (1981) ("Perhaps the most important conclusion to be drawn from this analysis of the role of schools in the housing choice process, however, is that segregation in one institution reinforces it in another.").

⁶⁵ Peter W. Salsich, Jr., *Thinking Regionally About Affordable Housing and Neighborhood Development*, 28 STETSON L. REV. 577, 596 (1999).

⁶⁶ See Gary Orfield, *Metropolitan School Desegregation: Impacts on Metropolitan Society*, 80 MINN. L. REV. 825, 857 (1996). See also Bryant, *supra* note 2, at 163-64.

⁶⁷ See *Rodriguez v. San Antonio Indep. Sch. Dist.*, 337 F. Supp. 280, 285 (W.D. Tex. 1973) (holding that the rights to vote and to free speech do not include the right to educational services); *Jelliffe v. Berdon*, 345 F. Supp. 773 (D. Conn. 1972) (class action challenging constitutionality of Connecticut statutes that provide for financing of elementary and secondary schools largely through local property taxation). See generally *Van Duzart v. Hatfield*, 334 F. Supp. 870 (D. Minn. 1971); *Spano v. Bd. of Educ.*, 328 N.Y.S.2d 229 (N.Y. Sup. Ct. 1972) (cases based upon the Equal Protection Clause were stopped quickly by the Supreme Court's decision in *Rodriguez*); *Robinson v. Cahill*, 287 A.2d 187 (N.J. Super. Ct. Law Div. 1972); *Serrano v. Priest*, 487 P.2d 1241 (Cal. 1971) (overturned state education finance plans that relied heavily on property taxes); *Sweetwater County Planning Comm. v. Hinkle*, 491 P.2d 1234 (Wyo. 1971).

followed the white affluent population to the suburbs. Better schools and housing, together with the plants and offices of major employers, are now typically located outside the city."⁶⁸

The institution of public education maintains and reinforces a cycle of poverty where one of the foremost avenues out of poverty, a quality education, is unavailable to poor people. In fact, this method for maintaining our nation's caste system was a deliberate motivation of the founders of our present-day educational institution. Our current system of education was borne out of the communist 'scare' era; the founders of present-day schooling were motivated by a desire to prevent the poor from organizing a revolution.⁶⁹ "Schools were designed by Horace Mann and by Sears and Harper of the University of Chicago and by Thorndyke of Columbia Teachers College and by some other men to be instruments of the scientific management of a mass population. Schools are intended to produce, through the application of formulas, human beings whose behavior can be predicted and controlled."⁷⁰

The connection between schools with a disproportionate number of students living in poverty and racial inequality is incontrovertible. Students of color are much more likely to be attending schools with vastly greater numbers of impoverished students.⁷¹ Studies show that schools with ninety percent students of color in attendance are at least fourteen times more likely than other schools to have a majority of students living in poverty.⁷² In fact, "nearly a third of blacks and almost half of Latino children in the nation's largest urban school districts attend schools more than fifty percent poor. Large numbers are in almost totally impoverished schools."⁷³ Most importantly, in terms of inequitable distribution of resources, schools with higher percentages of impoverished children maintain much lower success rates for students' academic achievements.⁷⁴

Education is essential for creating opportunities throughout the rest of one's life. In the words of Professor Gary Orfield: "Education is believed to be the key to opportunity, and education has clearly become even more sharply related to economic success in the past generation as the incomes of people with less than a

⁶⁸ KUSHNER, *supra* note 2, at 1067.

⁶⁹ See JOHN TAYLOR GATTO, DUMBING US DOWN: THE HIDDEN CURRICULUM OF COMPULSORY SCHOOLING 17-18 (1992) ("But 'modern schooling' as we now know it is a by-product of the two 'Red Scares' of 1848 and 1919, when powerful interests feared a revolution among our own industrial poor."). Having worked as a New York City school teacher for 26 years and having won the "New York State Teacher of the Year" in 1991, and the "New York City Teacher of the Year" in 1990, Mr. Gatto writes of his observations of the inadequacies of the compulsory educational system, his knowledge of the history of its development, and the "invisible curriculum that reinforced the myths of the school institution and those of an economy based on caste." *Id.* at xiv.

⁷⁰ *Id.* at 26.

⁷¹ See Orfield, *supra* note 66, at 860-61.

⁷² See *id.* at 861.

⁷³ *Id.*

⁷⁴ See *id.*

college education declined and that of people with higher education rose significantly.”⁷⁵ Continuing to finance public schools through local property taxes continues to deny opportunities to people already disadvantaged in our society. Our educational system and its inequitable allocation of funding replicate and help perpetuate our racist social structures from generation to generation.⁷⁶ This unequal system of local property finance serves to increase the knowledge gap between blacks and whites.⁷⁷ In the words of Professor John Powell:

Inferior schools represent a component and a magnifier of the constrained ‘opportunity structure’ imposed by residential segregation. Housing is more than shelter, it provides links to formal and informal opportunity structures. School districts are a part of the opportunity structure represented by residence. Residential segregation excludes African Americans from mainstream opportunity structures. Educational segregation, in turn, perpetuates exclusion from the social networks that lead to job information, contacts, and sponsorship.⁷⁸

Exclusion from quality educational experiences also sends a more subtle message to those excluded. It sends the message that the person excluded is not valued by society. It affects a person’s self-image and sense of worthiness in the world.⁷⁹ Growing up in poor and segregated neighborhoods where society’s expectations for success are low, if not nonexistent, impacts children in the same way.⁸⁰ Minority students who have the opportunity to attend higher quality schools achieve much greater success in educational and vocational terms.⁸¹

But even in schools that are not segregated, students of color are at a disadvantage due to the racism in our society.⁸² In an extensive study of racial justice data from twelve cities throughout the country, the Applied Research Center found alarming evidence of unequal treatment and discrimination based on race in

⁷⁵ *Id.* at 856.

⁷⁶ See GATTO, *supra* note 69, at 100-01 (“Monopoly schooling is the major cause of our loss of national and individual identity. It has institutionalized the division of social classes and acted as an agent of caste – repugnant to our founding myths and to the reality of our founding period. Its strength arises from many quarters, the antichild, antifamily stream of history for one – but it draws its greatest power from being a natural adjunct to the kind of commercial economy we have that requires permanently dissatisfied consumers.”).

⁷⁷ See Professor Dale Tussing, Ph.D., *Paying for Public Education: Class, Race and Inequality*, Presentation at the Socialist Forum, Syracuse, N.Y. (Feb. 6, 2000).

⁷⁸ Powell, *supra* note 4, at 346.

⁷⁹ See Roberts, *supra* note 43, at 396 (“Individuals are not atomistic beings who create their identities apart from their social context. We form our personalities, interests, and opinions—our sense of self—only in interaction with the community to which we belong.”).

⁸⁰ See Powell, *supra* note 4, at 347.

⁸¹ See *id.* at 341-42.

⁸² See Rebecca Gordan et al., *Facing the Consequences: An Examination of Racial Discrimination in U.S. Public Schools 1*, Applied Research Center (2000).

our educational system, leading to the conclusion that there is "a deep pattern of institutional racism in U.S. public schools."⁸³ In comparison to their white peers, students of color, particularly African American students, are more frequently expelled or suspended, are less likely to be placed in advanced or honors classes, are academically "tracked" based on lower expectations, are allowed to drop out of school at a greater rate, and have fewer number of teachers of the same race who can serve as role models than white students.⁸⁴ The study found systematic inequalities in treatment of students of different races.⁸⁵

Instead of creating opportunities for families to provide their children with better educational opportunities, and therefore opportunities for an improved standard of living, our society continues to deprive the disadvantaged and reward the advantaged. The vicious cycle of housing segregation leading to school segregation leading to housing segregation is exacerbated by real estate agents who convey information to prospective property purchasers regarding the racial makeup of neighborhoods by describing school districts. Although illegal to provide information on the racial composition of a neighborhood, realtors can and do detail the racial composition of schools in a given neighborhood and thereby steer prospective purchasers to different neighborhoods depending on their race.⁸⁶ This device is also used in advertisements for homes to alert potential homebuyers of all-white schools in the neighborhood.⁸⁷ Housing and school segregation is thus perpetuated, as is racism and the inequality in educational opportunity.⁸⁸

The United States Supreme Court has shown little interest in reversing the racial inequality evidenced in this nation's educational system. In fact, the majority of its decisions concerning school segregation cases have reinforced the racist status quo. *Brown v. Board of Education* did not herald in an era of equal access to educational resources.⁸⁹ It has been opined that the timing of the flight of white people to suburban life occurring with the *Brown* decision was no coincidence.⁹⁰ This white flight was underwritten by federal FHA and VA mortgages that were deliberately made unavailable to African Americans.⁹¹ The government-subsidized ability of white people to leave the cities for the suburbs, whereby the financing of local

⁸³ *Id.* at 2.

⁸⁴ *See id.* at 2-3.

⁸⁵ *See id.* at 3.

⁸⁶ *See* Pearce, *supra* note 64, at 93-96.

⁸⁷ *See id.* at 98 ("[W]hen the schools are segregated, not only do they provide a means, as we have seen in our analysis of practices in advertising and advice, of conveying information about race, but they help perpetuate notions about the inherent desirability of all-white schools and neighborhoods.").

⁸⁸ *See* John A. Powell, *An Agenda for the Post-Civil Rights Era*, 29 U.S.F. L. REV. 889, 902 (1995) ("Most black children continue to attend segregated schools. Blacks and whites continue to live in segregated neighborhoods. As a group, black schools are underfunded and students perform considerably worse.") (citations omitted).

⁸⁹ *See id.* at 894.

⁹⁰ *See* KUSHNER, *supra* note 2, at 1065; Denton, *supra* note 1, at 804.

⁹¹ *See* Bryant, *supra* note 2, at 133-34.

governments and school districts became entrenched, coupled with the ineffective application of *Brown*, set the stage for the Supreme Court's subsequent decisions in the area of school segregation. In 1973, the Court deemed constitutional the financing of education through local property taxes despite the severe racial inequality that resulted.⁹² Then in 1974, the Court went a step further by affirmatively exempting suburban, all-white areas from planned desegregation of central city school districts.⁹³ The Court insulated suburban whites from desegregation orders. In 1995, the Court decided not to intervene and remedy school segregation because school districts were blameless in regard to a phenomenon that occurs naturally, due to voluntary choices of people locating in segregated neighborhoods.⁹⁴ Believing that segregation can be explained away as a natural phenomenon contradicts accepted evidence that segregation continues purposefully due to external forces such as the real estate industry, private housing discrimination, and the banking and insurance industries.⁹⁵

The Supreme Court has consciously chosen to allow school segregation and the physical separation of the races to continue.⁹⁶ Because of the Supreme Court's holdings in racial segregation cases involving school districts, federal courts have become powerless to remedy school segregation.⁹⁷ In the words of Professor John Powell: "The federal courts have been unwilling to inconvenience whites to the extent necessary to remedy educational inequality for African Americans."⁹⁸ In sum, the intractability of housing segregation allows suburban schools to be racially exclusive while the United States Supreme Court insulates those schools from attack on grounds of educational discrimination.⁹⁹

B. Recommendations for Change in the Institution of Public Education

Although housing segregation was the precursor to school segregation, reversing

⁹² See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 54-55 (1973).

⁹³ See *Milliken v. Bradley*, 418 U.S. 717, 744-45 (1974); Bryant, *supra* note 2, at 168 ("The Court's assumption of suburban innocence essentially rewards suburbs able to successfully segregate their housing by exempting them from desegregation requirements imposed on cities. Meanwhile, unstable racially changing city neighborhoods are punished with mandatory desegregation orders that actually accelerate segregation in both housing and schools.") (citations omitted).

⁹⁴ See *Missouri v. Jenkins*, 515 U.S. 70 (1995). See also Powell, *supra* note 4, at 339.

⁹⁵ See Bryant, *supra* note 2, at 132-37.

⁹⁶ See KUSHNER, *supra* note 2, at § 9:8.

⁹⁷ See Powell, *supra* note 4, at 351.

⁹⁸ *Id.* at 354.

⁹⁹ See *id.* at 358-59. See also Bryant, *supra* note 2, at 160 ("This enables it to claim judicial helplessness in combating the segregatory effects on schools that the allegedly private decisions about housing and neighborhood choice have caused.") (citation omitted); Armstrong, *supra* note 36, at 53 ("Courts also reinforce popular notions of an extralegal 'right' to discriminate on the basis of race by recognizing residential segregation as a legal impediment to judicial intervention in school desegregation cases.").

the patterns of school segregation is one of the primary ways to initiate reversal of the patterns of housing segregation. That is to say, if the racial composition of a school is not an issue for a family in deciding residential location, the choice of neighborhood is broadened.¹⁰⁰ Finding ways to desegregate schools may actually be the path of least resistance in fighting housing segregation.

A method of desegregating schools and thus neighborhoods that has proven successful in several areas is metropolitan-wide, city-suburban school desegregation. This strategy is championed by Professor Gary Orfield of Harvard University.¹⁰¹ Metropolitan-wide school desegregation has demonstrated the benefits that occur when inequitable public school financing is eliminated. Instead of financing from individual local tax bases of local suburban governments and municipal governments, metropolitan-wide school systems are funded collectively by both suburbs and the city in a given metropolitan area. This unified system of financing, when coupled with an equitable distribution of those resources, equalizes the educational quality between city and suburbs. Children of parents with low incomes have the same opportunity for a quality education as children of high income parents.¹⁰² Area unified school districts can also maintain equity in their efforts to acquire their share of state funding.¹⁰³

Implementing metropolitan-wide school systems not only solves the inequitable financing problem, but it also provides the opportunity for desegregating schools within the district through busing. Children of differing races and classes have the opportunity to learn together, are afforded equal access to quality education, and relate to each other on a daily basis.¹⁰⁴ The tolerance and acceptance of people different from themselves follows children educated in integrated schools throughout their lives and cannot help but redefine their conception of "community."¹⁰⁵

Studies have shown that most Americans, regardless of race, react positively to actual experiences of having their children bused for the purpose of desegregation.¹⁰⁶ Metropolitan-wide school districts have been accomplished mostly in southern and western states.¹⁰⁷ In Raleigh and Charlotte, North Carolina,

¹⁰⁰ See Pearce, *supra* note 64, at 98. See also Orfield, *supra* note 66, at 834 ("People have very little incentive to make residential choices on the basis of a school's racial concentration since none of the schools are segregated or threaten to become segregated soon and none are isolated and all-white."); Denton, *supra* note 1, at 821; KUSHNER, *supra* note 2, § 9:16.

¹⁰¹ See Orfield, *supra* note 66, at 828. See also Feagin, *supra* note 1, at 83 (explaining that school desegregation has led to housing desegregation).

¹⁰² See Orfield, *supra* note 66, at 834.

¹⁰³ See *id.* at 844.

¹⁰⁴ See *id.* at 847.

¹⁰⁵ See *id.* at 828, 849. See also Powell, *supra* note 4, at 348 ("Desegregated schools foster interaction among blacks and whites, both in school ages and in mature life."); Denton, *supra* note 1, at 822.

¹⁰⁶ See Orfield, *supra* note 66, at 865.

¹⁰⁷ See *id.* at 841.

cities that have generation-old metropolitan-wide school districts, the populace has expressed their continuing satisfaction with desegregation in the electoral process.¹⁰⁸

Large-scale, county-wide desegregation plans, such as those adopted by Raleigh and Charlotte, are most effective in affecting neighborhood housing segregation. In the words of Professor Orfield:

Another sign that the scale of a district matters can be found in data on the stability of the racial proportions in the school systems, a fundamental issue in the white flight literature. A study of racial change over a nineteen-year period found that among the nation's sixty largest school districts, a majority of the ten districts with the least decline in percentage of white students (9% or less) had county-wide desegregation plans in place In contrast, most of the ten with the largest declines in percentage of white students were in central-city systems with no mandatory student reassignments.¹⁰⁹

The theory is that integrating all schools throughout a county lessens the incentive for white parents to base their neighborhood decision on the racial composition of a school. This outcome would thus impact housing choice by equalizing the distinction between city and suburb and between different suburbs.¹¹⁰

Metropolitan-wide school districts take some of the fuel out of the zoning battle fire. As stated by Professor Orfield:

It seems very likely that the social and economic structure of our urban settlements strongly reflects the working out of various ways families with choices can provide superior education for their children and avoid the cost of providing it for other children. Many battles over zoning, land use, affordable housing, and taxation turn directly on these issues. Metropolitan desegregation takes attention from these boundary-protection activities that generate intense metropolitan fragmentation, and turns it toward the needs of the larger community.¹¹¹

There exists one potential downside to metropolitan school-wide desegregation. The downside lies in the argument that white fear will be allayed by across-the-board integration, resulting in all schools having a majority of white children. If wholesale integration of schools is the goal, with the expressed hope that integration of neighborhoods will follow, the advocates of "spatial equality"¹¹² in affordable housing development have good cause for concern. Theorists of spatial

¹⁰⁸ See *id.* at 846.

¹⁰⁹ *Id.* at 842.

¹¹⁰ See *id.* at 831, 853.

¹¹¹ *Id.* at 857 (citation omitted).

¹¹² See, e.g., John O. Calmore, *Spatial Equality and the Kerner Commission Report: A Back-to-the-Future Essay*, 71 N.C. L. REV. 1487, 1487 (1993).

equality, who envision the revitalization of central city neighborhoods and the improvement of infrastructure in central cities, set forth an alternative to integration measures that dilute efforts to strengthen black communities. Further, even if school integration does not precipitate housing integration to a proportionate degree, is the absence of choice for schools where minorities are a majority an outcome minority communities will accept? The defenders of housing choice advocate opportunities for everyone to have significant choices about the demographics of the neighborhood in which they live. The goal of affordable housing development becomes equalization of desirability of neighborhoods between the city and the suburbs, and availability of affordable housing in both, so that there is *real* choice in location of residence. Should the same choice be sought in the realm of school desegregation? Would the equitable financing of schools between cities and suburbs resulting from metropolitan-wide school systems coupled with less than full-scale desegregation facilitate this choice by families? There are no easy answers, but it does seem that if whites have the overwhelming advantage of choosing majority-white schools for their children, true equality would provide an equivalent choice for minorities.

There are other viable solutions to the problem of school segregation. One successful strategy involves coordinating school and housing development to facilitate integrated neighborhoods.¹¹³ Governmental approval of development projects can be made contingent upon giving priority to the social aspect of community development.¹¹⁴ Policy decisions at all levels of the development process should take into account the connection between school and housing desegregation.¹¹⁵ In addition, some states have solved the problem of inequitable local financing of public schools by equalizing funding of schools at the state level.¹¹⁶

The importance of public education's contribution to the racial divide in this nation cannot be overemphasized. It now remains an integral part of the problem of racial segregation and animosity, but it can equally become a major part of the solution. The capacity to understand and accept people of varying backgrounds begins at a young age. The racism inherent in our system of public education needs to be eliminated.

IV. THE INSTITUTION OF CRIMINAL JUSTICE

A. Racism in the Criminal Justice System

The United States has the dubious distinction of incarcerating a higher

¹¹³ See Orfield, *supra* note 66, at 868; Denton, *supra* note 1, at 821.

¹¹⁴ See Orfield, *supra* note 66, at 868.

¹¹⁵ See Denton, *supra* note 1, at 821.

¹¹⁶ See Professor Bill Duncombe, Presentation at the Socialist Forum, Syracuse, N.Y. (Feb. 6, 2000).

percentage of its population than any other Western country.¹¹⁷ Currently, there are more than one million people in the United States prison system.¹¹⁸ As if this fact were not alarming enough, the injustice is heightened by the fact that a segment of the population that represents 12% of the people in the United States accounts for over half (55%) of the entire prison population.¹¹⁹ Blacks are incarcerated at a rate seven times greater than whites in our country.¹²⁰ Young black men between the ages of 20 and 29 years old represent half of the total prison population while accounting for only 4% of the overall population.¹²¹ In 1989, one in four black men were in prison, an alarming enough number. By 1995, this statistic of human tragedy had increased to one in three black men.¹²² More black men inhabit the prison system than participate in the college-level educational system.¹²³

Does the rate of incarceration phenomenon have anything to do with the racism in this country? There exists irrefutable evidence that it does. If it were not for our country's deliberate and flagrant desire to marginalize, demoralize, and control blacks and black communities, evidenced historically by housing segregation and, more significantly, in recent times by the criminal justice system, the number of people in this nation's prisons would be significantly lower.

The disproportionately higher number of blacks in prison results mainly from racist drug laws and their enforcement in a racially discriminatory manner. The overall high rates of incarceration in the United States have primarily been the result of the increase in the number of drug offenders in prison. The number of drug offenders in prison grew from less than 6% in 1979 to 21.5% in 1991.¹²⁴ At present, nearly 60% of people in federal prison are doing time for drug violations and 22% of prisoners in state prison and local jails are there on drug violations.¹²⁵ This represents more people in prison for drug offenses in the United States than in prison for any offense in England, France, Germany and Japan combined.¹²⁶

Furthermore, between 1976 and 1989 the number of white people arrested for

¹¹⁷ See Paul Butler, *Retribution for Liberals*, 46 UCLA L. REV. 1873, 1881 (1999).

¹¹⁸ Nkechi Taifa, *Cracked Justice: A Critical Examination of Cocaine Sentencing*, 27 U. WEST L.A. L. REV. 107, 158 (1996).

¹¹⁹ See *id.* at 158-59; Butler, *supra* note 117, at 1881.

¹²⁰ See MARC MAUER, RACE TO INCARCERATE 125 (1999) ("African Americans, therefore, have a seven times greater chance of being incarcerated than do whites."). See also Alfred Blumstein, *Racial Disproportionality of U.S. Prison Populations Revisited*, 64 U. COLO. L. REV. 743, 750-51 (1993).

¹²¹ See John Powell & Eileen B. Hershenov, *Hostage To the Drug War: The National Purge, the Constitution and the Black Community*, 24 U.C. DAVIS L. REV. 557, 610 (1991).

¹²² See MAUER, *supra* note 120, at 124-25.

¹²³ See Taifa, *supra* note 118, at 159; Paul Butler, *Starr is to Clinton as Regular Prosecutors are to Blacks*, 40 B.C. L. REV. 705, 707 (1999).

¹²⁴ See Blumstein, *supra* note 120, at 750.

¹²⁵ See Timothy Egan, *The Nation: Hard Times; Less Crime, More Criminals*, N.Y. TIMES, Mar. 7, 1999, sec. 4, at 1.

¹²⁶ See MARC MAUER, AMERICANS BEHIND BARS: U.S. AND INTERNATIONAL USE OF INCARCERATION, 1995 4-5 (1997).

drug offenses grew by 70%, while the corresponding number of black people arrested grew by almost 450%.¹²⁷ This increase in drug arrests was during a time when the rate of drug use was declining. In 1979, 14.1% of people surveyed reported drug use compared to 6.7% in 1990 and 6.1% in 1995.¹²⁸ Over 50% of all federal prisoners and about 25% of state prisoners are now incarcerated for drug-related crimes.¹²⁹ Over half of the people in prison for drug offenses are black.¹³⁰

The war on drugs, an initiative that gained momentum in the mid-1980s, appears to be primarily responsible for the dramatic rise in black imprisonment. Prosecution for other types of offenses has remained relatively steady over the past 40 years or so. But between 1986 and 1991, the percentage of blacks arrested for drug crimes began to increase sharply.¹³¹

Each step of the law enforcement process, from arrest to prosecution to conviction to sentencing, provides fertile ground for the seeds of racism to grow and flourish. "Today, blacks constitute 13 percent of the country's drug users; 37 percent of those arrested on drug charges; 55 percent of those convicted; and 74 percent of all drug offenders sentenced to prison."¹³² The perils of "driving while black" because of selective police stops based on race are now indisputable.¹³³ Localities are taking serious measures to monitor and prevent selective enforcement by police forces.¹³⁴

Blacks are the main target of police stops and searches even though they do not

¹²⁷ Doris Marie Provine, *Too Many Black Men: The Sentencing Judge's Dilemma*, 23 LAW AND SOC. INQUIRY 823, 825 (1998).

¹²⁸ See MAUER, *supra* note 120, at 145.

¹²⁹ See Provine, *supra* note 127, at 835.

¹³⁰ See Blumstein, *supra* note 120, at 751.

¹³¹ Provine, *supra* note 127, at 82. See also Blumstein, *supra* note 120, at 756-57 ("One of the sad commentaries of criminal justice policy that is contributing in a major way to the racial disproportionality in prison is the war on drugs. Despite clear indications that attacking the supply-side of the drug markets is futile, that has been the major strategy, and one that has increased dramatically since about 1985, with a particularly severe effect on racial minorities."); MAUER, *supra* note 120, at 143 ("Since 1980, no policy has contributed more to the incarceration of African Americans than the 'war on drugs.' To say this is not to deny the reality of drug abuse and the toll it has taken on African American and other communities; but as a national policy, the drug war has exacerbated racial disparities in incarceration while failing to have any sustained impact on the drug problem.").

¹³² David A. Harris, *Driving While Black: Racial Profiling on Our Nation's Highways*, ACLU Special Report, <<http://www.aclu.org/profiling/report/index.html>> (June 1999).

¹³³ See *id.*

¹³⁴ See e.g., U.S. v. New Jersey, <<http://www.usdoj.gov/crt/split/documents/jerseysa.htm>> (consent decree "supporting vigorous, lawful, and nondiscriminatory traffic enforcement"); <<http://www.usdoj.gov/crt/cor/Pubs/mcagrmt.htm>> (Memorandum of Agreement Between the U.S. Department of Justice, Montgomery County, Maryland, the Montgomery County Department of Police, and the Fraternal Order of Police, Montgomery County Lodge 35, Inc., resolving complaint of selective enforcement and promoting nondiscriminatory law enforcement).

represent the majority of the drug-using population.¹³⁵ While blacks comprise only 15 percent of all drug users, they represent 33 percent of all arrests for possession of drugs and 49 percent of all arrests for sale of drugs.¹³⁶ As stated by Professor David A. Harris in a special report of the American Civil Liberties Union:

Racial profiling is based on the premise that most drug offenses are committed by minorities. The premise is factually untrue, but it has nonetheless become a self-fulfilling prophecy. Because police look for drugs primarily among African Americans and Latinos, they find a disproportionate number of them with contraband. Therefore, more minorities are arrested, prosecuted, convicted, and jailed, thus reinforcing the perception that drug trafficking is primarily a minority activity. This perception creates the profile that results in more stops of minority drivers. At the same time, white drivers receive far less police attention, many of the drug dealers and possessors among them go unapprehended, and the perception that whites commit fewer drug offenses than minorities is perpetuated. And so the cycle continues.¹³⁷

The 7:1 disproportionate ratio of blacks to whites in prison is explained primarily by the corresponding rates of arrest, with 76% of that number accounted for by disproportionate arrest rates.¹³⁸ Police have broad discretion in deciding where to enforce the drug laws and whom to arrest for drug offenses.¹³⁹ They have used this discretion in a discriminatory manner, accomplishing drug law enforcement primarily in low income and black communities.¹⁴⁰ Moreover,

¹³⁵ See Butler, *supra* note 123, at 708-09 ("The law explicitly allows law enforcement to focus on black people because they are black. Race-based stops are one of the best explanations of why African Americans are disproportionately arrested and punished for drug offenses, even though they do not disproportionately use drugs."). See also Feagin, *supra* note 1, at 86 (stating that African-Americans have been targets for police harassment and brutality since the days of slavery); Blumstein, *supra* note 120, at 753; David Sklansky, *Cocaine, Race, and Equal Protection*, 47 STAN. L. REV. 1283, 1289 (1995); Taifa, *supra* note 118, at 110; John A. Powell & Eileen B. Hershenov, *Hostage to the Drug War: The National Purse, The Constitution and the Black Community*, 24 U.C. DAVIS L. REV. 557, 610 (1991) ("Drug arrests target the black community, notwithstanding the acknowledgement by former federal drug czar William Bennett that '[t]he typical cocaine user is white, male, a high school graduate employed full time, and living in a small metropolitan area or suburb."); Butler, *supra* note 117, at 1882-83 ("Judicial support for pretextual stops and racial profiling enhance police discretion and the potential for its unfair use."); Harris, *supra* note 132, at 6 ("According to the government's own reports, 80 percent of the country's cocaine users are white, and the 'typical cocaine user is a middle-class, white suburbanite.'").

¹³⁶ See MAUER, *supra* note 120, at 147, 149.

¹³⁷ Harris, *supra* note 132, at 3.

¹³⁸ See Blumstein, *supra* note 120, at 750-51.

¹³⁹ See MAUER, *supra* note 120, at 143.

¹⁴⁰ See *id.* See also Powell & Hershenov, *supra* note 135, at 578; Sklansky, *supra* note

Although the professed priority of federal drug law enforcement authorities is targeting major trafficking organizations and drug kingpins including their supporting infrastructure, the reality is that the enforcement has been primarily waged against low level street dealers. This trend is not limited to federal authorities. "In 1993, slightly less than 30% of the arrests for drug violations by state and local authorities were for the sale or manufacture of drugs. Over 70% of drug violation arrests were for possession."¹⁴¹

The isolation of communities of color due to housing segregation provides the opportunity for strategically discriminatory law enforcement.¹⁴² Several reasons have been promulgated for this selectively discriminatory enforcement of drug laws against a race of people who do not represent the majority of drug users. First, drug use and sales in low-income, black neighborhoods are much less discrete and hidden than in middle- and upper-class communities. Blacks are more vulnerable to arrest due to the visibility of their drug markets. In higher income, white neighborhoods, enforcement of the drug laws is not as easy as in low-income, black neighborhoods since its activity remains more secretive and difficult to detect.¹⁴³

Second, the discriminatory enforcement may be explained by the nature of the relationship between police forces and black neighborhoods. Police forces throughout the country, being predominantly comprised of white police officers, are viewed as protectors in white communities, as opposed to intruders in black communities. The predominant view of police in black communities is as the enemy, a view reinforced by the concentration on those communities for drug enforcement.¹⁴⁴ In contrast, the image of police in white neighborhoods as protectors would soon be destroyed if the police enforced the drug laws there with the same fervor and frequency as in black neighborhoods. As stated by Professor Harris:

Widespread DWB [driving while black] practices deeply undermine the legitimacy – and, therefore, the effectiveness – of the criminal justice system. Pretextual traffic stops fuel the belief that the police are not only unfair and biased, but untruthful as well. Each pretextual traffic stop involves an untruth, and both the officer and the driver recognize this. The alleged traffic infraction is not the real reason that the officer has stopped the driver. This becomes obvious when the officer asks the driver whether he or she is carrying drugs or guns and seeks consent to search the car. If the stop was really about enforcement of the traffic code, there would be no need for a search. Stopping a driver for a traffic

135, at 1289; Taifa, *supra* note 118, at 110.

¹⁴¹ Taifa, *supra* note 118, at 125.

¹⁴² See Feagin, *supra* note 1, at 86.

¹⁴³ See MAUER, *supra* note 120, at 148. See also powell & Hershenov, *supra* note 135, at 611; Blumstein, *supra* note 120, at 753; Sklansky, *supra* note 135, at 1289.

¹⁴⁴ See Lawrence, *supra* note 4, at 370-71.

offense when the officer's real purpose is drug interdiction is a lie – a legally sanctioned one, to be sure, but a lie nonetheless.¹⁴⁵

The third explanation proffered for selective enforcement of the drug laws is institutionalized racism.¹⁴⁶ This harsh reality runs through the first two explanations. It is hard to escape the conclusion that the war on drugs is a war on poor, black people and their communities.¹⁴⁷

This conclusion is borne out in the prosecutorial stage of the law enforcement process as well. Prosecutorial discretion in decision-making which impacts selective drug law enforcement is manifold. First, prosecutors have the ultimate authority over who gets prosecuted.¹⁴⁸ Keeping in mind that African Americans comprise barely 15% of all drug users and represent only 33% of all arrests for drug use, the fact that over 50% of all people prosecuted on drug charges are African Americans should call into question prosecutorial discretion.¹⁴⁹

Second, prosecutors also have an enormous impact on the racial demographics of the prison population. Prosecutors decide the seriousness of the charge for a certain offense, the possibility and nature of plea bargains,¹⁵⁰ and, most importantly for the discussion at hand, whether to prosecute a particular defendant in state court or federal court.¹⁵¹ Mandatory minimum sentencing guidelines for federal offenses were instituted in the mid-1980s, just as the war on drugs was launched as an all-out offensive.¹⁵² These sentencing guidelines effectively remove any judicial discretion from the role of federal judges and create an enormous disparity between state and federal courts in sentencing for drug convictions.¹⁵³ Since there is little discretion available to federal court judges in sentencing drug offenders, a

¹⁴⁵ Harris, *supra* note 132, at 25.

¹⁴⁶ See powell & Hershenov, *supra* note 135, at 611; Sklansky, *supra* note 135, at 1289.

¹⁴⁷ See powell & Hershenov, *supra* note 135, at 559. See also Harris, *supra* note 132, at 2 ("From the outset, the war on drugs has in fact been a war on people and their constitutional rights, with African Americans, Latinos and other minorities bearing the brunt of the damage.").

¹⁴⁸ See Butler, *supra* note 123, at 709.

¹⁴⁹ See *id.* at 714. See also powell & Hershenov, *supra* note 135, at 568 (noting that African American males account for 80 – 90% of all people prosecuted for drug charges).

¹⁵⁰ See MAUER, *supra* note 120, at 139 ("A more comprehensive statistical analysis by the United States Sentencing Commission concluded that, for comparable behavior, whites were being offered plea bargains leading to outcomes falling below the level requiring a mandatory minimum sentence more often than blacks or Hispanics although a reexamination by an analyst for the Justice Department concluded that these disparities were based on legally relevant case-processing factors.").

¹⁵¹ See *id.* at 137, 155.

¹⁵² See *id.* at 152; Provine, *supra* note 127, at 823.

¹⁵³ See MAUER, *supra* note 120, at 155; Sklansky, *supra* note 135, at 1285 ("Almost half of all federal criminal defendants are prosecuted for narcotics offenses. The sentences they receive reflect the confluence a decade ago of two broad trends in public policy: a reduction of judicial discretion in sentencing, and an increased concern about drug abuse.").

prosecutor's decision on whether to bring a defendant to state or federal court retains significant power over the outcome of the sentencing. The wielding of this power becomes particularly important given the fact that the federally instituted mandatory minimum sentences have a racially disparate impact resulting in extremely severe sentences for black defendants.¹⁵⁴ "Given the severity of crack penalties in the federal system, the prosecutorial decision regarding whether to charge a drug offense as a state or federal crime has potentially significant consequences for sentencing."¹⁵⁵

The root of the racially disparate impact exists in the different sentencing treatment given to crack cocaine offenders as opposed to powder cocaine offenders, despite the similar pharmacological properties of the two drugs. "At every quantity level federal defendants convicted of trafficking in crack cocaine receive the same sentences as defendants convicted of trafficking in one hundred times as much powder cocaine."¹⁵⁶ The federal mandatory minimum guidelines impose a five-year sentence for dealing 500 grams of powder cocaine or five grams of crack cocaine and a ten-year sentence for dealing 5000 grams of powder cocaine or 50 grams of crack cocaine.¹⁵⁶

Especially ironic, given law enforcement's professed goal of fighting the war on drugs from the top down,¹⁵⁷ is the fact that the smaller quantities of crack cocaine triggering the longer sentences target the lower-level street dealers. In contrast, 100 times that amount of powder cocaine targets major- and middle-level dealers.¹⁵⁸ Professor David Sklansky states:

Indeed, crack is made from powder cocaine, and because the conversion is so easy, it tends to take place toward the end of the drug distribution chain. As Congress appears to have recognized, large-volume drug traffickers generally do not deal in crack; they deal in its precursor, powder cocaine. Defendants caught trafficking in crack thus are almost always the street-level retailers of the cocaine

¹⁵⁴ See Taifa, *supra* note 118, at 109, 122 ("Just as this country was governed by two sets of laws during slavery and the Jim Crow era – one for Blacks and one for Whites, that double standard persists today in the criminal justice system. One of the most glaring examples of this racism is reflected in the sentencing for cocaine offenses."). See also MAUER, *supra* note 120, at 156 ("The results of a *Los Angeles Times* analysis, which examined prosecutions for crack cocaine trafficking in the Los Angeles area from 1988 to 1994, are quite revealing. During that period, not a single white offender was convicted of a crack offense in federal court, despite the fact that whites comprise a majority of crack users. During the same period though, hundreds of white crack traffickers were prosecuted in state courts, often receiving sentences as much as eight years less than those received by offenders in federal courts. As is true nationally, the *Times* analysis revealed that many of the African Americans charged in federal court were not necessarily drug kingpins, but rather low-level dealers or accomplices in the drug trade."). (citation omitted).

¹⁵⁵ MAUER, *supra* note 120, at 157.

¹⁵⁶ Sklansky, *supra* note 135, at 1288.

¹⁵⁷ See Taifa, *supra* note 118, at 125.

¹⁵⁸ See Sklansky, *supra* note 135, at 1287.

trade, not the wholesalers.¹⁵⁹

So what could be the explanation for the more severe penalties for lesser quantities of crack cocaine? The street-level dealers of small quantities of crack cocaine are almost always black.¹⁶⁰ There has never been an explanation other than racism for the racially disparate impact between sentences for crack cocaine dealers and powder cocaine dealers despite the fact that there is no scientifically significant characteristic differentiating the two. "The Sentencing Commission's Special Report to Congress noted that cocaine in any form produces the same physiological and psychological effects. It is the onset, intensity, and duration of the effects which vary, and these variations are tied to the manner in which the drug is administered, as opposed to any distinctions in the chemical make-up of the drug."¹⁶¹ The unavoidable conclusion remains that the disparate sentencing is due to the race of crack cocaine dealers.¹⁶²

Institutionalized racism of the most insidious kind runs rampant through our criminal justice system.

The effect on minorities of drugs and the war waged against them cannot be fully understood save in the context of institutionalized racism. Not only is this country's racist past (and present) a cause of the minority communities' victimization by the drug trade, but also the widespread public association of drugs with minorities in turn fuels more discrimination. Cause becomes effect in a vicious cycle.¹⁶³

Far from being addressed as a problem requiring immediate attention, the field of law enforcement and the courts continue to act in complicity to further entrench the racist effects of the war on drugs with its devastating results for an entire race of people inhabiting this country. Congress, despite its knowledge of the inequity of the crack cocaine sentences, enacted the racially discriminatory legislation in the mid 1980s and remains unwilling to remedy the inequities.¹⁶⁴ The Supreme Court

¹⁵⁹ *Id.* at 1288. See also Taifa, *supra* note 118, at 125-26 ("With respect to function in the organization, the Commission found that the majority of crack offenders were low level street dealers at the very bottom of the distribution system (59.6%), while those higher in the distribution chain traffic in powder. Paradoxically, retail crack dealers receive longer sentences than their wholesale drug suppliers who provide the powder cocaine from which their crack is produced. Of all drug defendants, crack defendants are most likely to receive a sentence of imprisonment as well as the longest average period of incarceration."). See also *id.* at 137 ("Furthermore, higher penalties for crack cocaine guarantee that small time street level users will be penalized more severely than larger distributors who possess powder cocaine before it is transformed into crack. This type of drug abuse policy which disproportionately impacts lower income people is neither logical nor effective."); MAUER, *supra* note 120, at 156.

¹⁶⁰ See Sklansky, *supra* note 135, at 1289.

¹⁶¹ Taifa, *supra* note 118, at 129 (citation omitted).

¹⁶² See Sklansky, *supra* note 135, at 1319; Taifa, *supra* note 118, at 110.

¹⁶³ powell & Hershenov, *supra* note 135, at 599 (citation omitted).

¹⁶⁴ See Sklansky, *supra* note 135, at 1287-90, 1302.

has deliberately turned a deaf ear to equal protection challenges to the federal mandatory minimum sentences for drug offenders. Requiring proof that discrimination against black defendants in drug law enforcement is intentional has effectively denied blacks their constitutional right to equal treatment under the law.¹⁶⁵

The war on drugs continues to be funded, fought against minority communities, and upheld as constitutional, despite the known fact that it racially discriminates and that it has been ineffective in solving the drug crisis. "The billions of dollars poured into the war on drugs has [sic] done little to slow, much less stem, the tide of the drug trade."¹⁶⁶ Law enforcement efforts have proven ineffective in reducing both the demand for drugs and their availability.¹⁶⁷ Instead of solving any crisis, the war on drugs has created a host of social problems affecting us all—and having devastating effects on black communities.

The inflated drug prices caused by prohibition contribute to crime, intra-family abuse and neglect, and health-threatening sex-for-crack transactions. As during alcohol Prohibition, profit in this trade, controlled by those living far from the inner-cities, is so lucrative that many neighborhoods have been reduced to combat zones for rival traffickers.¹⁶⁸

The war has exacted an incredible toll on entire communities, increasing rates of incarceration and mortality for young black men, disenfranchising them from society due to their criminal records, and resulting in their inability to gain employment, sustain parental rights, contribute to families, and enjoy their right to vote.¹⁶⁹ Tragically, it has caused the vast majority of people who live in neighborhoods affected by the war on drugs, but who are not involved in the drug trade, to live in military zones, fearing for their lives and the lives of their loved ones, unable to participate in stable community life.¹⁷⁰

B. Recommendations

The financial, societal, and human resources now devoted to the war on drugs would be much better spent on humanitarian efforts to approach the underlying social problems causing the drug problem. In white, middle class communities, the drug problem, equally as prevalent as in low income communities, is addressed as a health problem through preventative programs and treatment programs. Instead of approaching the problem in low income communities as a law enforcement problem, the same care should be taken to provide resources that treat the underlying causes rather than the effects of the problem.¹⁷¹ Significantly, provision

¹⁶⁵ See *id.* at 1301, 1303; powell & Hershenov, *supra* note 135, at 578-79.

¹⁶⁶ powell & Hershenov, *supra* note 135, at 565.

¹⁶⁷ See *id.* at 560; Blumstein, *supra* note 120, at 756-57.

¹⁶⁸ powell & Hershenov, *supra* note 135, at 561.

¹⁶⁹ See Butler, *supra* note 123, at 707; Taifa, *supra* note 118, at 160.

¹⁷⁰ See powell & Hershenov, *supra* note 135, at 609.

¹⁷¹ See *id.* at 561, 599-600, 615; Butler, *supra* note 117, at 1882; MAUER, *supra* note 120,

of real solutions to the drug problem in this country would have infinite value in terms of lives saved and would also be more cost effective. Drug treatment programs are billions of dollars less expensive than incarceration in prisons.¹⁷² Approaching the drug problem as a health problem in low income communities would also serve to help rebuild communities rather than destroy them as has been the overwhelming effect of the war on drugs.

Furthermore, racial profiling for drug arrests should be recognized for the racist and ineffective law enforcement method it is and ended. The ACLU calls for a five-part program to end racial profiling: 1) ceasing the use of pretextual traffic stops to enforce drug laws; 2) passing the Traffic Stops Statistics Study Act which would require the compilation of information on the race of the driver for each traffic stop and whether a drug search was executed by police; 3) enacting state remedial legislation; 4) banning racial profiling by the federal government's programs for drug interdiction; and 5) collecting and compiling information on traffic stops for cities throughout the nation.¹⁷³

If we were at all serious about dismantling racist institutions in our nation and ending systemic racism, our system of drug law enforcement and its role in the criminal justice system would be a prime target for reform. The penalties for cocaine possession, whether powder or crack, would be equalized. Precious public funds would be spent on treating drug addiction as the public health problem it is and on providing treatment and rehabilitation programs for people convicted of drug offenses rather than locking them away in prisons where their problems intensify. The communities now being devastated by the war on drugs—low income, black communities— would, at a minimum, be allowed to heal from the ravages of war.

at 134-36 ("As of 1990, drunk drivers were responsible for approximately 22,000 deaths annually, while overall alcohol-related deaths approached 100,000 a year. Drug-related deaths, through overdose, AIDS, or the violence associated with the drug trade, were estimated at 21,000 annually. Drunk drivers are predominantly white males, representing 78 percent of the arrests for this offense as of 1990. They are generally charged as misdemeanants and typically receive sentences involving fines, license suspension, and community service. Persons convicted of drug possession, though, are disproportionately low-income, and African American or Hispanic; they are usually charged with felonies and frequently sentenced to incarceration. Overall, the societal response to drunk drivers has generally emphasized keeping the person functional and in society, while attempting to respond to the dangerous behavior through treatment; for drug offenders, though, the response has primarily involved greater use of law enforcement and incarceration. At the same time, while drug treatment remains popular and available for middle-class drug users, it is in short supply for low-income persons.").

¹⁷² See Powell & Hershenov, *supra* note 135, at 571-72. Another interesting approach, referred to as "Harm Reduction" is becoming more common in European countries. This approach combines decriminalization of personal possession of drugs and the establishment of drug treatment programs. See ReconsiDer: Forum on Drug Policy, *Alternatives*, at <<http://www.reconsider.org/issues/alternatives.htm>>.

¹⁷³ See Harris, *supra* note 132.

V. THE INSTITUTIONS OF WEALTH AND PROPERTY OWNERSHIP

A. *The Racial Disparity of Wealth and Property Ownership*

At the time of the Emancipation Proclamation,¹⁷⁴ African Americans owned 0.5 percent of the nation's wealth. In the year 1990, African Americans owned 1% of the national wealth.¹⁷⁵ As stated by Professor June Jordan:

The Civil War had set us "free" to wander a racist wilderness where, forcibly illiterate and forcibly unskilled and forcibly destitute of capital or land or access to capital or land, and forcibly kept out of any promising employment apprenticeship, we were, nevertheless, expected to celebrate that peculiar ending of our enslavement and we were watched and measured and criticized and, quickly, condemned as unequal to the sons and daughters of our former slaveowners, because, given our "freedom" without equality, we could not be or become equal.¹⁷⁶

The history of the United States since the end of slavery has evidenced an institutionalization of economic opportunity for whites and the lack of economic opportunity for blacks.¹⁷⁷ Blacks historically started without wealth and have had little or no opportunity to acquire it in our society. Race remains a major divider in the United States in all forms of income acquisition and distribution.¹⁷⁸ When

¹⁷⁴ See Abraham Lincoln, *A Proclamation*, reprinted in 12 Stat. App. 1268 (1863).

¹⁷⁵ See Professor John O. Calmore, On Solutions: Public or Private, Presentation at the Association of American Law Schools Annual Meeting Workshop on Property, Wealth and Inequality (January 4, 2001).

¹⁷⁶ JUNE JORDAN, *AFFIRMATIVE ACTS: POLITICAL ESSAYS* 202 (1998).

¹⁷⁷ See OLIVER & SHAPIRO, *supra* note 20, at 174. ("We argue, furthermore, that the racialization of the welfare state and institutional discrimination are fundamental reasons for the persistent wealth disparities we observed. Government policies that have paved the way for whites to amass wealth have simultaneously discriminated against blacks in their quest for economic security. From the era of slavery on through the failure of the freedman to gain land and the Jim Crow laws that restricted black entrepreneurs, opportunity structures for asset accumulation rewarded whites and penalized blacks. FHA policies then thwarted black attempts to get in on the ground floor of home ownership, and segregation limited their ability to take advantage of the massive equity build-up that whites have benefited from in the housing market. As we have also seen, the formal rules of government programs like social security and AFDC have had discriminatory impacts on black Americans. Finally, the U.S. tax code has systematically privileged whites and those with assets over and against asset-poor black Americans."); Professor Nancy Denton, Property, Wealth and Inequality: Residential Segregation, Presentation at the Association of American Law Schools Annual Meeting Workshop on Property, Wealth and Inequality (January 4, 2001).

¹⁷⁸ See Professor Melvin Oliver, Property Wealth and Inequality: Wealth, Presentation at the Association of American Law Schools Annual Meeting Workshop on Property, Wealth and Inequality (January 4, 2001).

comparing the income and assets of whites and blacks, the inequality is stark. The median family income of blacks is 62 cents to every \$1.00 for whites. The median net worth of blacks is 12 cents to every \$1.00 for whites. The median net financial assets of black families are .031 cents to every \$1.00 for whites.¹⁷⁹ Denied the ability to compete on a level playing field in the economic world, denied the opportunities enjoyed by whites, blacks are consistently at a disadvantage in terms of acquiring wealth. In the words of Professor Feagin:

Without inherited wealth and decent incomes, it has been difficult for the majority of African-Americans to build up any significant family wealth. Legal and de facto segregation, until the late 1960s supported by the Federal Government, kept African-Americans from generating the family wealth necessary to compete effectively with Whites in the economy, particularly as the generations passed. Home equity is a major source of wealth for most families. Persistent discriminatory practices in housing and insurance sectors still seriously limit the ability of many Black Americans to build up housing equity that can be used to start a business or help the next generation get a good education. Average African-American families today have about one-tenth the wealth of their White Counterparts. White families with modest incomes (\$7,500 – 15,000) actually have greater net worth than African-Americans making four times as much (\$45,000 – 60,000). Without this housing capital Black parents often have been unable to provide the kind of education or other cultural advantages necessary for their children to compete equally and fairly with Whites.¹⁸⁰

Residential racial segregation severely limits blacks' abilities to acquire wealth and property and to benefit from the wealth accumulation that arises from property ownership.¹⁸¹ There remains a substantial difference of home ownership rates between whites and blacks – with over 70% of whites owning homes compared with less than 50% of blacks.¹⁸² The result of systemic segregation maintains economic inequalities between the races, providing the "haves" with the ability to keep on having, and the "have-nots" the inability to get.¹⁸³ Blacks are denied equal access to mortgage markets,¹⁸⁴ appreciation rates,¹⁸⁵ and inheritance. In addition to

¹⁷⁹ See *id.*

¹⁸⁰ Feagin, *supra* note 1, at 86 (citations omitted).

¹⁸¹ See Denton, *supra* note 14, at 113 ("This . . . is a particularly salient point because rising housing value has been the primary route for middle-class families to acquire some wealth. But it is unearned income related to the location of the house.").

¹⁸² See Denton, *supra* note 178.

¹⁸³ See Denton, *supra* note 14, at 113.

¹⁸⁴ See OLIVER & SHAPIRO, *supra* note 20, at 137 (blacks and Hispanics are turned down when applying for mortgages 60% more often than whites, despite having the same credit history).

¹⁸⁵ See *id.* at 147-51 (property owned by whites appreciates at a rate about 40% greater

the consequences of housing segregation already discussed, and the lack of equal opportunity in education and the job market, the combined effect is grossly disparate income inequality.¹⁸⁶

B. Recommendations for Economic Equity and Access to Property

A simple solution for leveling the playing field and beginning to address the economic inequalities between races is to compensate African-Americans for the deliberate exclusion from economic opportunity in this country. Professor Oliver recommends a dollar-for-dollar reimbursement plan.¹⁸⁷ Professor Calmore advocates territorial reparations which would take the form of community reinvestment in black communities historically marginalized by the federal government's active and malicious involvement in spatial subordination.¹⁸⁸

In addition to community and/or individual reparations, the more complex problem of access to property should be explored and redressed to sustain economic equity for the long term. Until systemic housing segregation is reversed, the marginalization and economic isolation of black people will be perpetuated. There are three approaches that, taken together, would provide increased access to property and its concomitant economic resources. First, the economic forces that prevent blacks, especially low and moderate income blacks, from having choices about where to live have to be reversed. Second, discriminatory practices in the mortgage lending, real estate, and insurance industries must be effectively outlawed. Finally, there must be comprehensive programs instituted to support black people who wish to exercise housing choice by moving to the suburbs.¹⁸⁹ The first of these approaches needs further explanation.

There are at least two illusions in our nation's approach to property that work together to exclude blacks from the suburbs and from property ownership. Unfortunately, people hold steadfast to their beliefs in these illusions, perpetuating the severely disproportionate distribution of wealth between blacks and whites.

The first illusion is that the market that defines property values somehow magically operates independent of any human manipulation. Nothing could be further from the truth. In fact, as explained by Professor Jennifer Nedelsky:

Property takes its power and importance in large part from "the market"—which

than for blacks). See generally, Margalynne Armstrong, *Race and Property Values in Entrenched Segregation*, 52 U. MIAMI L. REV. 1051 (1998).

¹⁸⁶ See Feagin, *supra* note 1, at 86; Denton, *supra* note 14, at 113.

¹⁸⁷ See *id.* ("Melvin L. Oliver and Thomas M. Shapiro [1995] estimate that the current generation of Blacks have missed out on \$82 billion this way—\$58 billion through the lack of housing appreciation with another \$10.5 billion due to paying higher mortgage rates, and \$13.5 billion from the denial of mortgages.").

¹⁸⁸ See Lincoln, *supra* note 174.

¹⁸⁹ See Philip D. Tegeler, *Housing Segregation and Local Discretion*, 3 J. L. & POL'Y. 209, 230 (1994); Roisman, *supra* note 25, at 1399; Carr, *supra* note 10, at 626.

is itself defined by the legal system. "The market" is not a freestanding, natural phenomenon, but consists of rules defined by law and backed by the power of the state.¹⁹⁰

At present, the market is regulated to maintain property ownership and wealth in the hands of the powerful, at the expense of those without power. Professor Oliver states: "Our empirical investigation of housing and mortgage markets demonstrates the way in which racialized state policies interact with other forms of institutional discrimination to prevent blacks from accumulating wealth in the form of residential equity."¹⁹¹ Historical patterns of residential housing segregation are entrenched by the operation of the market.¹⁹² As stated by Professor Alex M. Johnson, Jr.: "Thus, the cycle of segregated neighborhoods is reinforced by the market, which creates endogenous economic incentives for the maintenance and expansion of such neighborhoods."¹⁹³

There exist two significant areas of human intervention in the market system of property valuation that require attention. The first is the appraisal system. Home appraisals are conducted by human beings. These human beings are allowed to take racism into account when determining the resale value of a home. Our present system of appraising home values, inflating the value of homes in white neighborhoods and reducing the value of homes in black or integrated neighborhoods, contributes significantly to the inability of blacks to reap the financial benefits of home ownership and prevents them from buying homes in certain neighborhoods.¹⁹⁴ The appraisal industry needs to be subject to better enforcement of fair housing requirements.

A second significant regulatory variable influencing the housing market is the federally granted mortgage interest deduction for homeowners. The federal government foregoes \$54 billion in tax revenues each year by subsidizing housing for middle and high income families in the form of property tax and mortgage interest deductions.¹⁹⁵ It spends barely half of that amount in subsidizing housing

¹⁹⁰ Jennifer Nedelsky, *Reconceiving Autonomy: Sources, Thoughts and Possibilities*, 1 YALE J. L. & FEMINISM 7, 18 (1989).

¹⁹¹ OLIVER & SHAPIRO, *supra* note 20, at 175.

¹⁹² See Johnson, *supra* note 1, at 1599-1600.

¹⁹³ *Id.* at 1626. See also KUSHNER, *supra* note 2, at 1066 ("Thus, any hope for integration through natural market forces, even with the presence of aggressive fair housing enforcement, is simply nonexistent.").

¹⁹⁴ See William R. Tisdale, *Fair Housing Strategies for the Future: A Balanced Approach*, 4 CITYSCAPE: J. POL'Y DEV. AND RES. 147, 155-56 (1999) ("Although decisions made by real estate appraisers are vital to housing transactions, relatively little attention has been directed to evaluating the practices of these professionals and how they impact housing discrimination and residential patterns. Training and practice standardization for appraisers is currently not federally regulated, appraisers generally are not required to receive formal fair housing training, and there has not been broad-based involvement of fair housing advocates in monitoring their activities.").

¹⁹⁵ See OLIVER & SHAPIRO, *supra* note 20, at 183 ("While the homeowner deduction

for the less fortunate among us who are in need of adequate shelter. "When the government stimulates the high end of the housing market and provides virtually no support for the lower end, conditions of supply and demand result in high prices and a constricted supply of low-and moderate-income housing."¹⁹⁶ Equalizing housing subsidies among the classes would engender greater equity in property ownership.

The second illusion operating to the exclusion of blacks is that individual rights of property ownership exist in a vacuum and individuals enjoy free expression independent of the rights of others. This illusion creates a dangerous fiction enabling the widespread practice of racially exclusionary zoning in the suburbs.¹⁹⁷ Again, the "haves," the white people with property, are benefactors of a racially and economically discriminatory system that reproduces itself to the exclusion of blacks. Having acquired property through this racially discriminatory system, whites then get to preserve their segregated neighborhoods. "Rights to racial equality in education and housing cannot coexist with rights to private property, contract and free association when these more traditional rights are defined primarily by the right to exclude."¹⁹⁸

Operating together, our system of exclusionary zoning, and the market system of property ownership, prevent equal access to property in this nation. Suburbs must be prohibited from abusing their zoning power to prevent affordable housing from being built within their boundaries.¹⁹⁹ A more drastic, but effective solution, would be to remove property ownership from the vagaries of the market system. In low income communities, "community land trusts" have been created to maintain affordability of housing for the long term. The concept of a community approach to property valuation could be extended to all communities. Upon resale of property, individuals would receive return on any reasonable, pre-approved investment made in the property. However, the increase in the value of their property based on forces outside their control, i.e., appreciation in market value, would be recaptured by the societal forces that caused that appreciation. This social value of property could then be utilized to stimulate the production of affordable housing for those placed out of the housing market by those same societal forces.²⁰⁰ Individuals do not exist independently of society; nor do property rights. To begin to achieve a reconception of property ownership reversing the racist past, a collective, community approach must be taken.²⁰¹

primarily benefits the affluent, fewer than one in five low-income Americans receive federal housing assistance.").

¹⁹⁶ Jargowsky, *supra* note 2, at 52.

¹⁹⁷ See Bryant, *supra* note 2, at 144, 163.

¹⁹⁸ *Id.* at 144.

¹⁹⁹ See KUSHNER, *supra* note 2, at 57.

²⁰⁰ See Chuck Matthei, *A Community to Which We Belong: The Value of Land in Economics*, SOJOURNERS, Nov. 1993, at 12.

²⁰² See Philip Nyden et al., *The Emergence of Stable Racially and Ethnically Diverse Urban Communities: A Case Study of Nine U.S. Cities*, 8 HOUS. POL'Y DEBATE 491, 521-22 (1997);

VI. CONCLUSION

The legacy of racism in the United States is undeniable. The continuation of that legacy remains unabated. Only lip service has been paid to easing the tension between the races. Housing segregation and the deliberate physical separation of races has unavoidably led to a snowballing effect of unequal opportunity between communities with people of different skin colors. Blacks have less opportunity for quality education and gainful employment due to their geographical isolation and marginalization in society. The hopeless conditions caused by social isolation, lack of opportunity, and ensuing poverty create an environment where criminal activity is highlighted, visible, and easily targeted by selective law enforcement. A vicious cycle of racism is thus maintained and negative stereotypes reinforced because there is no opportunity to get to know the unknown "other." In the words of Professor Patricia J. Williams:

There is a crisis of community in the United States no less than in the rest of the world, of specific and complicated origin perhaps, but in this moment of global upheaval, worth studying for possibilities both won and lost. Whites fear blacks, blacks fear whites. Each is the enemy against whom the authorities will not act.²⁰²

Until an effort equal to the efforts to create and maintain housing segregation and its consequences is initiated, supported, and perpetuated in our country, we can expect our racist legacy to continue and intensify. The effort must start with dismantling the racist institutions of housing segregation, white privilege, school segregation, and discrimination in the criminal justice system. The systemic problem of racism must be attacked systemically. Again, Professor Williams states:

With regard to all these configurations, let me just say that I am certain that the solution to racism lies in our ability to see its ubiquity but not to concede its inevitability. It lies in the collective and institutional power to make change, at least as much as with the individual will to change. It also lies in the absolute moral imperative to break the childish, deadly circularity of centuries of blindness to the shimmering brilliance of our common, ordinary humanity.²⁰³

Above all, each individual (and I'm speaking here to white people) needs to acknowledge that they can either be part of the problem or part of the solution. Continuing merrily along, enjoying our white privilege, oblivious to the negative impact we have on our black neighbors, makes us complicit in the centuries of racism that brought us to our racist present. Doing nothing is doing everything to

Nedelsky, *supra* note 190, at 21.

²⁰² WILLIAMS, *supra* note 42, at 12.

²⁰³ *Id.* at 68.

be a part of the problem. In the eloquent words of Professor June Jordan:

We need, each of us, to begin the awesome, difficult work of love: loving ourselves so that we become able to love other people without fear so that we can become powerful enough to enlarge the circle of our trust and our common striving for a safe, sunny afternoon near to flowering trees and under a very blue sky.²⁰⁴

We can continue to travel the path of hatred and distrust or we can choose to begin dismantling the institutions borne of the distrust between races. Which kind of world do we want to live in—a world of hate or a world of love? Will we choose a world that isolates, separates, and wreaks unimaginable suffering on entire communities of people, or a world that celebrates the diversity of people and welcomes differences between people for the richness it brings to our lives?

²⁰⁴ JORDAN, *supra* note 176, at 89.