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The Fallacy of Systemic Racism in the American Criminal Justice System

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ABSTRACT

Critics of the criminal justice system have repeatedly charged it with systemic racism. It is a tenet of the "war" on the "War on Drugs," it is a justification used by the so-called "progressive prosecutors" to reject the "Broken Windows" theory of law enforcement, and it is an article of faith of the "Defund the Police!" movement. Even President Joe Biden and his chief lieutenants leveled the same allegation early in this administration. Although the President has eschewed the belief that Americans are a racist people, others have not, proclaiming that virtually anyone who is white is a racist.

Yet, few people have defined what they mean by that term. This Article examines what it could mean and tests the truth of the systemic racism claim under each possible definition. None stands up to scrutiny. One argument is that the American citizens who run our many institutions are motivated by racial animus. But the evidence is that racial animus is no longer tolerated in society, and what is more, the criminal justice system strives to identify it when it does occur and to remedy it. Another argument says that the overtly racist beliefs and practices of the past have created lingering racist effects, but this argument cherry-picks historical facts (when it does not ignore them altogether) and fails to grapple with the country's historic and ongoing efforts to eliminate racial discrimination. It also assumes a causal relationship between past discrimination and present disparities that is unsupported and often contradicted by the evidence. Yet another argument relies psychological research to claim that white Americans are animated by a subconscious racial animus. That research, however, has been debunked. Still another argument says that the criminal

justice system is systemically racist because it has disparate effects across racial groups, but this argument looks only at the offenders' side of the criminal justice system and fails to consider the effect of the criminal justice system on victims.

Proponents of the systemic racism theory often proffer "solutions" to it. This Article examines those too and finds that many would, in fact, harm the very people they aim to help. In the context of the "War on Drugs," where so much of the rhetoric is focused, the authors examine these arguments and solutions. The bottom line is this: the claim of systemic racism in the criminal justice system is unjustified.

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ARTICLE

THE FALLACY OF SYSTEMIC RACISM IN THE AMERICAN CRIMINAL JUSTICE SYSTEM

Paul J. Larkin[†] *& GianCarlo Canaparo*[††]

ABSTRACT

Critics of the criminal justice system have repeatedly charged it with systemic racism. It is a tenet of the "war" on the "War on Drugs," it is a justification used by the so-called "progressive prosecutors" to reject the "Broken Windows" theory of law enforcement, and it is an article of faith of the "Defund the Police!" movement. Even President Joe Biden and his chief lieutenants leveled the same allegation early in this administration. Although the President has eschewed the belief that Americans are a racist people, others have not, proclaiming that virtually anyone who is white is a racist.

Yet, few people have defined what they mean by that term. This Article examines what it could mean and tests the truth of the systemic racism claim under each possible definition. None stands up to scrutiny. One argument is that the American citizens who run our many institutions are motivated by racial animus. But the evidence is that racial animus is no longer tolerated in society, and what is more, the criminal justice system strives to identify it when it does occur and to remedy it. Another argument says that the overtly racist beliefs and practices of the past have created lingering racist effects, but

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this argument cherry-picks historical facts (when it does not ignore them altogether) and fails to grapple with the country's historic and ongoing efforts to eliminate racial discrimination. It also assumes a causal relationship between past discrimination and present disparities that is unsupported and often contradicted by the evidence. Yet another argument relies psychological research to claim that white Americans are animated by a subconscious racial animus. That research, however, has been debunked. Still another argument says that the criminal justice system is systemically racist because it has disparate effects across racial groups, but this argument looks only at the offenders' side of the criminal justice system and fails to consider the effect of the criminal justice system on victims.

Proponents of the systemic racism theory often proffer "solutions" to it. This Article examines those, too, and finds that many would, in fact, harm the very people they aim to help. In the context of the "War on Drugs," where so much of the rhetoric is focused, the authors examine these arguments and solutions. The bottom line is this: the claim of systemic racism in the criminal justice system is unjustified.

CONTENTS

INTRODUCTION: WHAT IS SYSTEMIC RACISM? 6

I. IS AMERICA SYSTEMICALLY RACIST? 20
- A. *Are Americans Systemically Racist?* 20
  - 1. Critical Race Theory and the 1619 Project 23
    - a. History 24
    - b. Law 31
  - 2. Experience 35
  - 3. The Implicit Association Test 36
- B. *Are American Institutions Systemically Racist?* 45

II. IS THE AMERICAN CRIMINAL JUSTICE SYSTEM SYSTEMICALLY RACIST? 59
- A. *The Challenge of Analyzing a Complex, Multipart System* 60
- B. *Does the American Criminal Justice System Operate with a Discriminatory Intent?* 62
- C. *Does the American Criminal Justice System Have a Discriminatory Effect?* 68
  - 1. The Mistaken Demand for Race-Neutral Results 69
  - 2. The Mistaken Adoption of an Offender-Oriented Perspective 71

III. IS THE "WAR ON DRUGS" SYSTEMICALLY RACIST? 112
- A. *The Problem of Drug Use in the Twentieth Century* 112
- B. *The Critics' Position* 125
- C. *Problems with the Critics' Position* 129
  - 1. Racism as Intentional Discrimination 129
  - 2. Racism as Indifference 138
- D. *Problems with the Critics' Remedy* 166
  - 1. Option 1: Repeal the CSA 167
  - 2. Option 2: Exempt African-Americans from the CSA 170

IV. GOING FORWARD 175
- A. *Increase the Availability of Drug Treatment* 175
- B. *Increase the Investigation and Prosecution of White-Collar Crime* 177
- C. *Calm the Tone of the Debate* 180

CONCLUSION 187

INTRODUCTION: WHAT IS SYSTEMIC RACISM?

"Systemic racism." "Structural racism." "Unconscious racism." "Implicit bias." Critics of the criminal justice system often use terms like those to describe it.[1] It is a tenet of opposition to the "War on Drugs,"[2] it is a justification used by the so-called "progressive prosecutors" to reject the "mass incarceration" of offenders,[3] and it is an article of faith of the "*Black Lives Matter!*" and "*Defund the Police!*" movements.[4] Even President Joe

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[1] *See*, *e.g.*, MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (rev. ed. 2012); RICHARD DELGADO & JEAN STEFANCIC, CRITICAL RACE THEORY: AN INTRODUCTION (3d ed. 2017); F. MICHAEL HIGGINBOTHAM, GHOSTS OF JIM CROW: ENDING RACISM IN POST-RACIAL AMERICA 156–64 (2013); JEROME G. MILLER, SEARCH AND DESTROY: AFRICAN-AMERICAN MALES IN THE CRIMINAL JUSTICE SYSTEM (2d ed. 2011); DORIS MARIE PROVINE, UNEQUAL UNDER LAW: RACE IN THE WAR ON DRUGS (2007); William J. Chambliss, *Policing the Ghetto Underclass: The Politics of Law and Law Enforcement*, 41 SOC. PROBS. 177 (1994); David A. Sklansky, *Cocaine, Race, and Equal Protection*, 47 STAN. L. REV. 1283 (1995). Other scholars agree that racism is present in our criminal justice system, as it still is in contemporary American society, but do not see racism as the prime mover responsible for everything that the criminal justice system does. *See, e.g.*, RANDALL KENNEDY, RACE, CRIME, AND THE LAW 375–76 (First Vintage Books ed. 1998) (1997); JOHN F. PFAFF, LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION AND HOW TO ACHIEVE REAL REFORM (2017); Paul J. Larkin, Jr. & David L. Rosenthal, *Flight, Race, and* Terry *Stops:* Commonwealth v. Warren, 16 GEO. J.L. & PUB. POL'Y 163 (2018); Barry Latzer, *The Hard Realities of Hard Time*, CITY J. (June 9, 2017), https://www.city-journal.org/html/hard-realities-hard-time-15248.html [https://perma.cc/8THS-JK2N].

[2] *See, e.g.*, ALEXANDER, *supra* note 1; PROVINE, *supra* note 1.

[3] *See, e.g.*, EMILY BAZELON, CHARGED: THE NEW MOVEMENT TO TRANSFORM AMERICAN PROSECUTION AND END MASS INCARCERATION (2019); Angela J. Davis, *Reimagining Prosecution: A Growing Progressive Movement*, 3 UCLA CRIM. JUST. L. REV. 1, 7–15 (2019); Daniel Fryer, *Race, Reform, & Progressive Prosecution*, 110 J. CRIM. L. & CRIMINOLOGY 769, 770–72 (2020); Katrina vanden Heuvel, Opinion, *How Progressive District Attorneys Are Leading the Charge to Fix Our Broken Justice System*, WASH. POST (Feb. 9, 2021, 8:00 AM), https://www.washingtonpost.com/opinions/2021/02/09/how-progressive-district-attorneys-are-leading-charge-fix-our-broken-justice-system/.

[4] *See* Jessica M. Eaglin, *To "Defund" the Police*, 73 STAN. L. REV. ONLINE 120, 135–36 (2021) (footnote omitted) ("Discursively, the social meaning of 'defund the police' emerges from '[o]ne of the most contested planks' of the Black Lives Matter movement: the call to 'invest/divest.' . . . The demand to divest and invest is a demand to address structural marginalization, which in turn illustrates its disproportionate concentration among black people."); *see also, e.g.*, Matt Wall & Zaid Jilani, *Austin, Texas, Defunded Its Police*

Biden has often used the term systemic racism, first as a candidate and later as President.[5] He claims that it describes a problem that has infused American history and still permeates the nation's contemporary

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Department. Now Voters Will Decide if City Needs More Officers, FOX NEWS (Oct. 31, 2021, 9:00 AM), https://www.foxnews.com/politics/austin-texas-defunded-its-police-department-now-voters-will-decide-if-city-needs-more-officers.

[5] *See, e.g.*, John Verhovek, *Joe Biden: White America 'Has to Admit There's Still a Systemic Racism'*, ABC NEWS (Jan. 21, 2019, 2:17 PM), https://abcnews.go.com/Politics/joe-biden-white-america-admit-systemic-racism/story?id=60524966; Errin Haines & Juana Summers, *Biden: Racism in US Is Institutional, 'White Man's Problem'*, ASSOCIATED PRESS (Aug. 28, 2019, 5:52 AM), https://apnews.com/article/election-2020-joe-biden-race-and-ethnicity-donald-trump-ap-top-news-88bd58010e75449eb5748499724df2f2 (using the term *institutional* to describe racism in America); Ella Nilsen, *"The Presidency Is a Duty to Care": Read Joe Biden's Full Speech on George Floyd's Death*, VOX (June 2, 2020, 11:55 AM), https://www.vox.com/2020/6/2/21277967/joe-biden-full-speech-george-floyd-death-trump; Michael Finnegan, *Biden Vows to Uproot Systemic Racism in Fourth of July Message*, L.A. TIMES (July 4, 2020, 6:00 PM), https://www.latimes.com/politics/story/2020-07-04/biden-july-fourth-racism-trump; Joe Biden, *Biden: We Must Urgently Root Out Systemic Racism, from Policing to Housing to Opportunity*, USA TODAY (June 11, 2020, 11:17 AM), https://www.usatoday.com/story/opinion/2020/06/10/biden-root-out-systemic-racism-not-just-divisive-trump-talk-column/5327631002/ [hereinafter Biden, *Root Out Systemic Racism*]; Kathryn Watson, *Biden Says There's "Absolutely" Systemic Racism in Law Enforcement and Beyond*, CBS NEWS (June 10, 2020, 7:22 AM), https://www.cbsnews.com/news/joe-biden-systemic-racism-exists-law-enforcement/; NBC News, *Joe Biden: 'America Is Ready' to Root Out Systemic Racism*, YOUTUBE (Aug. 21, 2020), https://www.youtube.com/watch?v=xEnwjnsnpHc; Courtland Milloy, *Biden Speaking About Systemic Racism Is a Win. But the Battle Is Just Beginning.*, WASH. POST (Nov. 14, 2020, 9:00 AM), https://www.washingtonpost.com/local/biden-systemic-racism/2020/11/13/c99ec540-239a-11eb-952e-0c475972cfc0_story.html; Joseph R. Biden, Jr., President, White House, Inaugural Address by President Joseph R. Biden, Jr. (Jan. 20, 2021), https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/01/20/inaugural-address-by-president-joseph-r-biden-jr/ [hereinafter Biden, Inaugural Address]; Andrea Shalal, *Biden, Harris Condemn U.S. Racism, Sexism in Blunt Language*, REUTERS (Mar. 21, 2021, 8:31 PM), https://www.reuters.com/article/us-usa-biden-racism/biden-harris-condemn-u-s-racism-sexism-in-blunt-language-idUSKBN2BE019; Sarah Ruiz-Grossman, *Joe Biden Calls for U.S. to 'Root Out Systemic Racism' in Speech to Congress*, HUFFPOST (Apr. 28, 2021, 9:58 PM), https://www.huffpost.com/entry/joe-biden-george-floyd-congress-systemic-racism_n_608a0e00e4b0c15313efcc35; Proclamation No. 10219, 86 Fed. Reg. 29929 (May 31, 2021).

institutions.[6] His chief lieutenants have voiced the same claim.[7] It is a commonplace term in today's criminal justice policy debates.

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[6] *See* JOHN MCWHORTER, WOKE RACISM: HOW A NEW RELIGION HAS BETRAYED BLACK AMERICA 10, 22–60 (2021); Jason L. Riley, Opinion, *The Racial Progress Democrats Won't Admit*, WALL ST. J. (Jan. 18, 2022, 6:17 PM), https://www.wsj.com/articles/the-racial-progress-democrats-atlanta-georgia-speech-biden-vote-suppression-black-minority-voter-turnout-11642539202?st=zrmlrvypjxnhh06&reflink=article_email_share; Scott Stump, *President Biden in TODAY Exclusive: 'I Don't Think the American People Are Racist'*, TODAY (Apr. 29, 2021, 6:46 PM), https://www.today.com/news/president-joe-biden-i-don-t-think-american-people-are-t216914.

[7] *See, e.g.*, Secretary Antony Blinken (@SecBlinken), X (Apr. 20, 2021, 10:03 PM), https://twitter.com/secblinken/status/1384689323719659520?lang=en ("As @POTUS said, systemic racism is a stain on our nation's soul. Today can be a step forward in the march towards justice in America. In order to lead abroad, America must continue to address racial injustice and inequities at home."); Secretary Antony Blinken (@SecBlinken), X (June 1, 2021, 5:13 PM), https://twitter.com/SecBlinken/status/1399836438187872261 ("100 years ago Black Americans in Tulsa were subject to one of the worst incidents of racial violence in our history. Our nation must confront systemic racism, both in our past and at present, openly. @POTUS is leading this Administration's commitment to doing this difficult work."); Paul LeBlanc, *Pete Buttigieg: 'Systemic Racism Is a White Problem'*, CNN POLITICS (Aug. 8, 2019, 9:43 PM), https://www.cnn.com/2019/08/08/politics/pete-buttigieg-nabj-el-paso-texas-dayton-ohio/index.html (concerning statements made by U.S. Secretary of Transportation Pete Buttigieg); Gabe Kaminsky, *Biden HUD Secretary Nominee Marcia Fudge Is a 'Systemic Racism' Conspiracy Theorist*, THE FEDERALIST (Mar. 2, 2021), https://thefederalist.com/2021/03/02/biden-hud-secretary-nominee-marcia-fudge-is-a-systemic-racism-conspiracy-theorist/ (concerning statements made by U.S. Secretary of Housing and Urban Development Marcia Fudge); Marty Johnson, *Garland Commits to Combatting Systemic Racism*, THE HILL (Feb. 22, 2021, 2:34 PM), https://thehill.com/homenews/senate/539911-garland-commits-to-combatting-systemic-racism/ (concerning statements made by U.S. Attorney General Merrick Garland); Rep. Deb Haaland (@RepDebHaaland), X (Mar. 1, 2021, 7:00 PM), https://twitter.com/repdebhaaland/status/1366538751422255110?lang=en ("Thank you @AmazonWatch for raising awareness about systemic racism & how it affects the #COVID19 response, especially for Indigenous communities."); Chuck Abbott, *Equity Commission Will Root Out Systemic Racism in USDA Programs, Says Vilsack*, SUCCESSFUL FARMING (Mar. 2, 2021), https://www.agriculture.com/news/business/equity-commission-will-root-out-systemic-racism-in-usda-programs-says-vilsack (concerning statements made by U.S. Secretary of Agriculture Tom Vilsak); Eli Rosenberg, *'People Shouldn't Be Afraid of the Word White Privilege': New Labor Secretary Talks Inequality, Racism and Union Power in First Interview*, WASH. POST (Mar. 24, 2021, 11:45 PM), https://www.washingtonpost.com/business/2021/03/24/marty-walsh-labor-secretary-racism/ (concerning statements made by U.S. Secretary of Labor Marty Walsh);

Are those critics right? Is the criminal justice system thoroughly, invariably, and irredeemably racist? The answer is a clear "No," but the process of getting there is a long one. One reason why is that, as Professor John McWhorter has recently explained, many people hold that belief as an article of religious faith rather than as a logically or empirically established proposition.[8] Like any religious belief, however, it is ultimately not subject to refutation or debate; it is, as the term is used, "a leap of faith." As explained below, that leap starts not at the one- or two-yard line, but on the other side of midfield. To mix metaphors, only members of the choir are likely to make that leap.

Another reason, one that we can address, is that the people who use such terms often do so without defining what they mean or explaining why their interpretation is the legally or empirically correct or best one. To answer those questions, we need to understand what terms like "systemic racism"

Secretary Janet Yellen (@SecYellen), X (June 1, 2021, 5:30 PM), https://twitter.com/USTreasury/status/1399842378723307520 ("To understand the American economy & make thoughtful policy, we must talk about the devastating impact of systemic racism. The Tulsa Massacre is among our most visceral reminders. We can build a more equal, just economy—but only if we acknowledge history & work to unwind it."). Biden Administration officials are not the only ones with difficulty defining "systemic racism." *See, e.g.*, Janel George, *A Lesson on Critical Race Theory*, A.B.A.: HUM. RTS. MAG. (Jan. 11, 2021), https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/civil-rights-reimagining-policing/a-lesson-on-critical-race-theory/ (noting that Khiara Bridges, Professor of Law at UC Berkeley School of Law and a critical race theory adherent, describes systemic racism in the context of Critical Race Theory) ("[S]cholar Khiara Bridges outlines a few key tenents of CRT, including . . . [a]cknowledgement that racism is a normal feature of society and is embedded within systems and institutions, like the legal system, that replicate racial inequality. This dismisses the idea that racist incidents are aberrations but instead are manifestations of structural and systemic racism."). The best definition of "structural racism" is that it is "the perpetuation of de facto discrimination by ingrained social arrangements and assumptions." Jonathan Rauch & Peter Wehner, Opinion, *What's Happening on the Left Is No Excuse for What's Happening on the Right*, N.Y. TIMES (Jan. 20, 2022), https://www.nytimes.com/2022/01/20/opinion/illiberalism-left-right.html?smid=em-share. As explained below, that definition might apply to discrimination in employment and housing, but it does not apply to discrimination in the criminal justice system.

[8] *See* MCWHORTER, *supra* note 6, at 10, 22–60.

mean. After all, we can't know whether an object is red or green without having a reference to distinguish them.[9]

There are several possible meanings of "systemic racism." None of them, however, is legally sufficient to condemn our entire law enforcement system as a group of modern-day slave masters. Not one—or all of them together—justifies the smear that the American criminal justice system, along with every participant, white and black, has racism built into its, his, and her DNA. Contemporary American society has rejected racism as a legitimate attitude.[10] As John McWhorter put it, "to the modern American, being called a racist is all but equivalent to being called a pedophile."[11] To enforce that attitudinal change through the law, Congress has passed numerous laws to bar racial discrimination in public and private decision-making.[12] Atop that, today's criminal justice institutions are not your grandaddy's systems. There are numerous legal and political safeguards to prevent racism from arising, determine whether it has occurred nonetheless, and prevent it from having an effect on a defendant.

To be sure, racism does exist in the criminal justice system, even today. Some people harbor a discriminatory attitude, some of them work in that system, and some of them act on their biases.[13] That is a fact, a sad and unfortunate one, that cannot be denied. But crime exists today as well, and no one can seriously argue—even though some parties do, such as those who voice the demand to "*Defund the Police!*"—that we should abandon all

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[9] *See, e.g.*, LUDWIG WITTGENSTEIN, REMARKS ON COLOUR (G.E.M. Anscombe ed., Linda L. McAlister & Margarete Schättle trans., 1978).

[10] *See, e.g.*, MCWHORTER, *supra* note 6, at 13.

[11] *Id.*

[12] *See infra* notes 125–126 (collecting examples of such statutes).

[13] *See, e.g.*, Pena-Rodriguez v. Colorado, 580 U.S. 206, 221–28 (2017) (holding that a defendant can challenge jury deliberations on the ground of racial bias); Buck v. Davis, 580 U.S. 100, 105–09, 118–22 (2017) (ruling that defense counsel provided constitutionally ineffective assistance by calling a defense witness who testified on cross-examination that blacks are more likely to commit violent crimes than non-blacks); Miller-El v. Dretke, 545 U.S. 231, 240–45 (2005) (ruling that the prosecutor peremptorily dismissed members of the venire because of their race); Larkin & Rosenthal, *supra* note 1, at 205 & n.220 (collecting authorities).

federal, state, and local law enforcement efforts to protect the community against violent criminals and drug traffickers.[14] Racism and crime are

[14] Commentators have argued that the slogan "Defund the Police!" can have four separate meanings: as a call (1) to abolish the police, (2) to elevate other community needs above law enforcement, (3) to increase civilian oversight of the police, or (4) to reduce police funding. *See* Eaglin, *supra* note 4, at 124–34. That is, to be polite, political salesmanship. If you think that some of the movement's advocates do not literally intend to "defund" the police, think again. *See, e.g.*, Jessica Chasmar, *Rep. Bush Not Backing Down on 'Defund the Police,' Says Congress Inaction Has 'Cost Lives'*, FOX NEWS (Aug. 8, 2021, 11:01 AM), https://www.foxnews.com/politics/cori-bush-not-backing-down-on-defund-the-police-message; Patrisse Cullors, *What Is Abolition and Am I an Abolitionist?*, YOUTUBE (Feb. 22, 2021), https://www.youtube.com/watch?v=-RbFhM32YNI ("Abolition is the getting rid of police, surveillance and jails, and courts."); Mariame Kaba, Opinion, *Yes, We Mean Literally Abolish the Police*, N.Y. TIMES (June 12, 2020), https://www.nytimes.com/2020/06/12/opinion/sunday/floyd-abolish-defund-police.html?referringSource=articleShare; Philip V. McHarris & Thenjiwe McHarris, Opinion, *No More Money for the Police*, N.Y. TIMES (May 30, 2020), https://www.nytimes.com/2020/05/30/opinion/george-floyd-police-funding.html?action=click&module=RelatedLinks&pgtype=Article; J. Edward Moreno, *Ocasio-Cortez Dismisses Proposed $1B Cut: 'Defunding Police Means Defunding Police'*, HILL (June 30, 2020, 5:02 PM), https://thehill.com/homenews/house/505307-ocasio-cortez-dismisses-proposed-1b-cut-defunding-police-means-defunding ("'Defunding police means defunding police,' the congresswoman said in a statement. 'It does not mean budget tricks or funny math. It does not mean moving school police officers from the NYPD budget to the Department of Education's budget so the exact same police remain in schools.'"); Mychal Denzel Smith, *Abolish the Police. Instead, Let's Have Full Social, Economic, and Political Equality*, NATION (Apr. 9, 2015), https://www.thenation.com/article/archive/abolish-police-instead-lets-have-full-social-economic-and-political-equality/ [https://perma.cc/Z3CN-TPGM]. It is impossible to take those statements seriously, but they have populated our public debates and have motivated elected officials to weaken police departments through budget cuts. We are now paying a price for those decisions. *See infra* note 239; *see also, e.g.*, Aneeta Bhole, *Austin Police Blast 'Miserable' Conditions and 911 Callers Put on Hold as Crime Rates in Texas City Soar After BLM-Inspired Defund Movement*, DAILY MAIL (Aug. 19, 2023, 2:22 PM), https://www.dailymail.co.uk/news/article-12393877/Austin-Police-Association-podcast-conditions-BLM-defund-movement.html; Audrey Conklin, *Nine Cities Reached Record Homicides in 2022 as Staffing Shortages Plagued Police Departments*, FOX NEWS (Feb. 15, 2023, 7:00 AM), https://www.foxnews.com/us/nine-cities-reached-record-homicides-2022-staffing-shortages-plague-police-departments; Greg Wehner, *Austin Police Chief Abruptly Retires Amid Staffing Shortages, Lack of Police Union Contract*, FOX NEWS (Aug. 21, 2023, 6:05 PM), https://www.foxnews.com/us/austin-police-chief-abruptly-retires-staffing-shortages-lack-police-union-contract. President Biden realizes that the Defund Movement is a poor policy (or poor politics) because he rejected the notion in the 2022 State

different forms of socially aberrant, harmful, and prohibited conduct. It is possible to fight each one while also tackling the other.[15] The idea that the latter is the inevitable product of only the former or that society should ignore all or some categories of the latter to combat the former is logically incoherent, socially corrosive, and certain to be self-defeating if the goal is to reduce both types of antisocial conduct.

This Article will attempt to evaluate those possible meanings in two contexts. The first one is the American criminal justice system writ large. There are two reasons for asking whether that enterprise is systemically racist. One reason is that imprisonment is the most drastic and frightful restriction that the government can inflict on its citizens.[16] Incarceration

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of the Union Speech. Joseph R. Biden Jr., President, State of the Union Address (Mar. 1, 2022) ("We should all agree the answer is not to defund the police. It's to fund the police. Fund them. Fund them. Fund them with the resources and training—resources and training they need to protect our communities."). Interestingly, perhaps the best hope for this movement to go down in flames is already under way. *See* Natalie Andrews, *Suspect in Rep. Angie Craig's Attack Arrested and Charged*, WALL ST. J. (Feb. 9, 2023), https://www.wsj.com/articles/suspect-in-rep-angie-craigs-attack-arrested-and-charged-24627293?mod=article_inline; Matthew Choi, *U.S. Rep. Henry Cuellar Carjacked at Gunpoint Near His Washington Home*, TEX. TRIB. (Oct. 3, 2023), https://www.texastribune.org/2023/10/03/henry-cuellar-carjacked/.

[15] *See, e.g.*, Daniel Knowles, *How to Stop the Killing*, ECONOMIST (Sept. 12, 2022), https://www.economist.com/special-report/2022/09/12/how-to-stop-the-killing ("'Defunding' the police, a leftist obsession that became popular in 2020, is not the answer. But neither is a strategy that reverts blindly to the aggressive, untargeted policing of the past."); *America Should Reform Its Police Forces, Not Defund Them*, ECONOMIST (Sept. 15, 2022), https://www.economist.com/leaders/2022/09/15/america-should-reform-its-police-forces-not-defund-them ("Though some activists, such as the American Civil Liberties Union, which criticised Mr Biden's plan, pretend otherwise, [rising violent crime] is a problem that cannot be solved without investment in policing.").

[16] Capital punishment obviously is, both legally and biologically, a more severe punishment than even life imprisonment without the possibility of parole, *Biddle v. Perovich*, 274 U.S. 480, 486–87 (1927), but the Biden Administration might decide against asking juries to impose the death penalty. *See* Benjamin Weiser & Hailey Fuchs, *U.S. Won't Seek Death Penalty in 7 Cases, Signaling a Shift Under Biden*, N.Y. TIMES (July 22, 2021), https://www.nytimes.com/2021/07/22/nyregion/justice-department-death-penalty.html. In any event, President Biden is likely to commute all such sentences before he leaves office to make sure that no one is executed on his watch. It's happened before. *See* Paul J. Larkin,

limits a prisoner's freedom in ways that approximate those imposed by slavery, certainly more so than any other state action.[17] The other reason is that the claim that the criminal justice system is rife with systemic racism is not a new one. Over the last few decades, numerous commentators have repeatedly attacked that system on that ground. In their view, the system was designed and is implemented to ensure that, as a practical matter, blacks cannot escape the chains that sometimes literally held them before 1865.[18] The advocates for this view of systemic racism have highlighted it and have especially condemned the criminal justice system on this ground, so naturally more has been written through this lens than any other.

The second context is a subset of the first one: the "War on Drugs." That enterprise involves the use of severe criminal penalties and civil asset forfeiture to deter the importation, manufacture, distribution, possession, and use of illicit drugs; to incapacitate undeterred offenders; and to deny them the fruits of their criminal activity.[19] Asking whether that undertaking

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Wholesale-Level Clemency: Reconciling the Pardon and Take Care Clauses, 19 U. ST. THOMAS L.J. 534, 536 n.14 (2023) (describing the practice in the states).

[17] One court expressly drew that parallel. *See* Ruffin v. Commonwealth, 62 Va. (21 Gratt.) 790, 795–96 (1871) (emphasis added) ("It is essential to the safety of society, that those who violate its criminal laws should suffer punishment. A convicted felon, whom the law in its humanity punishes by confinement in the penitentiary instead of with death, is subject while undergoing that punishment, to all the laws which the Legislature in its wisdom may enact for the government of that institution and the control of its inmates. For the time being, during his term of service in the penitentiary, he is in a state of penal servitude to the State. He has, as a consequence of his crime, not only forfeited his liberty, but all his personal rights except those which the law in its humanity accords to him. He is for the time being the slave of the State. He is *civiliter mortuus;* and his estate, if he has any, is administered like that of a dead man.").

[18] *See* ALEXANDER, *supra* note 1; PROVINE, *supra* note 1.

[19] KENNEDY, *supra* note 1, at 351. The "war" is sometimes mistakenly attributed to President Ronald Reagan rather than President Richard Nixon. *See* ALEXANDER, *supra* note 1, at 49–53. Nixon launched the "War on Drugs" in 1971. *See*, *e.g.*, Richard Nixon, President, United States, Special Message to the Congress on Drug Abuse Prevention and Control (June 17, 1971) (transcript available through The American Presidency Project), https://www.presidency.ucsb.edu/documents/special-message-the-congress-drug-abuse-prevention-and-control; Exec. Order No. 11599, 36 Fed. Reg. 11793 (June 19, 1971). Ironically, Nixon also saw a need for improved treatment for drug addicts. Nixon, *supra*. Attributing the "war" to Reagan, however, has the benefit of allowing critics to focus on the

is systemically racist is necessary because, according to critics, it is the principal villain in this story. In the critics' view, however it might seem to the average person, the "War on Drugs" was designed to be, or has effectively become, a "war on blacks."[20]

The issues raised by these complaints are critical ones for the effective operation of the criminal justice system. On the one hand, racial discrimination demeans its victims, both the individuals who directly suffer it as well as the group that is the object of disapproval.[21] If the malefactors are in law enforcement, racism also drives away potential allies and sources of information, thereby victimizing an unknown number of innocent parties.[22] But on the other hand, unjustified accusations of racism, especially when they are repeatedly broadcast by the media, also impose widespread costs, claiming innocent individual and societal victims. For example, false allegations can induce police officers to avoid productive investigatory conduct because it might give rise to a claim of racism. The best example is

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Anti-Drug Abuse Act of 1986 and not consider the Rockefeller Drug Laws of 1973. *See infra* notes 309–469.

[20] STEVEN B. DUKE & ALBERT C. GROSS, AMERICA'S LONGEST WAR: RETHINKING OUR TRAGIC CRUSADE AGAINST DRUGS 161 (1993) (footnote omitted) (quoting Ron Harris, *Blacks Feel Brunt of Drug War*, L.A. TIMES, Apr. 22, 1990, at A1) ("Maybe no one planned it, maybe no one wanted it and certainly few saw it coming, but around the country, politicians, public officials and even many police officers and judges say, the nation's war on drugs has in effect become a war on black people."); *see also, e.g.*, ALEXANDER, *supra* note 1, at 223 ("Few Americans today recognize mass incarceration for what it is: a new caste system thinly veiled by the cloak of colorblindness."); KENNEDY, *supra* note 1, at 351–52 (discussing the theories that (1) the drug war is designed to imprison and re-enslave blacks; (2) its purpose is to incapacitate and scapegoat them; or (3) it is indifferent to the effect of imprisoning large numbers of African-Americans); MARC MAUER, RACE TO INCARCERATE 157–74 (2d ed. 2006) (1999).

[21] *See* Rice v. Cayetano, 528 U.S. 495, 517 (2000) ("One of the principal reasons race is treated as a forbidden classification is that it demeans the dignity and worth of a person to be judged by ancestry instead of by his or her own merit and essential qualities.").

[22] *See, e.g.*, John J. Donohue III & Steven D. Levitt, *The Impact of Race on Policing and Arrests*, 44 J.L. & ECON. 367, 368 (2001) (footnote omitted) ("It is frequently argued that without the cooperation of community members in reporting crimes and identifying criminals, there may be little that police can do either to prevent crime or to punish those who commit crimes.").

the frequently used and often (unjustly) maligned stop-question-and-frisk practice that police officers employ to determine if a suspect illegally possesses a weapon.[23] The reluctance to approach such suspects for fear of being called a racist is at least arguably a principal cause of the enormous increase in homicides the nation witnessed in 2020.[24] A December 2020 study of the increase in homicides that year after the killing of a black man (George Floyd) by a white police officer in May concluded that the best explanation for the rise was not due to other alleged causes such as COVID-19 confinement, unemployment caused by the disease, or an upswing in firearms purchases.[25] Instead, the increase was due to what the authors

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[23] *See* Paul Larkin, *Reviewing the Rationale for Stop-and-Frisk*, ATLANTIC (Mar. 24, 2014), https://www.theatlantic.com/national/archive/2014/03/reviewing-the-rationale-for-stop-and-frisk/284603/.

[24] *See, e.g.*, Ryan Lucas, *FBI Data Shows an Unprecedented Spike in Murders Nationwide in 2020*, NPR (Sept. 27, 2021, 1:12 PM), https://www.npr.org/2021/09/27/1040904770/fbi-data-murder-increase-2020 ("The number of murders in the United States jumped by nearly 30% in 2020 compared with the previous year in the largest single-year increase ever recorded in the country, according to official FBI statistics released Monday. The data shows 21,570 homicides in the U.S. in 2020, which is a staggering 4,901 more than in 2019. The tally makes clear—in concrete terms—just how violent last year was."); Neil MacFarquhar, *Murders Spiked in 2020 in Cities Across the United States*, N.Y. TIMES (Nov. 15, 2021), https://www.nytimes.com/2021/09/27/us/fbi-murders-2020-cities.html; Rafael A. Mangual, Opinion, *Yes, the Crime Wave Is as Bad as You Think*, WALL ST. J. (Dec. 8, 2021, 4:51 PM), https://www.wsj.com/articles/yes-the-crime-wave-is-as-bad-as-you-think-murder-rate-violent-killings-shootings-defund-police-11638988699?st=y376ax199plhz05&reflink=article_email_share ("The U.S. experienced its largest-ever single year homicide spike in 2020 . . . ."). That increase, by the way, was not limited to Minneapolis or 2020. Recent statistics show that homicide has increased in 2021 in other cities as well. *See, e.g.*, COUNCIL CRIM. JUST., PANDEMIC, SOCIAL UNREST, AND CRIME IN U.S. CITIES: MARCH 2021 UPDATE 3 (Richard Rosenfeld & Ernesto Lopez eds., May 2021) ("During the first quarter of 2021, homicide rates declined from their peak in the summer of 2020, but remained above levels in the first quarter of prior years. The number of homicides rose by 24% compared to the first quarter of 2020 (an increase of 193 homicides) and by 49% compared to the first quarter of 2019 (an increase of 324 homicides)."); COUNCIL CRIM. JUST., PANDEMIC, SOCIAL UNREST, AND CRIME IN U.S. CITIES: 2020 YEAR-END UPDATE 3, 6–7 (Richard Rosenfeld et al. eds., 2020).

[25] *See* Paul G. Cassell, *Explaining the Recent Homicide Spikes in U.S. Cities: The "Minneapolis Effect" and the Decline in Proactive Policing*, 33 FED. SENT'G REP. 83, 113–17

labelled a "Minneapolis Effect"—viz., a passive form of law enforcement, also known as "de-policing," by officers who feel a dissipation of public support (and sometimes downright hostility) for engaging in a risky line of work along with an attack by interest groups unconcerned for the risks officers run and committed to the belief that all police officers, regardless of their race, oppress racial minorities and the poor.[26]

(2020); *see also, e.g.*, Lawrence Rosenthal, *The Law and Economics of De-policing*, 33 FED. SENT'G REP. 128 (2020).

[26] Cassell, *supra* note 25, at 113 (footnotes omitted) ("It is easy to explain the logic for homicide spikes nationally. Following George Floyd's death on May 25, antipolice protests took place in more than 400 cities across the country. Indeed, the recent protests are some of the largest and most widespread in American history. An estimated 15 million to 26 million Americans have taken to the streets to protest police violence and advocate for Black lives. While details no doubt vary in particular cities, the overarching fact is that such extensive protests initially required police officers in many urban areas to significantly divert their attention to those protests. And in the aftermath of protests against aggressive police tactics, officers became increasingly hesitant to engage in proactive policing. The predictable result: gun violence has abruptly and starkly increased across the country, particularly in urban areas where the protests were concentrated.").

Worsening the situation is the rise of a host of so-called "progressive prosecutors," who have refused to prosecute low-level offenses to avoid a potentially adverse effect on minorities and the poor. *See, e.g.*, Davis, *supra* note 3, at 7–9. The consequence is a proliferating open-and-obvious, smash-and-grab practice in urban retail stores. *See, e.g.*, Charles C.W. Cooke, *California's Predictable Descent into Petty Lawlessness*, NAT'L REV. (Aug. 14, 2023, 5:24 PM), https://www.nationalreview.com/2023/08/californias-predictable-descent-into-petty-lawlessness/ ("In a free country, it *should* be difficult to convict someone of a crime. But it should not be *impossible*—or, worse, unthinkable. There is—or, at least, there ought to be—an enormous difference between insisting on placing a series of obstacles in front of the government when it is trying to punish presumptively innocent people and deciding preemptively that a whole bunch of our laws will be downplayed or ignored. . . . Private property is the foundation of our society. To signal that theft is no big deal is to undermine that foundation. As one cannot have a culture of ordered liberty without protecting the public from violence, one cannot have a culture of ownership without protecting the public from theft. It's the little things—not the big ones—that most acutely affect the quality of life."); Faith Karimi, *Why Some U.S. Cities Are Facing a Spree of 'Smash-and-Grab' Crimes*, CNN (Nov. 24, 2021, 2:45 AM), https://www.cnn.com/2021/11/23/us/smash-and-grab-thefts-explainer-cec/index.html; Charles Lane, Opinion, *The Perverse Incentives Behind the 'Smash and Grab' Wave*, WASH. POST (Nov. 30, 2021, 5:30 PM), https://www.washingtonpost.com/opinions/2021/11/30/perverse-incentives-behind-smash-and-grab-wave/ ("At the root of the smash-and-grab

Numerous parties have argued that the state and federal criminal codes and criminal justice systems should be improved.[27] Bettering our efforts to guarantee fair treatment and accurate judgments regardless of race is one

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epidemic lies that old social-science truism: incentives influence behavior. For now, perverse incentives prevail and, unless and until they're corrected, so will perverse behavior."); Talia Kaplan, *Smash-and-Grab Crime Wave Disrupting Retail Ahead of Busy Shopping Season*, FOX BUS. (Nov. 30, 2021, 10:50 AM), https://www.foxbusiness.com/retail/smash-and-grab-crime-wave-disrupting-retail-ahead-of-busy-shopping-season. As a result, some companies have decided to close stores because the police or prosecutors will not enforce the laws defining misdemeanors. *See, e.g.*, Mallory Moench, *'Out of Control': Organized Crime Drives S.F. Shoplifting, Closing 17 Walgreens in Five Years*, S.F. CHRON. (May 15, 2021, 4:16 PM), https://www.sfchronicle.com/local-politics/article/Out-of-control-Organized-crime-drives-S-F-16175755.php; Neil Vigdor, *Walgreens to Close 5 Stores in San Francisco, Citing 'Organized' Shoplifting*, N.Y. TIMES (Oct. 14, 2021), https://www.nytimes.com/2021/10/13/us/walgreens-store-closures-san-francisco.html; Danielle Wallace, *Coordinated Crime Sprees Forcing Retailers to Close Stores, Limit Hours*, FOX NEWS (July 12, 2021, 11:13 AM), https://www.foxnews.com/us/crime-sprees-retailers-close-stores-limit-hours-shoplifting. Remarkably, some politicians have blamed the victim retail stores for not doing the government's job—viz., protecting the public against crime. *See* Paul Best, *Chicago Mayor Blames Retailers for Not Doing Enough to Fight Organized Theft*, FOX BUS. (Dec. 8, 2021, 8:50 AM), https://www.foxbusiness.com/economy/chicago-mayor-lori-lightfoot-blames-retailers-smash-grab-thefts. When retail stores close in predominantly black communities, the African-American community residents suffer. *See, e.g.*, Jason L. Riley, Opinion, *San Francisco Has Become a Shoplifter's Paradise*, WALL ST. J. (Oct. 19, 2021, 6:24 PM), https://www.wsj.com/articles/san-francisco-shoplifters-theft-walgreens-decriminalized-11634678239 ("These trends don't affect all groups and all communities in the same way. Target has closed stores in predominantly black sections of Chicago, Milwaukee and Flint, Mich. in recent years in the wake of not only increased store thefts but also rioting, looting and violent antipolice protests. If you are middle class and the nearest big-box store closes, you simply drive to a different one or its equivalent. But if you are a poor single mom without a car, your options are limited. You've just lost access, perhaps, to the closest, cheapest and widest variety of fresh produce, medicines and other goods. The alternatives are more-expensive convenience stores and less-healthy processed food for your family."). The result harms the very people the policies are said to protect.

[27] *See, e.g.*, OFF. OF CMTY. ORIENTED POLICING SERVS., U.S. DEP'T OF JUST., FINAL REPORT OF THE PRESIDENT'S TASK FORCE ON 21ST CENTURY POLICING (May 2015); OFF. OF CMTY. ORIENTED POLICING SERVS., U.S. DEP'T OF JUST., THE PRESIDENT'S TASK FORCE ON 21ST CENTURY POLICING: IMPLEMENTATION GUIDE MOVING FROM RECOMMENDATIONS TO ACTION (2015); Paul J. Larkin, Jr., *Public Choice Theory and Overcriminalization*, 36 HARV. J.L. & PUB. POL'Y 715, 716 n.1 (2013) (collecting authorities so arguing).

way to do so. Of course, if the federal and state criminal justice systems were stood up and run, originally and today, like political show trials in the former Soviet Union—viz., proceedings designed to oppress whomever the party in power deemed out of favor—micro-level improvements would have the same effect as rearranging the deck chairs on the Titanic. So too if those systems existed only for the purpose of reintroducing slavery in a slightly less obvious form—walls and orange jumpsuits rather than chains and whips—tinkering with the definition of offenses and procedures used to adjudicate criminal charges would insult the intelligence of everyone involved in the system as well as the members of the public. As explained below, however, neither such charge is justified. At bottom, the claim of systemic racism in the criminal justice system is less a matter of fact and more a matter of rhetoric, politics, or faith.[28]

It is the burden of this Article to explain why our criminal processes are not steeped in systemic racism; that the people who so claim cannot prove their case under the law as it stands today; and that, were those critics successful, their efforts would worsen the lives of the average law-abiding African-Americans critics profess to be concerned about. That is because the critics have it backwards. At every step of the process, advocates who tar the system as systemically racist choose to focus on the parties who break the law rather than the ones victimized by their assaults, thefts, and other crimes. The federal and state governments do not violate the laws prohibiting racial discrimination by enforcing the laws prohibiting murder and drug trafficking regardless of the offender's race, especially when those crimes injure other minorities in poor neighborhoods. This Article explains why.

This Article will proceed as follows: Part I will examine possible meanings of systemic racism. In our opinion, none justifies use of that term in connection with contemporary American government or civil society. Part II will turn to the contemporary criminal justice system. It will ask whether the operation of a system that all agree is facially neutral on the

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[28] RAFAEL A. MANGUAL, CRIMINAL (IN)JUSTICE: WHAT THE PUSH FOR DECARCERATION AND DEPOLICING GETS WRONG AND WHO IT HURTS MOST 155 (2022) (describing the problem as "[d]istinguishing between the actual and newly contrived definitions of racism").

issue of race nonetheless was designed and is still being operated for the purpose of condemning blacks to remain in the bottom caste of American society. We argue that the critics have not made a persuasive argument. The system has substantive and procedural flaws, but it is materially different from the processes that were in effect during slavery as well as during the Jim Crow period after Reconstruction ended. Today, the participants in the criminal justice system—the government officials who initiate and manage the process and the private parties who, as grand or petit jurors, serve as decisionmakers—are not invariably and unalterably racist. Part III considers the War on Drugs. We will evaluate the critics' claim that federal and state enforcement of the drug laws is systemically racist. We disagree not only with that premise but also with the conclusion that no remedy other than the complete overthrow of current legal, political, economic, and social structures can remedy those instances where discrimination does appear. The criminal justice system can seek justice for individuals victimized by crime while also extirpating racism where and when it exists; the goals are not mutually exclusive. Part IV explains where we should go from here.[29]

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[29] Two additional points should be noted here. One is that other laws, structures, and practices have been challenged as being systemically racist. *See, e.g.*, Ayanna Pressley (@AyannaPressley), X (Apr. 12, 2021, 10:50 AM), https://twitter.com/ayannapressley/status/1381620841868361742?lang=en ("You can't be anti-racist if you're anti student debt cancellation."); Naomi Schaefer Riley, Opinion, *No, 'Systemic Racism' Is Not Why So Many Black Kids Are in Foster Care*, N.Y. POST (June 10, 2021, 5:03 PM), https://nypost.com/2021/06/10/no-systemic-racism-is-not-why-so-many-black-kids-are-in-foster-care/. Those subjects have not been discussed as often as the criminal justice system, and they might involve unique issues not discussed here. The second point is that systemic racism has been used to justify horrific crimes against whites. *See, e.g.*, *NYC Shrink Tells Yale Audience She Fantasizes About Shooting White People in Head*, FOX NEWS (June 5, 2021, 2:59 AM), https://www.foxnews.com/us/nyc-shrink-tells-yale-audience-she-fantasizes-about-shooting-white-people-in-head ("A New York City-based psychiatrist told an audience at the Yale School of Medicine in April that she had fantasies of 'unloading a revolver into the head of any white person that got in my way.' Dr. Aruna Khilanani spewed the race-hating virtual remarks . . . at the Ivy League institution's Child Study Center on April 6. . . . 'I had fantasies of unloading a revolver into the head of any white person that got in my way, burying their body and wiping my bloody hands as I walked away relatively guiltless with a bounce in my step. Like I did the world a f–king favor.'"). Statements like

I. IS AMERICA SYSTEMICALLY RACIST?

It is difficult to know how to approach the claim that the nation is racist all the way down. It certainly is not a classic legal issue. It does not rest on or stem from one or more proposed interpretations of an imprecise-and-therefore-contestable text such as the Free Speech Clause of the First Amendment.[30] It does not find support in contemporary jurisprudence of the Supreme Court of the United States, which has often said and held that distinctions on the basis of race are "odious."[31] There is no modern-day legal institution whose mission, or *raison d'état*, is the subjugation of one or more races.[32] The systemic racism claim is more a matter of religion than a description of the American people or the criminal justice system.[33]

A. Are Americans Systemically Racist?

Institutions don't run themselves, so the claim that the nation is beset with systemic racism would ordinarily mean that Americans must be afflicted with that invidious motive. President Biden, however, has disavowed any such belief. In response to criticism of his address to a joint session of Congress from U.S. Senator Tim Scott that "America is not a racist country," the President said that "No, I don't think the American people are racist."[34] Accordingly, that explanation should be off the table.

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those merit awareness and derision, not a lengthy response. (But for a pithy, incisive one, see Charles C.W. Cooke, *The 'Anti-Racist' Who Wasn't*, NAT'L REV. (June 10, 2021, 11:47 AM), https://www.nationalreview.com/2021/06/the-anti-racist-who-wasnt/).

[30] U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech . . . .").

[31] *See* Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 143 S. Ct. 2141, 2162 (2023) (quoting Rice v. Cayetano, 528 U.S. 495, 517 (2000)) ("Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality."); *see also* Hirabayashi v. United States, 320 U.S. 81, 100 (1943); Adarand Constructors v. Pena, 515 U.S. 200, 214 (1995).

[32] Such institutions have existed elsewhere. *See* Fullilove v. Klutznick, 448 U.S. 448, 532, 534 n.5 (1981) (Stevens, J., dissenting) (referring to the First Regulation to the Reich's Citizenship Law of November 14, 1935).

[33] *See, e.g.*, MCWHORTER, *supra* note 6, at 10, 22–60; Riley, *supra* note 6.

[34] Stump, *supra* note 6.

President Biden's silence also cannot be explained on the ground that he thinks that the issue is unimportant. If quantity has a quality all its own,[35] the sheer number of times that he has used the term "systemic racism" signifies its priority status to him.[36] In any event, President Biden has expressly labeled this issue one of "the great crises of our time," so its gravity to him is a given.[37]

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[35] A remark attributed to Josef Stalin, who used it to describe the benefit of the greater number of inferior quality Soviet tanks.

[36] *See, e.g.*, Press Release, White House, Fact Sheet: Biden-Harris Administration Releases Agency Equity Action Plans to Advance Equity and Racial Justice Across the Federal Government (Apr. 14, 2022), https://www.whitehouse.gov/briefing-room/statements-releases/2022/04/14/fact-sheet-biden-harris-administration-releases-agency-equity-action-plans-to-advance-equity-and-racial-justice-across-the-federal-government/ (announcing that more than 90 federal agencies have created "Equity Action Plans" to remedy "systemic barriers" to "underserved communities").

[37] Adam Shaw, *Biden Calls Systemic Racism One of 'the Great Crises of Our Time'*, FOX NEWS (June 5, 2021, 5:14 PM), https://www.foxnews.com/politics/biden-systemic-racism-great-crises-time-address-class-of-2021. It is possible that President Biden simply lied when he denied believing that Americans are racist (to avoid antagonizing one segment of the electorate), just as it is possible that he lied when he claimed that the nation suffers from systemic racism (to express solidarity with a different group of the electorate). Two constants in life are (1) light travels at exactly 299,792,458 meters per second and (2) politicians lie. That is a harsh, ugly term, but politicians do it—boldly, unhesitatingly, repeatedly, and sometimes on a grand scale. Indeed, some might say that that dishonesty is the defining characteristic of being a politician. *See, e.g.*, Editorial Board, Opinion, *All the Adam Schiff Transcripts*, WALL ST. J. (May 12, 2020, 7:29 PM), https://www.wsj.com/articles/all-the-adam-schiff-transcripts-11589326164 [https://perma.cc/RZD4-UHQA] ("Americans expect that politicians will lie . . . ."). We certainly have recent proof of that proposition. President Biden repeatedly says that he reduced the national debt since January 20, 2021, despite irrefutable proof to the contrary. *See, e.g.*, Jim Geraghty, *Biden Lies About Reducing the National Debt, Everyone Yawns*, NAT'L REV. (May 10, 2023, 3:40 PM), https://www.nationalreview.com/corner/biden-lies-about-reducing-the-national-debt-everyone-yawns/?utm_source=recirc-desktop&utm_medium=homepage&utm_campaign=right-rail&utm_content=featured-writers&utm_term=second ("President Biden . . . : 'I might note parenthetically: In my first two years, I reduced the debt by $1.7 trillion. No president has ever done that.' As you likely know, this is not even close to true. When Biden took office January 20, 2021, the national debt was $28.4 trillion. The national debt is now $31.4 trillion, an increase of $3 trillion. Biden has made similar false boasts and claims during his presidency with metronomic frequency."); Caleb Howe, *CNN's Dale Delivers Laundry List of Biden 'Inventing' Lies About*

Other commentators, however, do believe that America is racist to its core.[38] The next three subparts discuss that argument.

His 'Own Biography' in Brutal 9/11 Fact Check, MEDIAITE (Sept 14, 2023, 12:29 PM), https://www.mediaite.com/tv/cnns-dale-delivers-laundry-list-of-biden-inventing-lies-about-his-own-biography-in-brutal-9-11-fact-check/amp/. Even *The New York Times* opinion writers have noted that Biden is a stranger to the truth. *See* Bret Stephens, Opinion, *An Ethically Challenged Presidency*, N.Y. TIMES (Oct. 5, 2021), https://www.nytimes.com/2021/10/05/opinion/biden-ethics-son.html?searchResultPosition=9 ("There should be little doubt that President Biden was not being truthful when, days after the Taliban's victory, he told ABC News that his senior military advisers had not urged him to keep some 2,500 troops in Afghanistan. The president's claim was flatly contradicted last week in sworn testimony from Gen. Mark Milley, the chairman of the Joint Chiefs of Staff, and Gen. Kenneth McKenzie Jr., the head of U.S. Central Command."). Barack Obama told the public that, "If you like your health care plan, you'll be able to keep your health care plan, period." Barack Obama, President, White House, Remarks by the President at the Annual Conference of the American Medical Association (June 15, 2009, 11:13 AM), https://obamawhitehouse.archives.gov/the-press-office/remarks-president-annual-conference-american-medical-association; *see also, e.g.*, *Insurance Fight: What Obama Has Said on 'You Can Keep It'*, WALL ST. J. (Oct. 30, 2013, 7:43 PM), http://blogs.wsj.com/washwire/2013/10/30/transcript-obama-addresses-you-keep-it-criticism/ (collecting the President's statements to that effect). Donald Trump claimed that Michigan gave him its non-existent "Michigan Man of the Year" award. *Anderson Cooper 360: Trump Said He Won an Award that Doesn't Exist* (CNN television broadcast Aug. 17, 2019), https://www.cnn.com/videos/us/2019/08/17/ridiculist-trump-michigan-man-of-the-year-ac360-vpx.cnn. Presidents have told the public whoppers to promote their policies or themselves. If you want to find an honest man, you shouldn't bother looking at 1600 Pennsylvania Avenue. *See, e.g.*, Editorial Board, Opinion, *Instant Bipartisan Double Cross*, WALL ST. J. (June 24, 2021, 6:36 PM), https://www.wsj.com/articles/instant-bipartisan-double-cross-11624574163?mod=opinion_lead_pos2. The smart money says that you also shouldn't bother looking around Capitol Hill. *See, e.g.*, FRED S. MCCHESNEY, MONEY FOR NOTHING: POLITICIANS, RENT EXTRACTION, AND POLITICAL EXTORTION 47 (1997) (quoting Senator Russell Long) ("A U.S. Senator is primarily interested in two things: one, to be elected, and the other, to be reelected.").

[38] *See, e.g.*, TA-NEHISI COATES, BETWEEN THE WORLD AND ME 42 (2015) ("'White America' is a syndicate arrayed to protect its exclusive power to dominate and control our bodies. Sometimes the power is direct (lynching), and sometimes it is insidious (redlining). But however it appears, the power of domination and exclusion is central to the belief in being white, and without it, 'white people' would cease to exist for want of reasons.").

1. Critical Race Theory and the 1619 Project

Critical Race Theory (CRT) is a form of "Identity Politics,"[39] which teaches that everyone is unavoidably defined by race and sex; that white males have historically exercised hegemony over the economic and social order; and that white males have structured and maintained the legal system to cement their position atop the government and society.[40] The creation of a small number of law school professors beginning late in the 1980s,[41] CRT long remained a boutique issue in the academy. It burst into nonacademic consciousness when the *New York Times* published its *1619 Project* on the 400th anniversary of the arrival of the first Africans in America who became slaves.[42] The project's thesis is quite simple: the Founders broke from England to protect slavery, making racism an

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[39] MIKE GONZALEZ, THE PLOT TO CHANGE AMERICA: HOW IDENTITY POLITICS IS DIVIDING THE LAND OF THE FREE 3 (2020); *see* CHARLES MURRAY, FACING REALITY: TWO TRUTHS ABOUT RACE IN AMERICA 5 (2021).

[40] *See, e.g.*, COATES, *supra* note 38, at 42; *id.* at 103 ("Here is what I would like for you to know: In America, it is traditional to destroy the black body—*it is heritage*."); Cameron Hilditch, *How Critical Race Theory Works*, NAT'L REV. (May 8, 2021, 6:30 AM), https://www.nationalreview.com/2021/05/how-critical-race-theory-works/ ("Critical race theory (CRT) takes the social constructivism that critical theorists applied to class and applies it to race. Not to all races, however. One of the tenets of CRT is that the universalizing abstractions of European liberalism—'race,' 'mankind,' 'truth,' 'justice,' etc.—disguise the particular provenance of these terms as products of imperialist European thought. They are thought to veil the particular injustices perpetrated by white European peoples against non-white non-European peoples. 'Racism,' then, ends up meaning not 'discrimination on the basis of race' but 'the discrimination perpetrated by whites against non-whites.' The abstract, universal formulation of the former definition is condemned as an example of colonial, imperial, white European, hegemonic thought.").

[41] *See, e.g.*, DERRICK BELL, FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM (rev. ed. 2018) (1992); CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT (Kimberlé Crenshaw et al. eds., 1996); DELGADO & STEFANCIC, *supra* note 1.

[42] Nikole Hannah-Jones, *Our Democracy's Founding Ideals Were False When They Were Written. Black Americans Have Fought to Make Them True*, N.Y. TIMES MAG. (Aug. 14, 2019), https://www.nytimes.com/interactive/2019/08/14/magazine/black-history-american-democracy.html. The magazine has been made into a book. NIKOLE HANNAH-JONES & N.Y. TIMES MAG., THE 1619 PROJECT: A NEW ORIGIN STORY (2021).

ineradicable part of America's DNA. CRT also rests on the tenet that America, particularly anyone white, is intrinsically and irremediably racist.

This simple thesis is simply wrong. Start with its erroneous analysis of American history.

a. History

Numerous eminent historians—such as Gordon Wood, James McPherson, Sean Wilentz, Victoria Bynum, James Oakes, and Allen Guelzo—have explained that the *1619 Project* is a deeply flawed explication of our history.[43] The colonies did not revolt to save slavery from a nascent English abolition movement.[44] "Far from protecting slavery, the American

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[43] *See, e.g.*, Letter from Victoria Bynum et al. to the Editor of The New York Times Magazine (Jan. 19, 2021), in We Respond to the Historians Who Critiqued the 1619 Project, N.Y. TIMES MAG. Dec. 29, 2019, at MM6, https://www.nytimes.com/2019/12/20/magazine/we-respond-to-the-historians-who-critiqued-the-1619-project.html; Allen C. Guelzo, *Preaching a Conspiracy Theory*, CITY J. (Dec. 8, 2019), https://www.city-journal.org/1619-project-conspiracy-theory; Sean Wilentz, *American Slavery and 'the Relentless Unforeseen'*, N.Y. REV. (Nov. 19, 2019), https://www.nybooks.com/daily/2019/11/19/american-slavery-and-the-relentless-unforeseen/. They are not alone. *See, e.g.*, PHILLIP W. MAGNESS, THE 1619 PROJECT: A CRITIQUE (2020); THE NEW YORK TIMES' 1619 PROJECT AND THE RACIALIST FALSIFICATION OF HISTORY: ESSAYS AND INTERVIEWS (David North & Thomas Mackaman eds., 2021); PETER W. WOOD, 1620: A CRITICAL RESPONSE TO THE 1619 PROJECT (2020); Charles Love, *We Must Scrap the '1619 Project' for an Accurate Account of American History*, *in* RED, WHITE, AND BLACK: RESCUING AMERICAN HISTORY FROM REVISIONISTS AND RACE HUSTLERS 137 (Robert L. Woodson, Sr., ed. 2021); Leslie M. Harris, *I Helped Fact-Check the 1619 Project.* The Times *Ignored Me.*, POLITICO: MAG. (Mar. 6, 2020, 5:10 AM), https://www.politico.com/news/magazine/2020/03/06/1619-project-new-york-times-mistake-122248; John McWhorter, *We Cannot Allow '1619' to Dumb Down America in the Name of a Crusade*, *in* RED, WHITE, AND BLACK, *supra*, at 23; Christopher F. Rufo, Opinion, *The Truth About Critical Race Theory*, WALL ST. J. (Oct. 4, 2020, 4:06 PM), https://www.wsj.com/articles/the-truth-about-critical-race-theory-11601841968?page=1; Carol M. Swain, *Critical Race Theory's Destructive Impact on America*, *in* RED, WHITE, AND BLACK, *supra*, at 143; Conor Friedersdorf, *1776 Honors America's Diversity in a Way 1619 Does Not*, ATL. (Jan. 6, 2020), https://www.theatlantic.com/ideas/archive/2020/01/inclusive-case-1776-not-1619/604435/.

[44] Gordon S. Wood, 1776: Out of Many, One: Remarks Accepting the Philip Merrill Award for Outstanding Contributions to Liberal Arts Education (Nov. 12, 2021), *in* AM. COUNCIL TRS. & ALUMNI 4–6, https://www.goacta.org/wp-content/uploads/2021/11/Gordon-Wood-Speech.pdf ("According to Nikole Hannah-Jones, the originator of the project, the

Revolution inflicted a massive blow to the entire slave system of the New World,"[45] Gordon Wood explained. "Not only were the northern states the first slaveholding governments in the world to abolish slavery," he added, "but the United States became the first nation in the world to begin actively suppressing the despicable international slave trade."[46] Snookered by the "social justice" warriors, "[t]he *New York Times* has the history completely backwards."[47]

American Revolution was a hypocritical example of white supremacy mouthing values that whites violated at every turn. Instead of promoting liberty and equality, white Americans undertook the Revolution largely to save slavery. . . . This claim is false. In 1776, Great Britain was not threatening to abolish slavery in its empire. If it had been, then the British sugar-producing colonies in the Caribbean would have been much more interested in leaving the empire than they were. Few if any British colonists in 1776 were frightened of British abolitionism. If the Virginian slaveholders had been frightened of British abolitionism, why only eight years after the war ended would the board of visitors or the trustees of the College of William and Mary, wealthy slaveholders all, award an honorary degree to Granville Sharp, the leading British abolitionist at the time? Had they changed their minds so quickly? From being so frightened of abolitionism as to leave the empire to awarding a Briton who promoted abolitionism? The *New York Times* has no accurate knowledge of Virginia's Revolutionary culture and cannot begin to answer these questions.").

[45] *Id.* at 5 ("It was the American colonists who were interested in abolitionism in 1776. While many of the Virginian planters were struggling with manumission and other ways of ending slavery, it was left to the northern states to successfully undertake the immense task of legally abolishing slavery.").

[46] *Id.*

[47] *Id.* at 5–6 ("Right now, it looks as if the desire for social justice is overwhelming the need for historical accuracy, at least with elites. . . . No one should ever minimize the importance of slavery and Jim Crow segregation in our history. But to make 1619 the birth date of the nation and to make slavery and segregation the frame for interpreting all of our turbulent and complicated past is not only false to the totality of our history but it will divide us further and undermine whatever sense of comity and unity we have left. Ordinary Americans seem to be becoming increasingly aware of this."). Alternatively, the project's thesis uses history selectively. *See* Hilditch, *supra* note 40.

> The social constructivism of critical race theorists also leads them to think of historic injustice as a kind of zero-sum relationship that can be rebalanced if only the correct political arithmetic is applied. The civil-rights approach to racial equality has been to attempt to redress the inequalities of *today* rather than to parcel out justice for every historic

> wrong ever committed. Bygones were, in this older view, to be treated as solemn and harrowing bygones from which we all must learn, but justice to the oppressed dead could no longer be done in any retributive sense since their oppressors have died with them.
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> Critical race theorists totally reject this view. Conceiving of identity in collective terms, they look upon white people today as essentially coextensive with their oppressive ancestors, still in possession of their ill-gotten racist gains—gains that manifest themselves in the guise of privilege. As Christopher Caldwell wrote in an essay on Kendi for NATIONAL REVIEW last year, "the historic victims of [the racist] system . . . look at the system as having taken from them concrete things that were theirs by right—above all, jobs, money, and housing. They will not consider the problem fixed until those deprivations have been remedied."
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> . . . .
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> As for Kendi's view of history, his idea of retributive racial justice tacitly assumes the existence at some point in the distant past of a time when the balance sheet of racial injustice was zero: a kind of equitable Eden shrouded in the mists of time before the white man ate of the poisoned tree of human bondage. The project of CRT that he spearheads is, as a result, almost a kind of Christian heresy. It's seeking to retrieve a paradise lost, to vanquish the lily-white angel guarding the gates to a lost land of pristine justice, from which people of color have been cast out into a land and into a life of unrelenting toil and oppression.
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> The truth, of course, is that there was never any such time. It's true that racial injustice began at a certain point in history, and that it really took off when civilization reached a point of development that allowed for intercontinental travel. But before the time in human history at which people of different races began to encounter one another, the story was still one of violence and oppression. It was merely one of Africans oppressing Africans and Europeans oppressing Europeans. The balance sheet of human conflict has never been zero.

Id.; *see also* Andreas Koureas, *There Is No Case for Reparations*, SPECTATOR WORLD (May 7, 2023, 11:52 AM), https://thespectator.com/topic/case-reparations-african-slavery/ ("The central thesis of slavery reparations is that white majority countries owe money to ethnic minorities as their ancestors may have enslaved others or benefited from a slave-system economy. There is a problem with this though: ultimately, the great evil of slavery was practiced by all inhabited continents and all races. And there will be almost no one alive

In a poetic sense, the project's thesis also violates the laws of physics, as George Will has explained. How? The event on which the *1619 Project* relies as the cornerstone of its thesis—a November 1775 English offer to free slaves who fought for the British—did not occur until *after* a decade-long series of events that triggered the Revolution, including the battles at Lexington, Concord, and Bunker Hill, as well as George Washington's appointment as commander of the Continental Army.[48] As Will put it, "Writing history is not like doing physics. But event A cannot have caused event B if B began before A."[49]

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today in the world who doesn't have an ancestral link to the slave trade. This fact collapses the modern-day reparations argument.").

[48] George F. Will, Opinion, *The Malicious, Historically Illiterate 1619 Project Keeps Rolling On*, WASH. POST (Dec. 17, 2021, 8:00 AM), https://www.washingtonpost.com/opinions/2021/12/17/new-york-times-1619-project-historical-illiteracy-rolls-on/.

> The Times's original splashy assertion—slightly fudged *after* the splash garnered a Pulitzer Prize—was that the American Revolution, the most important event in our history, was shameful because a primary reason it was fought was to preserve slavery. The war was supposedly ignited by a November 1775 British offer of freedom to Blacks who fled slavery and joined British forces. Well.
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> That offer came *after* increasingly volcanic American reactions to various British provocations: *After* the 1765 Stamp Act. *After* the 1770 Boston Massacre. *After* the 1773 Boston Tea Party. *After* the 1774 Coercive Acts (including closure of Boston's port) and other events of "The Long Year of Revolution" (the subtitle of Mary Beth Norton's "1774"). And *after*, in 1775, the April 19 battles of Lexington and Concord, the June 17 battle of Bunker Hill and George Washington on July 3 assuming command of the Continental Army.

Id.

[49] *Id.* Will believes that the *1619 Project*'s conclusion cannot be explained away as an example of "innocent ignorance" that could be cured through disproof or counterargument. *Id.* He believes that the project is merely an effort to shape history to justify long sought-after progressive political goals. The project is, to quote Will, "maliciousness in the service of progressivism's agenda, which is to construct a thoroughly different nation on the deconstructed rubble of what progressives hope will be the nation's thoroughly discredited past." *Id.* Alternatively, as John McWhorter sees it, the *1619 Project*, along with Critical Race Theory, is religion dressed up as history. Its goal is to obtain a metaphysical and moral

It might be possible to determine the objective intent of a collegial judgment, such as the passage of a statute, by examining the text of the legislation. Even then, however, there are inherent difficulties in discerning whether the text reveals that there was *a* particular consensus about why a law should be enacted or some other action undertaken.[50] "Christmas tree" legislation—bills that offer something for everybody to garner everyone's support—further confounds the inquiry. But those hardships pale by comparison to the difficulty in determining the *subjective* intent of a collegial body perhaps acting out of mixed motives. That task is well-nigh impossible under the best of conditions.[51] What makes it truly impossible is

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purchase for challenging the legitimacy of the nation's Constitution and institutions. *See, e.g.*, MCWHORTER, *supra* note 6, at 23–60; Guelzo, *supra* note 43 ("[T]he 1619 Project is not history; it is evangelism, but evangelism for a gospel of disenchantment whose ultimate purpose is the hollowing out of the meaning of freedom, so that every defense of freedom drops nervously from the hands of people who have been made too ashamed to defend it."); Peter C. Myers, *Strange Gods*, CLAREMONT REV. BOOKS, Summer 2021, at 19–20 (reviewing JOSHUA MITCHELL, AMERICAN AWAKENING: IDENTITY POLITICS AND OTHER AFFLICTIONS OF OUR TIME (2020)). Regardless of whether the *1619 Project* and Critical Race Theory are best described as political (Will) or religious (McWhorter) proposals, they serve the same function in contemporary politics that Karl Marx's *Das Capital* provided the communist state. For a lengthy argument that the parallel is an apt one, see MIKE GONZALEZ, BLM: THE MAKING OF A NEW MARXIST REVOLUTION (2021).

[50] *See, e.g.*, United States v. O'Brien, 391 U.S. 367, 383–84 (1968). *See generally* KENNETH J. ARROW, SOCIAL CHOICE AND INDIVIDUAL VALUES (3d ed., Yale Univ. Press 2012) (1951) (developing modern social choice theory); Frank H. Easterbrook, *Ways of Criticizing the Court*, 95 HARV. L. REV. 802 (1982) (applying that theory to collegial decision-making by the Supreme Court).

[51] Justice Antonin Scalia best explained why that inquiry is, in his words, "almost always an impossible task." Edwards v. Aguillard, 482 U.S. 578, 610, 636 (1987) (Scalia, J., dissenting).

> The number of possible motivations, to begin with, is not binary, or indeed even finite. In the present case, for example, a particular legislator need not have voted for the Act either because he wanted to foster religion or because he wanted to improve education. He may have thought the bill would provide jobs for his district, or may have wanted to make amends with a faction of his party he had alienated on another vote, or he may have been a close friend of the bill's sponsor, or he may have been repaying a favor he owed the Majority Leader, or he may have

hoped the Governor would appreciate his vote and make a fundraising appearance for him, or he may have been pressured to vote for a bill he disliked by a wealthy contributor or by a flood of constituent mail, or he may have been seeking favorable publicity, or he may have been reluctant to hurt the feelings of a loyal staff member who worked on the bill, or he may have been settling an old score with a legislator who opposed the bill, or he may have been mad at his wife who opposed the bill, or he may have been intoxicated and utterly *un*motivated when the vote was called, or he may have accidentally voted "yes" instead of "no," or, of course, he may have had (and very likely did have) a combination of some of the above and many other motivations. To look for *the sole purpose* of even a single legislator is probably to look for something that does not exist.

Putting that problem aside, however, where ought we to look for the individual legislator's purpose? We cannot of course assume that every member present (if, as is unlikely, we know who or even how many they were) agreed with the motivation expressed in a particular legislator's preenactment floor or committee statement. Quite obviously, "what motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it." *United States v. O'Brien,* 391 U.S. 367, 384 (1968). Can we assume, then, that they all agree with the motivation expressed in the staff-prepared committee reports they might have read—even though we are unwilling to assume that they agreed with the motivation expressed in the very statute that they voted for? Should we consider postenactment floor statements? Or postenactment testimony from legislators, obtained expressly for the lawsuit? Should we consider media reports on the realities of the legislative bargaining? All of these sources, of course, are eminently manipulable. Legislative histories can be contrived and sanitized, favorable media coverage orchestrated, and postenactment recollections conveniently distorted. Perhaps most valuable of all would be more objective indications—for example, evidence regarding the individual legislators' religious affiliations. And if that, why not evidence regarding the fervor or tepidity of their beliefs?

Having achieved, through these simple means, an assessment of what individual legislators intended, we must still confront the question (yet to be addressed in any of our cases) how *many* of them must have the invalidating intent. If a state senate approves a bill by vote of 26 to 25, and only one of the 26 intended solely to advance religion, is the law unconstitutional? What if 13 of the 26 had that intent? What if 3 of the

the burden of dealing with not just one but four macrolevel events—(1) the American Revolution, (2) the adoption of the U.S. Constitution, (3) the Civil War, and (4) the Reconstruction Era passage of the Thirteenth, Fourteenth, and Fifteenth Amendments—that rested on a series of subsidiary events undertaken by a multitude of people who were geographically separate and, in some instances, acted independently. Yet that is the burden the *1619 Project* and Critical Race Theory must bear to be taken seriously. As the historians noted above have concluded, however, they have not come close to carrying that burden.[52]

> 26 had the impermissible intent, but 3 of the 25 voting against the bill were motivated by religious hostility or were simply attempting to "balance" the votes of their impermissibly motivated colleagues? Or is it possible that the intent of the bill's sponsor is alone enough to invalidate it—on a theory, perhaps, that even though everyone else's intent was pure, what they produced was the fruit of a forbidden tree?
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> Because there are no good answers to these questions, this Court has recognized from Chief Justice Marshall, see *Fletcher v. Peck,* 6 Cranch 87, 130 (1810), to Chief Justice Warren, *United States v. O'Brien*, *supra*, at 383–384, that determining the subjective intent of legislators is a perilous enterprise. *See also Palmer v. Thompson*, 403 U.S. 217, 224–225 (1971); *Epperson v. Arkansas*, 393 U.S. [97], . . . 113 [(1968)] (Black, J., concurring). It is perilous, I might note, not just for the judges who will very likely reach the wrong result, but also for the legislators who find that they must assess the validity of proposed legislation—and risk the condemnation of having voted for an unconstitutional measure—not on the basis of what the legislation contains, nor even on the basis of what they themselves intend, but on the basis of what *others* have in mind.

Id. at 636–39.

[52] *See* Samuel Kronen, *Historical Racism Is Not the Singular Cause of Racial Disparity*, QUILLETTE (July 17, 2021), https://quillette.com/2021/07/17/historical-racism-is-not-the-singular-cause-of-racial-disparity/ ("The War on Poverty was based on the notion that black poverty was unique because of historical racism, just as activists claim today. But the desired results were not forthcoming. Violence, single households, joblessness, welfare dependency, teen pregnancy, drug addiction, and all of the ills we associate with the urban ghettos today were accelerated in the late 60s, whether or not those policies were a cause of the decline or just an ineffective remedy. So, much of what is called for by modern anti-racist activists has already been tried and failed. And yet it is critics of such policies that are accused of not knowing their history."). Professor Glenn Loury made that point, explaining that "[i]t is first

b. Law

Regardless of whether the *1619 Project* is "historical illiteracy," as George Will called it,[53] neither it nor Critical Race Theory can reasonably serve as *a legal justification* for the claim that the American criminal justice system is systemically racist. Like Critical Race Theory, the *1619 Project* suffers from a flaw that corrodes its utility as an explanation for contemporary blame-assignment: it disregards the critical role that causation plays in assigning responsibility.

As the Supreme Court explained three years ago, "[i]t is 'textbook . . . law' that a plaintiff seeking redress for a defendant's legal wrong typically must prove but-for causation"—that is, "a plaintiff must demonstrate that, but for the defendant's unlawful conduct, its alleged injury would not have occurred."[54] A party must prove not only "causation in fact"—viz., that the defendant's unlawful conduct led to the plaintiff's injury—but also "proximate causation"—viz., that the defendant can fairly

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crucial to address competing narratives about the American project, for the narrative that we blacks settle on is fundamentally important." Glenn C. Loury, *Whose Fourth of July? Black Patriotism and Racial Inequality in America*, *in* THE STATE OF BLACK AMERICA 190 (W.B. Allen ed., 2022). As he continued:

> Is this, basically, a good country that affords boundless opportunity to all who are fortunate enough to enjoy the privileges and bear the responsibilities of American citizenship? Or is this, basically, a venal, immoral, and rapacious bandit-society of plundering white supremacists, founded in genocide and slavery and propelled by capitalist greed and unrepentant racism? Of course, there is some warrant in the historical record for both sentiments, but the weight of the evidence overwhelmingly favors the former. I wish to argue that the founding of the United States of America was a world-historic event by means of which Enlightenment ideals about the rights of individual persons and the legitimacy of state power were instantiated for the first time in real institutions. To this extent, what happened in 1776 was vastly more significant for world history than what happened in 1619.

Id.

[53] Will, *supra* note 48.

[54] Comcast Corp. v. Nat'l Ass'n of Afr. Am.-Owned Media, 140 S. Ct. 1009, 1014 (2020) (citing Univ. of Tex. Sw. Med. Ctr. v. Nassar, 570 U.S. 338, 347 (2013)).

be held responsible for the plaintiff's loss. "The term 'proximate cause,'" as the Supreme Court noted, "is shorthand for a concept: Injuries have countless causes, and not all should give rise to legal liability."[55] The rule is that a party is not liable for harms that are unduly distant from his or her tortious conduct.[56] Foreseeability is an important feature of proximate cause, but it is not the only consideration. In Justice Ruth Bader Ginsburg's words, "because of convenience, of public policy, of a rough sense of justice, the law arbitrarily declines to trace a series of events beyond a certain point."[57] That rule is no modern-day contrivance slapped together to respond to criticisms of people or events in our past like the ones voiced by the *1619 Project* or Critical Race theory. It is a "maxim," a "well-established principle of law,"[58] an "ancient and simple" rule.[59] For hundreds of years Anglo-American law has limited a party's responsibility for actions that are unduly remote in space or time. It is a fixture in our law, as Supreme Court Justice Joseph Story noted in 1840.[60] More recently, the Supreme Court held that a five-month separation between an alleged cause and its alleged harm

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[55] CSX Transp., Inc. v. McBride, 564 U.S. 685, 692 (2011) (emphasis omitted).

[56] *See, e.g.*, Bank of Am. Corp. v. City of Miami, 581 U.S. 189, 201–02 (2017); Lexmark Int'l., Inc. v. Static Control Components, Inc., 572 U.S. 118, 132 (2014).

[57] *CSX Transp., Inc.*, 564 U.S. at 692 (quoting Palsgraf v. Long Island R.R. Co., 162 N.E. 99, 103 (N.Y. 1928) (Andrews, J., dissenting)).

[58] Waters v. Merchs.' Louisville Ins., 36 U.S. (11 Pet.) 213, 223 (1837) ("It is a well established principle of that law, that in all cases of loss we are to attribute it to the proximate cause, and not to any remote cause: *causa proxima non remota spectatur:* and this has become a maxim . . . .") (emphasis added).

[59] *Comcast Corp.*, 140 S. Ct. at 1014.

[60] *See, e.g.*, Peters v. Warren Ins., 39 U.S. (14 Pet.) 99, 108 (1840) ("The argument is, that in the law of insurance, which governs the present contract, it is a settled rule that underwriters are liable only for losses arising from the proximate cause of the loss, and not for losses arising from a remote cause, not immediately connected with the peril. *Causa proxima non remota spectatur*. The rule is correct, when it is understood and applied in its true sense; and, as such, it has been repeatedly recognised in this Court.") (emphasis added); W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 42 (W. Page Keeton gen. ed., 5th ed. 1984).

was too remote to give rise to liability.[61] If five-months is too remote, a century-plus surely is.

Even if the *1619 Project* and Critical Race Theory were correct about the Founders' intent as a matter of history, they do not make a persuasive case that the American criminal justice system should be permanently stained with the original sin of slavery. Those critics treat the Framers' design as an act of wickedness so foundational that it ineradicably permeates our present-day institutions and forever deserves a form of Old Testament condemnation without any hope of a New Testament expiation. Yet, that is not how the law works. The law of proximate causation recognizes that even evil misdeeds committed long ago can lose their venom over time. The criminal justice system must be examined on its merits *today*, and those merits must consider *both* those who are sinners and those who are sinned against. As explained below, despite the best efforts of some parties to make the subject verboten,[62] African-Americans are more often victimized today

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[61] Martinez v. California, 444 U.S. 277, 284–85 (1980) (citations omitted) ("Appellants contend that the decedent's right to life is protected by the Fourteenth Amendment to the Constitution. But the Fourteenth Amendment protected her only from deprivation by the '*State* . . . of life . . . without due process of law.' Although the decision to release Thomas from prison was action by the State, the action of Thomas five months later cannot be fairly characterized as state action. Regardless of whether, as a matter of state tort law, the parole board could be said either to have had a 'duty' to avoid harm to his victim or to have proximately caused her death, . . . we hold that, taking these particular allegations as true, appellees did not 'deprive' appellants' decedent of life within the meaning of the Fourteenth Amendment.").

[62] Rich Lowry, *When the Truth Becomes a Dog Whistle*, NAT'L REV. (May 8, 2023, 6:30 AM), https://www.nationalreview.com/2023/05/when-the-truth-becomes-a-dog-whistle/ ("There's a school of thought that believes that every instrument that makes a sound is a dog whistle. The MSNBC host Mehdi Hasan provided a remarkably telling example of this perspective a week or so ago when he objected to Bill Maher's talking about the problem of murders in Chicago in particular and black-on-black crime in general. Hasan's rant is worth dwelling on because it's such a clear demonstration of how intolerable certain realities are to left-wing opinion, even when they involve black lives in the starkest way possible. . . . The proportion of white and black murders that are intra-racial are about the same, roughly 80 percent and 90 percent respectively. But the rate at which blacks kill other blacks is much higher. In 2019, African Americans were about 14 percent of the population and 52 percent of homicide victims."); *see* FBI, 2019 CRIME IN THE UNITED STATES: EXPANDED HOMICIDE DATA tbl. 2 (2019) (noting that, in 2019, 41.6% of homicide victims were white, while 53.7%

by other African-Americans than by whites. Eliminating or weakening the criminal justice system, as some critics urge and as some elected officials have already done, will only hurt the very people the critics ostensibly want to protect.[63]

As for the argument that the sin of slavery is ineradicable: The Constitution quite clearly does not permit the sins of the fathers to be visited on their sons. At common law, that transference was a standard

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were black); *Id.* at tbl. 6 (noting that, in 2019, approximately 79% of white homicide victims (2,594 of 3,299) were killed by white offenders, while approximately 89% of black homicide victims (2,574 of 2,906) were killed by black offenders); *see also* VIOLENCE POL'Y CTR., BLACK HOMICIDE VICTIMIZATION IN THE UNITED STATES 1, 6 (2023) (footnote omitted) ("The devastation homicide inflicts on Black teens and adults is an ongoing national crisis, yet it is all too often ignored outside of affected communities. . . . For the year 2020, Blacks Americans represented 14 percent of the nation's population, yet accounted for 53 percent of all homicide victims.").

[63] *See, e.g.*, Editorial Board, Opinion, *A Larry Krasner Christmas*, WALL ST. J. (Dec. 22, 2021), https://www.wsj.com/articles/a-larry-krasner-christmas-crime-philadelphia-11640208516 ("Philadelphia has seen a record 544 homicides so far this year, up from 347 in the entirety of 2019. Police have recorded some 1,785 nonfatal shootings this year. More than 84% of the victims of the gun violence in 2021 were black, according to the Philadelphia Office of the Controller."); Audrey Conklin, *At Least 16 Cities See Record Homicides in 2021*, FOX NEWS (Dec. 18, 2021, 6:40 AM), https://www.foxnews.com/us/cities-record-homicides-2021 (noting homicide increases in Albuquerque, New Mexico; Atlanta, Georgia; Austin, Texas; Baton Rouge, Louisiana; Columbus, Ohio; Indianapolis, Indiana; Jackson, Mississippi; Louisville, Kentucky; Macon, Georgia; Milwaukee, Wisconsin; New Haven, Connecticut; Philadelphia, Pennsylvania; Portland, Oregon; Rochester, New York; St. Paul, Minnesota; and Tucson, Arizona); Rafael A. Mangual, Opinion, *Yes, the Crime Wave Is as Bad as You Think*, WALL ST. J. (Dec. 8, 2021, 4:51 PM), https://www.wsj.com/articles/yes-the-crime-wave-is-as-bad-as-you-think-murder-rate-violent-killings-shootings-defund-police-11638988699?page=1 ("Philadelphia just shattered its all-time annual homicide record with a full month remaining in 2021, as have [many of the cities noted above]. Other cities, like Cincinnati; Trenton, N.J.; Memphis, Tenn.; Milwaukee; Kansas City, Mo.; Jacksonville, Fla.; Denver; Cleveland; Jackson, Miss.; Wichita, Kan.; Greensboro, N.C.; Lansing, Mich.; and Colorado Springs, Colo., saw their highest homicide tallies since 1990 last year. Other cities flirting with their previous records include Shreveport, La.; Baltimore; Minneapolis; Rochester, N.Y.; and Tulsa, Okla. St. Louis didn't surpass its highest tally in 2020, but owing to population decline it did set a new record homicide rate. Chicago, Seattle and Fort Worth, Texas, would all have to go back 25 years to see homicide tallies comparable to what they're seeing now.").

practice. Anyone convicted of treason went to the gallows, and his or her children lost their right to inherit property from or through the offender.[64] The result was that "innocent children were made to suffer because of the offence of their ancestor."[65] Not so under our Constitution. Article III specifies that Congress cannot fix a penalty for treason that "work[s] Corruption of Blood, or Forfeiture except during the Life of the Person" convicted of that crime.[66] Put differently, the Constitution forbids the government from holding today's or tomorrow's generations legally responsible for whatever faults their ancestors might have committed. Yet that is exactly what the *1619 Project* and Critical Race Theory seek to do—to resurrect a common law sanction that the Constitution rejected more than 200 years ago that no one has sought to reinstate since 1787, all without admitting that is their goal. Regardless of its potential effectiveness in the political arena, that never-ending prospective transgenerational assignment of blame carries no weight in the law.

2. Experience

The second argument is that, for some people, experience has proved that whites are racist.[67] That inference, however, is an example of the fallacy of composition—that is, the mistaken assumption that what is true of an individual or subgroup is also true of the whole.[68] Atop that, the claim is more a definition or an article of faith than a syllogism or empirically

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[64] *See, e.g.*, Nixon v. Adm'r of Gen. Servs., 433 U.S. 425, 473 n.35 (1977).

[65] Wallach v. Van Riswick, 92 U.S. 202, 210 (1876).

[66] U.S. CONST. art. III, § 3, cl. 2 ("The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted.").

[67] *See, e.g.*, COATES, *supra* note 38, at 97. Even though racism requires a discriminatory state of mind, some believe that the denial of racism, however personally honest and authentic, is irrelevant. *Id.* ("[M]y experience in this world has been that the people who believe themselves to be white are obsessed with the politics of personal exoneration. And the word *racist*, to them, conjures, if not a tobacco-spitting oaf, then something just as fantastic—an orc, troll, or gorgon. . . . There are no racists in America, or at least none that the people who need to be white know personally.").

[68] *See, e.g.*, Adrian Vermeule, *Foreword: System Effects and the Constitution*, 123 HARV. L. REV. 4, 8 (2009).

verifiable conclusion that is subject to disproof or rebuttal. Claims like those certainly have considerable valence in a political arena, particularly when they are endlessly repeated by radio or television journalists, by a "Twitter mob," or across social media. The Romans satisfied the populace with bread and circuses; today's politicians often make do by sanctifying the views of squeaky media wheels. In the law, however, mistakes remain mistakes regardless of how often they are repeated. There is no factual or moral basis for the irrebuttable presumption that all members of any race are racist.

3. The Implicit Association Test

The third argument is based on social science research. Unconscious bias claims originally rested on Freudian psychodynamic considerations.[69] Late in the Twentieth Century, however, experimental psychology pushed its way to the front of the line. Anthony Greenwald and Mahzarin Banaji, psychologists at the University of Washington and Harvard, respectively, developed the Implicit Association Test (IAT) in an attempt to measure the presence of unobservable, unconscious mental attitudes. To simplify, the test measures subjects' response time to associations between terms such as "work" or "crime" with categories of people, such as "black" or "white."[70]

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[69] Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 322–23 (1987).

[70] Gregory Mitchell & Philip E. Tetlock, *Antidiscrimination Law and the Perils of Mindreading*, 67 OHIO STATE L.J. 1023, 1025 n.5 (2006).

> Essentially, the IAT measures millisecond differences in reaction times to pairings of concepts that vary in their putative stereotypic or prejudicial connotations. For instance, if a subject responds more quickly to the pairing of photographs of African-American faces with negative character trait words than to the pairing of photographs of European-American faces with the same negative character trait words, then the subject is said to exhibit an implicit negative stereotype toward African-Americans. Or if a subject responds more quickly to the pairing of "White-sounding" names with the term "pleasant" than to the pairing of "Black-sounding" names with the term "pleasant," then the subject is said to exhibit an implicit negative attitude (or prejudice) toward African-Americans.

Those response times are measured in milliseconds. Greenwald and Banaji concluded that whites unconsciously associate positive attributes with their own race and negative traits with blacks and that those attitudes direct or influence their interracial interactions and judgments.[71] Since then, the academy has fully embraced the IAT. The IAT is the best known and most often used test of its kind.[72] Numerous scholars have used the IAT in "an ambitious project" to entirely "remake"[73] the law in a diverse host of legal fields.[74]

Among the fields primed for re-examination is criminal law and procedure. Commentators have often relied on the IAT as a basis for claiming that the American criminal justice system is racist.[75] According to

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Id.; *see also* Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 CALIF. L. REV. 945 (2006); Anthony G. Greenwald et al., *Measuring Individual Differences in Implicit Cognition: The Implicit Association Test*, 74 J. PERSONALITY & SOC. PSYCH. 1464 (1998).

[71] *See* Mahzarin R. Banaji et al., *Implicit Stereotyping in Person Judgment*, 65 J. PERSONALITY & SOC. PSYCH. 272, 280 (1993) ("Implicit stereotyping critically compromises the efficacy of 'good intention' in avoiding stereotyping and points to the importance of efforts to change the material conditions within which (psychological) stereotyping processes emerge and thrive."); *see also, e.g.*, MAHZARIN R. BANAJI & ANTHONY G. GREENWALD, BLINDSPOT: HIDDEN BIASES OF GOOD PEOPLE (2013); Brian A. Nosek et al., *The Implicit Association Test at Age 7: A Methodological and Conceptual Review*, *in* SOCIAL PSYCHOLOGY AND THE UNCONSCIOUS: THE AUTOMATICITY OF HIGHER MENTAL PROCESSES 265 (John A. Bargh ed., 2007).

[72] There are other tests, but the IAT is the one most commonly used. *See* Brian A. Nosek & Rachel G. Riskind, *Policy Implications of Implicit Social Cognition*, 6 SOC. ISSUES & POL'Y REV. 113, 124 (2012).

[73] Mitchell & Tetlock, *supra* note 70, at 1027–28.

[74] *See, e.g.*, JENNIFER L. EBERHARDT, BIASED: UNCOVERING THE HIDDEN PREJUDICE THAT SHAPES WHAT WE SEE, THINK, AND DO (2019); IMPLICIT RACIAL BIAS ACROSS THE LAW (Justin D. Levinson & Robert J. Smith eds., 2012); Anthony G. Greenwald & Mahzarin R. Banaji, *Implicit Social Cognition: Attitudes, Self-Esteem, and Stereotypes*, 102 PSYCH. REV. 4 (1995); Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489 (2005); *see also, e.g.*, B. Keith Payne, *Prejudice and Perception: The Role of Automatic and Controlled Processes in Misperceiving a Weapon*, 81 J. PERSONALITY & SOC. PSYCH. 181 (2001) (discussing implicit bias in law enforcement and suggesting psychological changes to reduce that bias).

[75] *See, e.g.*, Jennifer L. Eberhardt et al., *Looking Deathworthy: Perceived Stereotypicality of Black Defendants Predicts Capital-Sentencing Outcomes*, 17 PSYCH. SCI. 383 (2006);

the IAT's supporters, only people infected by "hypocrisy or self-deception"[76] would deny the relevance of its results to legal analysis, particularly with regard to bodies of law that require proof of discriminatory intent to establish a constitutional violation, as the Supreme Court's longstanding equal protection case law demands.[77] If the IAT is relevant, its advocates say, the results are game-changing. A consequence of those results, its supporters contend, is that equal protection law should not demand proof of discriminatory intent to establish a constitutional violation. Disavowals and disproof of racist intent are unconvincing, if not irrelevant, critics say, because racism is ultimately unconscious.[78] Just as sonar enables surface vessels to detect the presence of submarines, IAT's

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Jennifer L. Eberhardt et al., *Seeing Black: Race, Crime, and Visual Processing*, 87 J. PERSONALITY & SOC. PSYCH. 876 (2004); Charles Ogletree et al., *Criminal Law: Coloring Punishment: Implicit Social Cognition and Criminal Justice*, *in* IMPLICIT RACIAL BIAS ACROSS THE LAW, *supra* note 74, at 45; Robert J. Smith & G. Ben Cohen, *Capital Punishment: Choosing Life or Death (Implicitly)*, *in* IMPLICIT RACIAL BIAS ACROSS THE LAW, *supra* note 74, at 229; Jerry Kang et al., *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124 (2012); Antony Page, Batson*'s Blind-Spot: Unconscious Stereotyping and the Peremptory Challenge,* 85 B.U. L. REV. 155, 156 (2005). *See generally* Robert J. Smith et al., *Implicit White Favoritism in the Criminal Justice System*, 66 ALA. L. REV. 871, 873–75 & nn.4–14 (2015) (collecting authorities).

[76] *See* Jerry Kang & Mahzarin R. Banaji, *Fair Measures: A Behavioral Realist Revision of "Affirmative Action"*, 94 CALIF. L. REV. 1063, 1065 (2006).

[77] *See* McCleskey v. Kemp, 481 U.S. 279, 297–99 (1987); Washington v. Davis, 426 U.S. 229, 239 (1976); *infra* note 159 (collecting cases).

[78] *See* BANAJI & GREENWALD, *supra* note 71, at 47 ("[T]he automatic White preference expressed on the Race IAT is now established as signaling discriminatory behavior. It predicts discriminatory behavior even among research participants who earnestly (and, we believe, honestly) espouse egalitarian beliefs. That last statement may sound like a self-contradiction, but it's an empirical truth. Among research participants who describe themselves as racially egalitarian, the Race IAT has been shown, reliably and repeatedly, to predict discriminatory behavior that was observed in the research."); *see also, e.g.*, EDUARDO BONILLA-SILVA, RACISM WITHOUT RACISTS: COLOR-BLIND RACISM AND THE PERSISTENCE OF RACIAL INEQUALITY IN AMERICA (5th ed. 2017); MALCOLM GLADWELL, BLINK: THE POWER OF THINKING WITHOUT THINKING 77–88 (2007); Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161 (1995); Charles R. Lawrence III, *Local Kine Implicit Bias: Unconscious Racism Revisited (Yet Again)*, 37 U. HAW. L. REV. 457 (2015).

supporters maintain, the IAT is accurate, robust, and invaluable in detecting submerged but existing attitudes harbored by otherwise ostensibly "good people."[79]

Like other social science research, however, the IAT does not enjoy the same status as Newton's Laws of Motion. Critics of the IAT have identified a host of flaws in its assumptions, methodology, and conclusions.[80] For

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[79] *See, e.g.*, Patricia G. Devine, *Implicit Prejudice and Stereotyping: How Automatic Are They? Introduction to the Special Section*, 81 J. PERSONALITY & SOC. PSYCH. 757, 757 (2001) ("Even those who consciously renounce prejudice have been shown to have implicit or automatic biases that conflict with their nonprejudiced values that may disadvantage the targets of these biases."); Kang & Banaji, *supra* note 76, at 1066 (claiming that "threats to fair treatment . . . lie in every mind"); Brian A. Nosek et al., *Harvesting Implicit Group Attitudes and Beliefs from a Demonstration Web Site,* 6 GRP. DYNAMICS: THEORY, RSCH. & PRAC. 101, 112 (2002) ("From young to old, male to female, Black to White, and conservative to liberal, implicit biases are not held by a select few but are readily observed among all social groups."); Reshma M. Saujani, *"The Implicit Association Test": A Measure of Unconscious Racism in Legislative Decision-Making*, 8 MICH. J. RACE & L. 395, 396 (2003) ("The IAT could 'smoke out' illegitimate purposes by demonstrating that the [racially-neutral] classification does not in fact serve its stated purpose.").

[80] *See, e.g.*, Tom Bartlett, *Can We Really Measure Implicit Bias? Maybe Not*, CHRON. HIGHER EDUC. (Jan. 5, 2017), https://www.chronicle.com/article/can-we-really-measure-implicit-bias-maybe-not/; ALTHEA NAGAI, HERITAGE FOUND., SPECIAL REPORT NO. 196, THE IMPLICIT ASSOCIATION TEST: FLAWED SCIENCE TRICKS AMERICANS INTO BELIEVING THEY ARE UNCONSCIOUS RACISTS (Dec. 12, 2017); Jesse Singal, *Psychology's Favorite Tool for Measuring Racism Isn't Up to the Job*, N.Y.: CUT (Jan. 11, 2017), https://www.thecut.com/2017/01/psychologys-racism-measuring-tool-isnt-up-to-the-job.html; *see also, e.g.*, Michael A. Olson & Russell H. Fazio, *Relations Between Implicit Measures of Prejudice: What Are We Measuring?*, 14 PSYCH. SCI. 636 (2003); Brian A. Nosek & Rachel G. Riskind, *Policy Implications of Implicit Social Cognition*, 6 SOC. ISSUES & POL'Y REV. 113 (2012) (one of the co-authors was a co-creator of the IAT). As Althea Nagai has summarized:

> To start, it is not clear that there are significant and reliable differences in response time, as has been asserted. When individuals take the IAT more than once, there is a good chance that results from the first and second (and subsequent) times have very low correlations. Perhaps this is to be expected from a test measuring differences in milliseconds: One-tenth of a second can lead to highly charged accusations of racism.
>
> Next, the difference in milliseconds can be explained by factors other than unconscious bias. There are, simply speaking, a wide variety of other explanations. Rather than unconscious racism, the test could

example, critics have argued that the IAT does not validly measure unconscious bias because the test does not exclude other non-racial-bias factors that could lead to the same results. Those considerations include the familiarity of the words, pictures, and associations shown to the test

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> measure the test taker's familiarity with pairings of words and pictures. Scientists who substituted familiar versus nonsense words in place of white versus black photos or names produced the same effect as the race IAT. Some behavioral scientists suggest the race IAT measures a "figure/ground" effect, where white faces and names are the familiar and fall into the background, while black faces and names are more distinctive, thus becoming more prominent.
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> Some critics note that the IAT does not distinguish between cultural stereotyping, knowledge of these stereotypes, and prejudice. In a similar vein, the IAT could measure knowledge of racial disparities, which in turn could generate anger, disapproval, or dismay—not necessarily endorsement or prejudice. In some test takers, the IAT could tap into a fear of being called a racist instead of being an unconscious racist.
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> There are many other factors that bias the test results, including knowing the purpose of the test, faking the test results, repeatedly taking the test, being in the presence of African Americans, cognitive quickness and flexibility, physical speed, and manual dexterity.
>
> Other social scientists have raised the serious problems related to the low level of predictive power associated with the test. The test has not been shown to significantly predict discriminatory behavior. Test results are not closely related to any other measures of discrimination: Correlations are modest at best. Even a meta-analysis by its inventors found this to be the case.
>
> Not surprisingly, the proportion of false positives may be substantial. Estimates of false positives range from 60 percent to 90 percent.
>
> This high probability of error has led its original proponents to conclude that it should be used with caution: "Taken together, there is substantial risk for both falsely identifying people as eventual discriminators and failing to identify people who will discriminate." In 2015, Greenwald, Banaji, and Brian Nosek, a University of Virginia psychologist, concluded that the IAT "risk[s] undesirably high rates of false classification."

NAGAI, *supra,* at 1–2 (footnotes omitted).

subjects; the subject's knowledge of racial stereotypes, rather than endorsement of those attitudes; the subject's familiarity with the images of prominent African-American figures; the number of test trials used to measure results (viz., an initial test versus retests); physiological factors such as manual dexterity; and fear of being labeled racist.[81] Those factors are particularly important given that the IAT measures responses in milliseconds, perhaps less time than it takes to blink your eyes.[82] Moreover, it is a mistake to attempt to justify the predictive ability of the IAT by comparing it to the "symbolic racism attitude" scores—viz., measures of preferences for or opposition to a list of policy-issue positions on subjects such as racial preferences and "affirmative action"—because those scores impermissibly assume their conclusion by treating conservative opposition to racial preferences as a form of racial bias.[83] In addition, the correlation between unconscious bias and discriminatory conduct—including controversial measures of racial bias, such as "symbolic racism" and

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[81] *See, e.g.*, C. Miguel Brendl et al., *How Do Indirect Measures of Evaluation Work? Evaluating the Inference of Prejudice in the Implicit Association Test*, 81 J. PERSONALITY & SOC. PSYCH. 760 (2001); William A. Cunningham et al., *Implicit Attitude Measures: Consistency, Stability, and Convergent Validity*, 12 PSYCH. SCI. 163 (2001); Nilanjana Dasgupta & Anthony G. Greenwald, *On the Malleability of Automatic Attitudes: Combating Automatic Prejudice with Images of Admired and Disliked Individuals*, 81 J. PERSONALITY & SOC. PSYCH. 800 (2001); Russell H. Fazio & Michael A. Olson, *Implicit Measures in Social Cognition Research: Their Meaning and Use*, 54 ANN. REV. PSYCH. 297 (2003); Cynthia M. Frantz et al., *A Threat in the Computer: The Race Implicit Association Test as a Stereotype Threat Experience*, 30 PERSONALITY & SOC. PSYCH. BULL. 1611 (2004); Anthony G. Greenwald et al., *Understanding and Using the Implicit Association Test: I. An Improved Scoring Algorithm*, 85 J. PERSONALITY & SOC. PSYCH. 197 (2003); Charles M. Judd et al., *Automatic Stereotypes vs. Automatic Prejudice: Sorting Out the Possibilities in the Payne (2001) Weapon Paradigm*, 40 J. EXPERIMENTAL SOC. PSYCH. 75 (2004); Hart Blanton & James Jaccard, *Unconscious Racism: A Concept in Pursuit of a Measure*, 34 ANN. REV. SOCIO. 277, 289 (2008); Mitchell & Tetlock, *supra* note 70, at 1031; Nilanjana Dasgupta, *Implicit Ingroup Favoritism, Outgroup Favoritism, and Their Behavioral Manifestations*, 17 SOC. JUST. RSCH. 143, 158 (2004); Klaus Rothermund & Dirk Wentura, *Underlying Processes in the Implicit Association Test: Dissociating Salience from Associations*, 133 J. EXPERIMENTAL PSYCH.: GEN. 139 (2004). *See generally* NAGAI, *supra* note 80, at 2, 5–7.

[82] Which takes only 400 milliseconds. Tyler Santora, *Why Do We Blink?*, LIVE SCI. (July 6, 2021), https://www.livescience.com/why-do-we-blink.html.

[83] NAGAI, *supra* note 80, at 8.

"microaggressions"[84]—is not robust and reliable.[85] The test might just as easily measure a subject's familiarity with the displayed pairs, rather than a racial attitude.[86] Even Greenwald and Banaji, the IAT's creators, have admitted that there is a substantial risk of false positives and false negatives with use of their test.[87]

There are two final points worth noting in this regard. Even if the above studies proved the existence of an unconscious racial bias, that would not

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[84] *Id.*

[85] Bartlett, *supra* note 80.

> Researchers from the University of Wisconsin at Madison, Harvard, and the University of Virginia examined 499 studies over 20 years involving 80,859 participants that used the IAT and other, similar measures. They discovered two things: One is that the correlation between implicit bias and discriminatory behavior appears weaker than previously thought. They also conclude that there is very little evidence that changes in implicit bias have anything to do with changes in a person's behavior. These findings, they write, "produce a challenge for this area of research."
>
> That's putting it mildly. "When you actually look at the evidence we collected, there's not necessarily strong evidence for the conclusions people have drawn," says Patrick Forscher, a co-author of the paper, which is currently under review at Psychological Bulletin. The finding that changes in implicit bias don't lead to changes in behavior, Forscher says, "should be stunning."
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> . . . .
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> Everyone agrees that the statistical effect linking bias to behavior is slight. They only disagree about how slight. Blanton's 2013 meta-analysis found less of a link than a 2009 meta-analysis by Banaji and Greenwald. Blanton sees the correlation as so small as to be trivial. Banaji and Greenwald, in a 2015 paper, argue that "statistically small effects" can have "societally large effects."

Id.

[86] *See* NAGAI, *supra* note 80, at 5–7.

[87] *See* MCWHORTER, *supra* note 6, at 20 (noting "the genuine and invaluable change that has occurred in our sociopolitical fabric over the past decades") ("That change is that to the to the modern American, being called a racist is all but equivalent to being called a pedophile."); NAGAI, *supra* note 80, at 8–9; Nosek & Riskind, *supra* note 80, at 133.

also automatically prove that a party's ultimate actions would be controlled by that attitude. "The critical point, for the purposes of policy implications, is that having thoughts is not the same as acting on those thoughts."[88] As Professors Brian Nosek and Rachel Riskind explained, "implicit measures assess thoughts, not behaviors—at least not behaviors of consequences."[89] The difference is significant. "Social policies are for regulating behaviors, not thoughts. Thinking particular thoughts might increase the likelihood of particular behaviors, but it does not guarantee that they will occur."[90] Multiple factors contribute to what a person does, particularly in the criminal justice system. Police officers might not have time to reflect on events as they unfold on the street, but prosecutors, judges, and juries do. Indeed, courts must consider the "totality of the circumstances" when reviewing whether a police officer had reasonable suspicion to detain someone for questioning or make an arrest,[91] judges instruct juries to consider all of the evidence when deciding the defendant's guilt, and appellate courts must review "*all of the evidence* . . . in the light most favorable to the prosecution" when deciding whether the proof is sufficient to support a jury's guilty verdict.[92] An unconscious attitude might have little effect on a person's ultimate action, and the amount of influence that the law is willing to suffer "is a value judgment," not a scientific conclusion.[93]

The other point is that the IAT does not support the conclusion that an unconscious bias reflects an *irremediable* character trait. On the contrary, social science experts acknowledge that subconscious biases are rectifiable.

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[88] Nosek & Riskind, *supra* note 80, at 125.

[89] *Id.* at 133.

[90] *Id.*

[91] *See, e.g.*, United States v. Sokolow, 490 U.S. 1, 9–10 (1989) (ruling that courts must consider the totality of circumstances when determining whether a police officer had reasonable suspicion that crime was afoot); Illinois v. Gates, 462 U.S. 213, 230–31 (1983) (same, probable cause to make an arrest).

[92] *See, e.g.*, Jackson v. Virginia, 443 U.S. 307, 318–19 (1979) (ruling that courts must consider all the record evidence when reviewing a claim that the evidence was insufficient to convict); Holland v. United States, 348 U.S. 121, 140 (1954) ("Circumstantial evidence in this respect is intrinsically no different from testimonial evidence.").

[93] Nosek & Riskind, *supra* note 80, at 124.

Consider the opinion of Stanford Professor Jennifer Eberhardt, who has trained police departments in responding to unconscious bias: "Neither our evolutionary path nor our present culture dooms us to be held hostage to bias. Change requires a kind of open-minded attention that is well within one's reach."[94] Even the creators of the IAT test, Professors Banaji and Greenwald, believe that overcoming unconscious biases takes "special effort" and is "not easy" but can be done.[95] Given the prominence of this social science theory over the last quarter century, as well as the heightened concern for awareness of racial bias since the 2020 death of George Floyd, it is unreasonable to maintain that Americans are unaware today of the risk of unconscious bias, regardless of what the case might have been decades ago.[96]

In sum, there is a strong argument that the IAT "isn't all it's cracked up to be."[97] The IAT is controversial even within the social science world and is more likely than not to produce false positive results based on response

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[94] EBERHARDT, *supra* note 74, at 7; *see also id.* at 68 (stating that training can overcome racial bias); *id.* at 185 ("Research supports the notion that raising the issue of race and discrimination explicitly can lead people to be more open-minded and act more fairly, particularly when they have time to reflect on their choices."); *id.* at 298 ("[T]he first step toward ending those disparities [who gets stopped, searched, etc.] is to discard the assumption that they are inevitable. Nowhere has this been made clearer to me than in Oakland, where the police department had a toxic relationship with the public for generations until it was ordered by the court to make sweeping changes. Through shifts in policies and practices over the last ten years, the department has not only improved police-community relations but also made it easier to curtail bias among officers."); Nosek & Riskind, *supra* note 80, at 125 ("If corrective processes are effective, unwanted implicit social cognitions may be present in mind but fail to influence judgment and action."); *id.* at 129–31 (discussing corrective strategies).

[95] BANAJI & GREENWALD, *supra* note 71, at 109.

[96] *See, e.g.*, NAGAI, *supra* note 80, at 2 (footnote omitted) ("Since the 1950s, public opinion on race has shown a decline in racial prejudice over time, with a momentous shift in white opinion toward the principle of racial equality."). It is also the case that "too much focus on how good innocent people can be biased without intention can sap people's motivation to do something about it. So teaching and learning about bias is a balancing act that has to be expertly calibrated to have the appropriate impact." EBERHARDT, *supra* note 74, at 282.

[97] Bartlett, *supra* note 80.

differences of mere milliseconds. It would be unconstitutional for the law to adopt, as a device for labeling the unconscious racial attitudes of individual parties, a test that cannot be used to measure the impartiality of a specific party's actions and that is more likely to be wrong than right.[98]

B. Are American Institutions Systemically Racist?

Perhaps critics believe that no definition of "systemic racism" is necessary because its meaning should be obvious to everyone. If that were true, however, the dictionary would tell us what that term means, because it gives us the average, everyday meaning of those words.[99] The dictionary, however, does not support that claim.

"Systemic" means "relating to or noting a policy, practice, or set of beliefs that has been established as normative or customary throughout a political,

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[98] *See* Turner v. United States, 396 U.S. 398, 418–19, 424 (1970); Leary v. United States, 395 U.S. 6, 52–53 (1969). *Leary* and *Turner* involved the constitutionality of a mandatory presumption that Congress adopted to help the prosecution prove an element of drug offenses. In each case, the Supreme Court held that device unconstitutional because it was irrational to presume that the ultimate fact (the defendant knew that a controlled substance had been imported) inevitably followed from the basic fact (the defendant possessed that drug). The Court held in *Leary* that the Due Process Clause bars Congress from presuming that a defendant knew that cannabis was imported or that it was in fact imported, given the amount of cannabis grown in the United States. *Leary*, 395 U.S. at 52–54. Relying on *Leary*, the Court later held that, given the amount of cocaine that is lawfully imported and later diverted, it was irrational to conclusively presume that any particular batch of cocaine had been unlawfully imported. It was rational, however, to presume that all heroin has been unlawfully imported, on the ground that heroin is not lawfully imported or produced domestically since it has no legitimate use under federal law. *Turner*, 396 U.S. at 418–24.

[99] Were this a case of constitutional or statutory interpretation, we would start our analysis of an undefined term by consulting the dictionary. *See, e.g.*, Van Buren v. United States, 141 S. Ct. 1648, 1654 (2021) (discussing statutory interpretation) ("Both Van Buren and the Government raise a host of policy arguments to support their respective interpretations [of the Computer Fraud and Abuse Act of 1986, 18 U.S.C. § 1030 (2018)]. But we start where we always do: with the text of the statute."); Nixon v. United States, 506 U.S. 224, 229 (1993) (discussing constitutional interpretation) ("In this case, we must examine Art. I, § 3, cl. 6, to determine the scope of the authority conferred upon the Senate by the Framers regarding impeachment. . . . The language and structure of this Clause are revealing. The first sentence is a grant of authority to the Senate, and the word 'sole' indicates that this authority is reposed in the Senate and nowhere else.").

social, or economic system"[100] or that is "fundamental to a predominant social, economic, or political practice."[101] "Racism" is "a belief . . . [in] inherent differences among the various human racial groups [that] determine cultural or individual achievement" and justify the ideology "that one's own race is superior and has the right to dominate others or that a [different] rac[e] . . . is inferior to" one's own.[102] Some dictionaries helpfully go further and define "institutional racism" or "structural racism" as being "a policy, system of government, etc., that is associated with or originated in such a doctrine . . . that favors members of the dominant racial or ethnic group, . . . while discriminating against or harming members of other groups [for the purpose of] preserv[ing] the social status, economic advantage, or political power of the dominant group."[103] In short, demonstrating that America is systemically racist would require someone to prove the existence of a consensus, backed by the force of law, that blacks are genetically and morally inferior to whites and that this difference

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[100] *Systemic*, DICTIONARY.COM, https://www.dictionary.com/browse/systemic (last visited Oct. 6, 2023).

[101] *Systemic*, MERRIAM-WEBSTER DICTIONARY, https://www.merriam-webster.com/dictionary/systemic (last visited Oct. 6, 2023).

[102] *Racism*, DICTIONARY.COM, https://www.dictionary.com/browse/racism (last visited Oct. 6, 2023); *see also, e.g.*, STEVEN E. BARKAN, RACE, CRIME, AND JUSTICE: THE CONTINUING AMERICAN DILEMMA 4–6 (2019) (defining "racial prejudice" as "negative attitudes and perceptions about social categories of people because of their perceived race or ethnicity," "racial stereotypes" as "false or simplified generalizations about people because of their race or ethnicity," and "racial discrimination" as "harsher treatment and/or the denial of rights and opportunities because of someone's race or ethnicity").

[103] DICTIONARY.COM, *supra* note 102. That is particularly the case where the burdened group is a minority, but the meaning is not limited in that regard. It goes both ways: members of a minority or majority can be the victim of discrimination. The Constitution reflects that broader interpretation. Members of majority groups have successfully challenged government programs that benefitted only minorities. *See, e.g.*, Students for Fair Admissions, Inc. v. President & Fellows of Harv. Coll., 143 S. Ct. 2141, 2166–76 (2023); Gratz v. Bollinger, 539 U.S. 244, 275–76 (2003); Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227–30 (1995); City of Richmond v. J.A. Croson Co., 488 U.S. 469, 509–11 (1989); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 319, 320–21, 321 n.54 (1978) (plurality opinion).

justifies discrimination against blacks throughout our legal, economic, and social institutions, policies, and practices.

If that is what critics mean, they are clearly wrong because the nation is *not* replete with systemic racism. Why? Because we know what systemic racism looks like in a government. How? Because it once *was* an integral part of our nation's legal fabric. The Declaration of Independence declared that "all men are created equal" and "are endowed by their Creator with certain unalienable rights," such as "Life, Liberty, and the pursuit of Happiness."[104] But the Supreme Court of the United States—in the most infamous passage of its most infamous opinion, *Dred Scott v. Sandford*—said that slaves "had no rights which the white man was bound to respect."[105] So much for "all men" meaning "all men."

Slavery existed in the American colonies from 1619 until July 4, 1776; no colony outlawed it.[106] Neither did the Declaration of Independence, the Articles of Confederation, nor the Constitution of the United States. In fact, several constitutional provisions, at a minimum, implicitly acknowledged

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[104] THE DECLARATION OF INDEPENDENCE pmbl. (U.S. 1776).

[105] Scott v. Sandford, 60 U.S. 393, 407 (1857).

> They had for more than a century before been regarded as beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect; and that the negro might justly and lawfully be reduced to slavery for his benefit. He was bought and sold, and treated as an ordinary article of merchandise and traffic, whenever a profit could be made by it. This opinion was at that time fixed and universal in the civilized portion of the white race. It was regarded as an axiom in morals as well as in politics, which no one thought of disputing, or supposed to be open to dispute; and men in every grade and position in society daily and habitually acted upon it in their private pursuits, as well as in matters of public concern, without doubting for a moment the correctness of this opinion.

Id.

[106] Connecticut and Rhode Island did, however, ban the importation of slaves in 1774. *See* David Menschel, Note, *Abolition Without Deliverance: The Law of Connecticut Slavery 1784–1848*, 111 YALE L.J. 183, 192–93 (2001); J. Stanley Lemons, *Rhode Island and the Slave Trade*, 60 R.I. HIST. 95, 96 (2002).

the institution of slavery and arguably gave it some political and legal protection.[107] Slavery existed on a legal basis in the Southern States for the

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[107] *See* Paul J. Larkin, Jr., *The Thirteenth Amendment*, *in* ANGELA SAILOR ET AL., HERITAGE FOUND., NO. 1320, LECTURE, SLAVERY AND THE CONSTITUTION (Feb. 23, 2021) [hereinafter SLAVERY AND THE CONSTITUTION]. The argument proceeds in several steps. First, the Framers knew how to outlaw unacceptable types of legislation. Congress cannot pass bills of attainder, ex post facto laws, export taxes, preferences for some ports over others, or titles of nobility. U.S. CONST. art. I, § 9, cl. 3. States cannot pass bills of attainder or ex post facto laws, adopt treaties with foreign nations, enact legislation coining money or impairing the obligation of contracts, or grant titles of nobility. *Id.* art. I, § 10, cl. 1. The Framers did not forbid slavery. Second, several provisions in the original Constitution protected the interests of slave owners. The Three-Fifths Clause augmented the voting power of slave states in the House of Representatives. *Id.* art. I, § 2, cl. 3 ("Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons."). The Slave Trade Clause kept Congress from outlawing the slave trade until a date in the future. *Id.* art. I, § 9, cl. 1 ("The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a Tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person."). The Militia Clause authorized Congress to empower the President to call out the militia to deal with slave insurrections. *Id.* art. I, § 8, cls. 1, 15 ("The Congress shall have Power . . . To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions . . . ."). And the Fugitive Slave Clause required each state to return slaves who had escaped to the state of their origin. *Id.* art. IV, § 2, cl. 3 ("No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due."). The issue whether the Constitution protected slavery has provoked a thoughtful debate in the academic community. *See, e.g.*, DON E. FEHRENBACHER & WARD M. MCAFEE, THE SLAVEHOLDING REPUBLIC: AN ACCOUNT OF THE UNITED STATES GOVERNMENT'S RELATIONS TO SLAVERY (Ward M. McAfee ed., 2001); MARK A. GRABER, *DRED SCOTT* AND THE PROBLEM OF CONSTITUTIONAL EVIL (2006); LUCAS E. MOREL, LINCOLN AND THE AMERICAN FOUNDING (2020); DAVID WALDSTREICHER, SLAVERY'S CONSTITUTION: FROM REVOLUTION TO RATIFICATION (2009); SEAN WILENTZ, NO PROPERTY IN MAN: SLAVERY AND ANTISLAVERY AT THE NATION'S FOUNDING (2019); Randy E. Barnett, *Was Slavery Unconstitutional Before the Thirteenth Amendment?: Lysander Spooner's Theory of Interpretation*, 28 PAC. L.J. 977, 977 (1997); Allen C. Guelzo, *The Slaveholders' View: An Anti-Slavery Constitution*, *in* SLAVERY AND THE CONSTITUTION, *supra*, at 9–12; Lucas E. Morel, *Lincoln and Douglas: Federalism and Founders' Intent*, *in* SLAVERY AND THE CONSTITUTION, *supra*, at 18–21; Timothy Sandefur,

nation's first seven decades.[108] Numerous federal and state laws reinforced that institution through a host of legal prohibitions on slaves and free blacks.[109] The criminal law made that point as well in numerous ways.[110] To

Pre-War, Anti-Slavery Constitutionalism, *in* SLAVERY AND THE CONSTITUTION, *supra*, at 5–9; Sean Wilentz, *Abolition and the Framers*, *in* SLAVERY AND THE CONSTITUTION, *supra*, at 13–17. The merits of that debate are beyond the scope of this Article.

[108] *See, e.g.*, DAVID BRION DAVIS, THE PROBLEM OF SLAVERY IN THE AGE OF REVOLUTION 1770–1823 (Oxford University Press 1999) (1975); A. LEON HIGGINBOTHAM, JR., IN THE MATTER OF COLOR: RACE AND THE AMERICAN LEGAL PROCESS: THE COLONIAL PERIOD (1978); KENNETH M. STAMPP, THE PECULIAR INSTITUTION: SLAVERY IN THE ANTE-BELLUM SOUTH (1956).

[109] For example, in 1790 Congress passed a naturalization law limiting citizenship to "any alien . . . being a free white person" who had resided within the United States for two years. Naturalization Act of 1790, ch. 3, § 1, 2 Stat. 103. Two years later, Congress passed legislation defining the militia as "each and every free able-bodied white male citizen" age eighteen or older in each state. Militia Act of 1792, ch. 33, § 1, 1 Stat. 271. States had numerous laws that facially discriminated against blacks. Those acts prohibited blacks from owning property, voting, sitting on a grand or petit jury, marrying whites, owning firearms, holding a business license, attending school, learning to read or write, raising or owning farm animals, and so forth. *See, e.g.*, Sherri Burr, *The Free Blacks of Virginia: A Personal Narrative, A Legal Construct*, 19 J. GENDER, RACE & JUST. 1, 13 (2016); John W. Cromwell, *The Aftermath of Nat Turner's Insurrection*, 5 J. NEGRO HIST. 208, 230 (1920); *supra* notes 13–14 (collecting authorities).

[110] As Professor Cassia Spohn explained:

> Before the Civil War, state laws provided different levels of punishment for blacks and whites. Slaves, in particular, were subject to harsher punishment. In Virginia, for example, slaves were subject to the death penalty for 73 offenses, whites for 1 offense. Sexual assault statutes also provided different punishments depending on the race of the victim. The Georgia Penal Code of 1816 prescribed the death penalty for the rape of a white woman by a slave or a free person of color. In contrast, the maximum penalty for the rape of a white woman by a white man was 20 years in prison, and a white man convicted of raping a black woman could be fined or imprisoned at the court's discretion. These racially discriminatory punishment differences reflected both a devaluation of black victims and a belief that strong measures were needed to restrain and control blacks, particularly black men, who were regarded as "primitive, wild, inferior beings." As a North Carolina Supreme Court Justice stated in 1830, 'The more debased or licentious a class of society is, the more rigorous must be the penal rules of restraint."

summarize a longstanding, tragic story, our history reveals ample proof that, at one time, the nation's laws created a legal caste system with blacks, whether slaves or free, occupying the bottom rung by force of law.

That legal system no longer exists. States and Congress took some preliminary steps at the end of the eighteenth century to end slavery.[111] But it took a long, bloody civil war to defeat the Southern States and pass the Reconstruction Amendments to end an institution that had existed in some states before our founding.[112] The Thirteenth Amendment expressly prohibited slavery throughout the United States.[113] The Fourteenth Amendment makes "[a]ll persons born or naturalized" in the nation "citizens of the United States and of the State wherein they reside," and bars any state from "depriv[ing] any person of life, liberty, or property without due process of law,"[114] or from "deny[ing] to any person within its jurisdiction the equal protection of the laws."[115] The Fifteenth Amendment adds to those rights the right to vote, a legal guarantee that enables blacks to

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CASSIA SPOHN, HOW DO JUDGES DECIDE?: THE SEARCH FOR FAIRNESS AND JUSTICE IN PUNISHMENT 185 (2d ed. 2009) (citations omitted).

[111] By 1790, more than 50 percent of the United States' population lived in the ten states that had outlawed slavery—Connecticut, Maine, Massachusetts, New Hampshire, New York, Pennsylvania, Rhode Island, and Vermont—as well as the Northwest and Indiana Territories. Congress prohibited American ships from participating in the slave trade in 1794 and made the importation of slaves a crime in 1808. Wilfred Reilly, *Slavery Does Not Define the Black American Experience*, *in* RED, WHITE, AND BLACK, *supra* note 43, at 39.

[112] *See, e.g.*, ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863–1877 (rev. ed. 2014) (1988); ALLEN C. GUELZO, RECONSTRUCTION: A CONCISE HISTORY (2018).

[113] *See* U.S. CONST. amend. XIII, § 1.

[114] *Id.* amend. XIV, § 1. That guarantee traces its lineage to Chapter 39 of the Magna Carta and prohibits the imprisonment of uncharged and unconvicted parties. Paul J. Larkin, Jr., *The Private Delegation Doctrine*, 73 FLA. L. REV. 31, 70–73 (2021).

[115] U.S. CONST. amend. XIV, § 1. That guarantee prohibits a state from adopting a separate legal code for African-Americans.

seek relief from the federal, state, and local political processes.[116] Formal, systemic, legally protected racism is gone.[117]

We also know what systemic racism looks like when it is a product of private custom protected or ignored by public law: the era of segregation. Following the passage of the Civil War Amendments and the end of Reconstruction, a shadowy version of systemic racism, known as "Jim Crow," used the law to enforce economic, political, and social forms of segregation for the seven decades that followed. Those laws were "public symbols and constant reminders of [the] inferior position" blacks held even after slavery's end.[118] Reminiscent in "bulk," "detail," and "effectiveness" of the "black codes" enacted in the post-Reconstruction South,[119] Jim Crow laws established two segregated legal and social systems "that lent the sanction of law to a racial ostracism" extending without exception to every institution and feature of life, "churches and schools, . . . housing and jobs, . . . eating and drinking."[120] The Supreme Court gave its approval to

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[116] *Id.* amend. XV, § 1 ("The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude . . . .").

[117] As is the "convict leasing" practice seen after Reconstruction in which blacks were arrested and convicted for nonpayment of debts, heavily fined, and imprisoned without pay—under conditions that would have made Dante's *Inferno* seem like a five-star hotel—until they could eliminate their debts. *See* DOUGLAS A. BLACKMON, SLAVERY BY ANOTHER NAME: THE RE-ENSLAVEMENT OF BLACK AMERICANS FROM THE CIVIL WAR TO WORLD WAR II 56–57 (2008). Debtors' prisons are now unlawful. *See* Tate v. Short, 401 U.S. 395, 397–98 (1971) (ruling that a state cannot imprison an offender for financial inability to pay a fine due to indigency); Williams v. Illinois, 399 U.S. 235, 239 (1970) (same, cannot extend a permissible term of imprisonment for financial inability to pay a fine due to indigency).

[118] *See, e.g.*, C. VANN WOODWARD, THE STRANGE CAREER OF JIM CROW 7 (commemorative ed. 2002) (1955).

[119] *See, e.g.*, JAMES FORMAN, JR., LOCKING UP OUR OWN: CRIME AND PUNISHMENT IN BLACK AMERICA 66 (2017) (quoting an Alabama law prohibiting blacks from carrying a pistol or other weapon).

[120] WOODWARD, *supra* note 118, at 7 ("Whether by law or by custom, that ostracism extended to virtually all forms of public transportation, to sports and recreations, to hospitals, orphanages, prisons, and asylums, and ultimately to funeral homes, morgues, and cemeteries.").

segregation in its 1896 decision in *Plessy v. Ferguson.*[121] *Plessy* upheld a state law requiring the use of separate railroad cars for whites and blacks and thereby gave birth to the "separate but equal" doctrine."[122]

But the Supreme Court ultimately did an about-face. Beginning with its 1954 and 1955 decisions in *Brown v. Board of Education*,[123] the Court held invalid obvious (and some subtle) forms of private but state-law-backed systemic racism.[124] Congress also prohibited private, informal social

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[121] Plessy v. Ferguson, 163 U.S. 537, 552 (1896).

[122] *Cf.* Brief for Plaintiff in Error, *Plessy*, 163 U.S. 537 (1896) (arguing that the law created a "legalized caste-distinction *among citizens").* In dissent, Justice John Harlan predicted that "the judgment this day rendered will, in time, prove to be quite as pernicious as the decision made by this tribunal in the Dred Scott case." *Plessy*, 163 U.S. at 552, 559 (Harlan, J., dissenting). History proved him right. For a contemporary discussion of why *Plessy* was wrong and why today's woke racialists simply repeat the same mistake it made, see GianCarlo Canaparo, *Permission to Hate: Antiracism and* Plessy, 27 TEX. REV. L. & POL. 97 (2022).

[123] Brown v. Bd. of Educ. (*Brown I*), 347 U.S. 483 (1954) (ruling that the Fourteenth Amendment prohibited segregated public elementary schools); Brown v. Bd. of Educ. (*Brown II*), 349 U.S. 294, 301 (1955) (ruling that the holding of *Brown I* must be implemented nationwide with "all deliberate speed").

[124] *See, e.g.*, Adickes v. S.H. Kress & Co., 398 U.S. 144 (1970) (holding that a plaintiff could seek relief under the Enforcement Act of 1871 (codified in part at 42 U.S.C. § 1983 (2018)), against a state-enforced custom of segregating races in public eating places); Reitman v. Mulkey, 387 U.S. 369 (1967) (holding unconstitutional a state constitutional provision prohibiting the legislature from denying any property owner the right to sell, lease, or rent real property as he chose); Robinson v. Florida, 378 U.S. 153 (1964) (holding unconstitutional state regulations requiring separate toilet facilities in any business employing blacks); Anderson v. Martin, 375 U.S. 399 (1964) (holding unconstitutional a state law requiring designation of the race of a candidate on ballots in primary, general, or special elections); Goss v. Bd. Of Educ., 373 U.S. 683 (1963) (holding unconstitutional a state law permitting students to transfer out of any school where he or she would be in the minority); Lombard v. Louisiana, 373 U.S. 267 (1963) (ruling that the police may not enforce a private demand for segregated restaurant facilities); Peterson v. City of Greenville, 373 U.S. 244 (1963) (holding unconstitutional city ordinance requiring segregated restaurant facilities); Burton v. Wilmington Parking Auth., 365 U.S. 715 (1961) (holding unconstitutional the exclusion of blacks solely because of their race by a restaurant leasing from the state); Holmes v. Atlanta, 350 U.S. 879 (1955) (holding unconstitutional a city ordinance segregating city parks and golf courses); Baltimore City v. Dawson, 350 U.S. 877 (1955), *summarily aff'g* 220 F.2d 386 (4th Cir. 1955) (holding unconstitutional racial

ostracism of blacks, whether or not backed by statute. Beginning in 1964, Congress enacted a series of statutes outlawing private racial discrimination in employment, voting, and housing, as well as discrimination by the recipients of federal funds.[125] Since then, Congress has repeatedly passed supplementary legislation that reauthorized the laws on the books, expanded their substantive reach, and enhanced the remedies available to an injured party.[126] Together, the Supreme Court and Congress have sought

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segregation in public beaches and bathhouses maintained by the city); Shelley v. Kraemer, 334 U.S. 1 (1948) (holding unconstitutional restrictive covenants, enforced by state law, prohibiting occupancy or ownership by blacks); Guinn v. United States, 238 U.S. 347 (1915) (holding unconstitutional a "grandfather clause" voting requirement); Lane v. Wilson, 307 U.S. 268 (1939) (same, registration scheme predicated on grandfather clause); Smith v. Allwright, 321 U.S. 649 (1944) (same, white primaries); Schnell v. Davis, 336 U.S. 933 (1949) (per curiam), *aff'g* 81 F. Supp. 872 (S.D. Ala. 1949) (same, test of constitutional knowledge); Gomillion v. Lightfoot, 364 U.S. 339, 347 (1960) (same, racial gerrymander); *see also* Turner v. City of Memphis, 369 U.S. 350 (1962) (relying on *Burton* to rule that private facilities cannot rely on state statutes or regulations to bar blacks from service); *id.* at 353 (collecting cases); New Orleans City Park Improvement Ass'n v. Detiege, 358 U.S. 54 (1958), *summarily aff'g* 252 F.2d 122 (5th Cir. 1958) (relying on *Holmes* and *Dawson* to sustain a permanent injunction barring segregated city park facilities); Gayle v. Browder, 352 U.S. 903 (1956), *summarily aff'g* 142 F. Supp. 707 (M.D. Ala. 1956) (relying on *Brown I*, *Holmes*, and *Dawson* to hold unconstitutional a city ordinance requiring segregated busses); Barrows v. Jackson, 346 U.S. 249 (1953) (overturning state court judgment awarding damages for the breach of a covenant invalid under *Shelley*). At the same time, the Court also flubbed a few easy ground balls. *See, e.g.*, Palmer v. Thompson, 403 U.S. 217 (1971) (upholding the constitutionality of a city's decision to close all public pools rather than operate them on a nondiscriminatory basis).

[125] *See, e.g.*, Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (1964) (codified as amended at 42 U.S.C. § 2000e *et seq.* (2018)); Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (1965) (codified as amended at 52 U.S.C. § 10301 *et seq.* (2018)); Civil Rights Act of 1968, Pub. L. No. 90-284, 82 Stat. 73 (1968) (codified as amended at 42 U.S.C. § 3601 *et seq.* (2018)).

[126] *See, e.g.*, Fannie Lou Hammer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, 120 Stat. 577 (2006) (codified as amended at 52 U.S.C. § 10301 *et seq.* (2018)); Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991) (codified as amended in scattered sections of 42 U.S.C. (2018)); Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, 102 Stat. 28 (1988) (same); Voting Rights Amendments Act of 1982, Pub. L. No. 97-205, 96 Stat. 131 (1982) (codified at 52 U.S.C. § 10301 *et seq.* (2018)); Housing and Community Development Act of

to extirpate racism from public and private life in the hope of achieving a race-neutral Constitution and society.[127]

To be sure, there is no doubt that the path from 1787 to 1865, from 1865 to 1954, from 1954 to 1964, and from 1964 to today has been a slow one; that there have been numerous missteps along the way;[128] and that the enterprise will always be a work in progress on this side of the Promised Land.[129] We must be vigilant to eliminate racial discrimination when it

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1974, Pub. L. No. 93-383, 88 Stat. 633 (1974); Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103 (1972) (codified as amended in scattered sections of 42 U.S.C. (2018)); Voting Rights Act Amendments of 1975, Pub. L. No. 94-73, 89 Stat. 400 (1975); Voting Rights Act Amendments of 1970, Pub. L. No. 91-285, 84 Stat. 314 (1970); *see also, e.g.*, Donald R. Livingston, *The Civil Rights Act of 1991 and EEOC Enforcement*, 23 STETSON L. REV. 53, 53–54 (1993). Congress has also passed ancillary legislation to try to help black Americans improve their economic, social, and educational status. *See, e.g.*, Food Stamp Act of 1964, Pub. L. No. 88-525, 78 Stat. 703 (1964); Child Nutrition Act of 1966, Pub. L. No. 89-642, 80 Stat. 885 (1966); Elementary and Secondary Education Act of 1965, Pub. L. No. 89-10, 79 Stat. 27 (1965); Child Nutrition and WIC Reauthorization Act of 2004, Pub. L. No. 108-265, 118 Stat. 729 (2004). Public and private "affirmative action" programs in education and employment also sought to assist blacks. *See, e.g.*, Grutter v. Bollinger, 539 U.S. 306 (2003); Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995); City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989); Fullilove v. Klutznick, 448 U.S. 448 (1980); United Steelworkers of Am. v. Weber, 443 U.S. 193 (1979); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978).

[127] As Justice John Harlan envisioned. *See Plessy*, 163 U.S. at 559 (Harlan, J., dissenting).

[128] Although "the central purpose of the Fourteenth Amendment was to eliminate racial discrimination emanating from official sources in the States," *McLaughlin v. Florida*, 379 U.S. 184, 192 (1964), the states often fell well short of meeting their duties. *See, e.g.*, Whitus v. Georgia, 385 U.S. 545 (1967); Hernandez v. Texas, 347 U.S. 475 (1954); Avery v. Georgia, 345 U.S. 559 (1953); Pierre v. Louisiana, 306 U.S. 354 (1939); Hale v. Kentucky, 303 U.S. 613 (1938); Hollins v. Oklahoma, 295 U.S. 394 (1935); Norris v. Alabama, 294 U.S. 587 (1935); Rogers v. Alabama, 192 U.S. 226 (1904); Carter v. Texas, 177 U.S. 442 (1900); Neal v. Delaware, 103 U.S. 370 (1881); *Ex parte* Virginia, 100 U.S. 339 (1880); Strauder v. West Virginia, 100 U.S. 303 (1880); James Forman, Jr., *Juries and Race in the Nineteenth Century*, 113 YALE L.J. 895, 917–18 (2004).

[129] *See, e.g.*, Pena-Rodriguez v. Colorado, 580 U.S. 206, 222–29 (2017) (ruling that the Equal Protection Clause entitles a defendant to prove his claim that racial bias infected jury deliberations); Buck v. Davis, 580 U.S. 100, 118–22 (2017) (finding prejudicial the introduction of testimony by a defense psychologist that black males are prone to violence); Miller-El v. Dretke, 545 U.S. 231, 236, 266 (2005) (ruling that the prosecution used

occurs, to avoid the obvious physical or financial harm and personal insult that discrimination causes its victims, and to enlist the support of community members by cooperating with law enforcement.[130] But the nation is committed to a color-blind approach to public and private governance. Indeed, even some of the most fervent advocates of the existence of systemic racism have acknowledged that Americans have emphatically rejected racism as a legitimate justification for public or private policy.[131]

Those who believe America is systemically racist respond that racism's lingering effects still permeate the institutions that run and govern the country to the detriment of non-whites.[132] The continuing existence of this racism, they argue, is proved by the continuing existence of racial disparities.[133] Racial disparities are proof-positive of racism because disparities come only from "power and policies" and are never "rooted in

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peremptory challenges to dismiss members of the venire because of their race); RONALD WEITZER & STEVEN A. TUCH, RACE AND POLICING IN AMERICA: CONFLICT AND REFORM 32 (2006) (citations omitted) ("The existence of police prejudice has been documented in studies going back several decades."); Lawrence W. Sherman, *Fair and Effective Policing*, *in* CRIME: PUBLIC POLICIES FOR CRIME CONTROL 383, 402 (James Q. Wilson & Joan Petersilia eds., 2002) ("Considerable evidence suggests that there is indeed racial discrimination or disparity in arrest decisions by police, even when appropriate denominators are employed.").

[130] *See, e.g.*, TOM R. TYLER, WHY PEOPLE OBEY THE LAW (2006) (concluding that people generally follow the law out of respect, not fear); PETER C. YEAGER, THE LIMITS OF LAW: THE PUBLIC REGULATION OF PRIVATE POLLUTION 9 (1991) ("As criminologists have long known, where laws lack legitimacy, violation rates are likely to be relatively high, other factors held constant."); Larkin & Rosenthal, *supra* note 1, at 206.

[131] *See, e.g.*, ALEXANDER, *supra* note 1, at 223 ("Nooses, racial slurs, and overt bigotry are widely condemned by people across the political spectrum; they are understood to be remnants of the past, no longer reflective of the prevailing public consensus about race.").

[132] DELGADO & STEFANCIC, *supra* note 1, at 2, 25.

[133] Claire Cain Miller et al., *'When I See Racial Disparities, I See Racism.' Discussing Race, Gender and Mobility*, N.Y. TIMES (Mar. 27, 2018), https://www.nytimes.com/interactive/2018/03/27/upshot/reader-questions-about-race-gender-and-mobility.html (quoting Professor Kendi) ("[W]hen I see racial disparities, I see racism.").

groups of people."[134] This claim, however, cannot pass an empirical stress test.

A vast army of researchers have spent thousands of combined years examining the underlying causes of racial disparities, and what they have found is that the causes of racial disparities are many and complicated. In rare instances, racism is a disparity's exclusive or dominant cause. Such was the case, for example, in the disparities between black and white populations at the polls during Jim Crow.[135] But far more often, disparities result from what economist Thomas Sowell calls "morally neutral" causes like "crop failures, birth order, geographic settings, or demographic and cultural differences."[136]

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[134] IBRAM X. KENDI, HOW TO BE AN ANTIRACIST 10 (rev. ed. 2023) (2019); *see id.* at 22 ("The defining question is whether the discrimination is creating equity or inequity. If discrimination is creating equity, then it is antiracist. If discrimination is creating inequity, then it is racist.); *id.* at 24 ("The only remedy to . . . racist discrimination . . . is . . . antiracist discrimination . . . . The only remedy to past . . . racist discrimination . . . is present . . . antiracist discrimination . . . . The only remedy to present . . . racist discrimination . . . is future . . . antiracist discrimination . . . .").

[135] *See* WOODWARD, *supra* note 118, at 85 (observing that the number of registered black voters in Louisiana fell from 130,334 in 1896 to only 1,342 in 1904, and that this was caused by disenfranchisement laws and policies).

[136] THOMAS SOWELL, DISCRIMINATION AND DISPARITIES 165 (2019) (collecting studies); *see also* ANGELO M. CODEVILLA, THE CHARACTER OF NATIONS: HOW POLITICS MAKES AND BREAKS PROSPERITY, FAMILY, AND CIVILITY (2009) (exploring the effects of various governmental systems on the development of the people under them); DELBERT S. ELLIOTT ET AL., GOOD KIDS FROM BAD NEIGHBORHOODS: SUCCESSFUL DEVELOPMENT IN SOCIAL CONTEXT (2006) (studying the effects of individual attributes and community values and customs on the development of youth from poor neighborhoods); PATRICK FAGAN ET AL., HERITAGE FOUND., THE POSITIVE EFFECTS OF MARRIAGE: A BOOK OF CHARTS (2002), https://www.heritage.org/marriage-and-family/report/the-positive-effects-marriage-book-charts (studying the effects of marriage and being raised in two- or one-parent homes on the development of children); MALCOLM GLADWELL, OUTLIERS: THE STORY OF SUCCESS (2008) (studying how successful people are shaped by their culture, family life, and other factors present in their upbringings); DONALD L. HOROWITZ, ETHNIC GROUPS IN CONFLICT (1985) (studying the effects of conflict on the development of the groups who are touched by them); DAVID S. LANDES, THE WEALTH AND POVERTY OF NATIONS: WHY SOME ARE SO RICH AND SOME SO POOR (1999) (studying why some countries are wealthy and others poor and noting the complex causes, which include culture, geography, and, sometimes, pure chance); CHARLES MURRAY, HUMAN ACCOMPLISHMENT: THE PURSUIT OF EXCELLENCE IN THE ARTS AND SCIENCES, 800 B.C.

Geography's effects on inter-group disparities offer a particularly salient counterargument to this claim because geographic settings involve no human actors whatsoever. Sowell has called geography an "intractable obstacle" to equal outcomes.[137] Significant causes of lingering disparities are the benefits of access to water transportation, which sped up some groups' scientific and cultural advancement, and the detriments of a lack of natural resources, which did the opposite for other groups.[138]

Another counterargument to the claim that racism lurks behind all disparities is found in natural experiments where race is held constant. Consider, for example, black West-Indians who immigrated into black neighborhoods in and around New York City throughout the 1900s. They shared skin color, location, schools, and a history of enslavement with their black American-born neighbors, and yet they tended to have higher-skill jobs, higher incomes, higher levels of education, and lower representation in prisons.[139] Nigerian immigrants offer another such natural experiment.

TO 1950 (2003) (collecting studies); ELLEN CHURCHILL SEMPLE, INFLUENCES OF GEOGRAPHIC ENVIRONMENT ON THE BASIS OF RATZEL'S SYSTEMS OF ANTHROPO-GEOGRAPHY (1911) (studying the ways in which human development is shaped by geography); THOMAS SOWELL, RACE AND ECONOMICS (1975) (collecting studies); David Austen-Smith & Roland G. Fryer, Jr., *The Economics of 'Acting White'* 3 (Nat'l Bureau of Econ. Rsch., Working Paper No. 9904, 2003), https://www.nber.org/papers/w9904 (finding a connection between disparities between black and white students' educational achievements and the cultural phenomenon of "acting white" whereby students of color socially condition one another against engaging in behaviors ("education, ballet, etc.") that are associated with white people).

137 SOWELL, DISCRIMINATION AND DISPARITIES, *supra* note 136, at 18.

138 *Id.* at 18–23 (collecting studies); *see also* THOMAS SOWELL, BLACK REDNECKS AND WHITE LIBERALS 264 (2006) (2005) ("If there is an injustice, it is an injustice which extends beyond the control of any existing government, institution, or society, because it involves the confluences of history, demography, culture, geography, and other factors, including luck. If there is an injustice, it is at this cosmic level in the vagaries of fate.").

139 SOWELL, BLACK REDNECKS AND WHITE LIBERALS, *supra* note 138, at 304–05 (citing IVAN LIGHT, ETHNIC ENTERPRISE IN AMERICA: BUSINESS AND WELFARE AMONG CHINESE, JAPANESE AND BLACKS (1972); NATHAN GLAZER & DANIEL PATRICK MOYNIHAN, BEYOND THE MELTING POT 35 (2d ed. 1970) (1963); GILBERT OSOFSKY, HARLEM: THE MAKING OF A GHETTO: NEGRO NEW YORK, 1890–1930 (1966); CLAUDE MCKAY, HARLEM: NEGRO METROPOLIS (1968); IRA DE A. REID, THE NEGRO IMMIGRANT: HIS BACKGROUND, CHARACTERISTICS AND SOCIAL ADJUSTMENT, 1899–1937, at 248 (1970) (1969); Nancy Foner, *West Indians in New York City and London: A Comparative Analysis*, 13 INT'L MIGRATION REV. 285 (1979); Thomas Sowell,

They too are black, but they tend to outperform both black and white native-born Americans in educational and financial metrics.[140] Asian Americans, meanwhile, beat every other racial group in America in terms of education, income, and self-reported happiness.[141] Systemic racism does not explain disparities like those,[142] and the fact that these groups thrive in a country that is supposedly designed to keep down anyone who is not white undermines the argument that America's institutions are operating on a sort of racist autopilot set in motion in the more overtly racist past.[143]

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Three Black Histories, in ESSAYS AND DATA ON AMERICAN ETHNIC GROUPS 43 (Thomas Sowell ed., 1978); Sara Rimer & Karen W. Arenson, *Top Colleges Take More Blacks, But Which Ones?*, N.Y. TIMES, June 24, 2004, at A1, A18, https://www.nytimes.com/2004/06/24/us/top-colleges-take-more-blacks-but-which-ones.html.).

[140] *See* Abel Chikanda & Julie Susanne Morris, *Assessing the Integration Outcomes of African Immigrants in the United States*, 40 AFR. GEOGRAPHICAL REV. 1 (2021); Ima Jackson-Obot, *What Makes Nigerians in Diaspora So Successful*, FIN. TIMES (Oct. 29, 2020), https://www.ft.com/content/ca39b445-442a-4845-a07c-0f5dae5f3460; Carlos Echeverria-Estrada & Jeanne Batalova, *Sub-Saharan African Immigrants in the United States*, MIGRATION POL'Y INSTITUTE SPOTLIGHT (Nov. 6, 2019), https://www.migrationpolicy.org/article/sub-saharan-african-immigrants-united-states-2018; STELLA U. OGUNWOLE ET AL., U.S. DEP'T OF COM., AM. CMTY. SURV. REPS., CHARACTERISTICS OF SELECTED SUB-SAHARAN AFRICAN AND CARIBBEAN ANCESTRY GROUPS IN THE UNITED STATES: 2008–2012 (June 2017), https://www.census.gov/content/dam/Census/library/publications/2017/acs/acs-34.pdf; RAD DIASPORA PROFILE: THE NIGERIAN DIASPORA IN THE UNITED STATES, MIGRATION POL'Y INST. (June 2015), https://www.migrationpolicy.org/sites/default/files/publications/RAD-Nigeria.pdf.

[141] *See, e.g.*, PEW RSCH. CTR. REP., THE RISE OF ASIAN AMERICANS (June 19, 2012), https://www.pewresearch.org/social-trends/2012/06/19/the-rise-of-asian-americans/; Tim Wadsworth & Philip M. Pendergast, *Race, Ethnicity and Subjective Well-Being: Exploring the Disparities in Life Satisfaction Among Whites, Latinx, and Asians*, 11 INT'L. J. WELLBEING 51, 57–58 (2021).

[142] Culture is a much better explanatory variable. *See, e.g.*, SOWELL, BLACK REDNECKS AND WHITE LIBERALS, *supra* note 138, at 54; IRA DE A. REID, THE NEGRO IMMIGRANT: HIS BACKGROUND, CHARACTERISTICS AND SOCIAL ADJUSTMENT, 1899–1937, at 35 (1970) (1969) (finding that black immigrants "bring[] a cultural heritage that is vastly different from that of the American Negro").

[143] *See also* Kronen, *supra* note 52 (pointing out the myriad problems of trying to prove the claim that historical racism is the cause of present disparities).

Where does that leave us? With these two questions: If the American people are not racist, if the nation's laws are facially neutral as to race, if those people do not apply their laws "with an evil eye and an unequal hand" when exercising public or private authority[144]—if all that is true, what does the president mean by his use of the term "systemic racism"? Once we know what that term means, the next question is this: Are critics right—that is, is the nation systemically racist? To answer those questions, we start with the criminal justice system.

II. IS THE AMERICAN CRIMINAL JUSTICE SYSTEM SYSTEMICALLY RACIST?

The people who believe that America is racist to its core have the same feeling about its criminal justice system. In fact, to them, the latter conclusion follows ineluctably from the former. They see that process as a tool to maintain a long-established caste system that originally placed black slaves in the lowest rung, tantamount to the shudra varna (or Hindu worker class), and that has kept so-called "free" blacks there ever since.[145] The institutions of the criminal justice system exist not to adjudicate criminal charges and constitutional rights, but to use force to maintain blacks in their current straits. White America might see the police as "the foot soldiers of an ordered society."[146] To black America, however, police officers are "fascist pigs" sent into poor black neighborhoods by "majoritarian pigs" to scoop up residents for the crime of being black.[147]

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144 Yick Wo v. Hopkins, 118 U.S. 356, 373–74 (1886).

145 *See, e.g.*, COATES, *supra* note 38, at 105 ("You and I, my son, are that 'below.' That was true in 1776. It is true today.").

146 Roberts v. Louisiana, 431 U.S. 633, 642 (1977) (Rehnquist, J., dissenting).

147 COATES, *supra* note 38, at 78–79 ("The truth is that the police reflect America in all of its will and fear, and whatever we might make of this country's criminal justice policy, it cannot be said that it was imposed by a repressive minority. The abuses that have followed from these policies—the sprawling carceral state, the random detention of black people, the torture of suspects—are the product of democratic will. And so to challenge the police is to challenge the American people who send them into the ghettos armed with the same self-generated fears that compelled the people who think they are white to flee the cities and into the Dream. The problem with the police is not that they are fascist pigs but that our country is ruled by majoritarian pigs."); *id.* at 98 (describing police forces as "armies"); *see* ALEXANDER, *supra* note 1, at 184–86; *infra* notes 222–32 and accompanying text.

Those critics are mistaken factually and legally. They overgeneralize from individual cases of discriminatory conduct to a class-wide claim of racism. People claiming to be the victim of discrimination must prove that the government injured them on the basis of race. Broad allegations of societal discrimination against blacks as a class are insufficient. Critics also overlook the fact that African-Americans are more often victimized by other African-Americans than by whites and that aggressive enforcement of the laws against violent crime and drug trafficking helps far more blacks by preventing them from becoming crime victims than it injures through imprisonment blacks who victimize their neighbors.

Before directly addressing the critics' claims, a word is needed about the difficulties of analyzing the complex, multipart framework constituting American criminal justice.

A. The Challenge of Analyzing a Complex, Multipart System

To some extent, any analysis of the "American criminal justice system" will inevitably lead to some degree of overgeneralization and, therefore, inaccuracy. Technically, there are either five different criminal justice systems—federal, state, tribal, the District of Columbia, and the territories—or fifty-four different systems—if you count each state and territory separately. There are sufficient commonalities to justify examining them as one system, but there also is a certain artificiality to doing so. Each state is responsible for designing and implementing its own criminal laws, which means that any flaws or benefits seen in one cannot automatically be attributed to the others.

There are also structural differences between the state and federal systems that further complicate the analysis. Voters elect their state's attorney general in forty-nine of fifty states,[148] which, by definition, makes them politicians. By contrast, the President appoints the U.S. Attorney General, who is generally considered to be the nation's chief but apolitical law enforcement officer.[149] Also, the Attorney General can only be held

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[148] *See, e.g.*, S.C. CONST. art. VI, § 7, cl. 1. New Jersey is the exception; the governor fills that position. *See* N.J. Stat. Ann. § 52:17A-2 (West 2023).

[149] *See, e.g.*, Kelly Laco, *AG Garland Violates Pledge to Remain Nonpolitical in Fiery Statement Blasting States' Election Laws*, FOX NEWS (July 17, 2021, 12:50 PM),

responsible for decisions as to whether and how to enforce the laws Congress passes; he has no authority to vote on or veto them. Plus, any decision to try to "make new law" by systematically declining to enforce legislation that Congress has passed via the exercise of prosecutorial discretion is a very bad idea.[150] We cannot fault the Attorney General for refusing to follow an unwise course.

Moreover, although the U.S. Attorney General is legally responsible for managing all aspects of the federal government's participation in the criminal justice system,[151] given the vast size of the U.S. Justice Department today, as a practical matter, it makes little sense to blame the Attorney General for the case-specific judgments of his principal lieutenants, let alone their subordinates.[152] The upshot is that, although we call the

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https://www.foxnews.com/politics/garland-violates-pledge-nonpolitical; Charlie Savage, *Is an Attorney General Independent or Political? Barr Rekindles a Debate*, N.Y. TIMES (May 1, 2019), https://www.nytimes.com/2019/05/01/us/politics/attorney-general-barr.html.

[150] *See* Paul J. Larkin, Jr., *Reflexive Federalism: Marijuana Federalism*, 44 HARV. J.L. & PUB. POL'Y 523, 538–42 (2021) (discussing those problems in detail).

[151] *See, e.g.*, 28 U.S.C. § 501 (creating the U.S. Justice Department); 28 U.S.C. § 503 (empowering the President to appoint a U.S. Attorney General as the principal officer heading the Justice Department); 28 U.S.C. §§ 517–19 (empowering the Attorney General to manage all federal litigation); 28 U.S.C. §§ 531–32 (creating the Federal Bureau of Investigation, placing it in the Justice Department, and empowering the Attorney General to appoint the FBI Director); 28 U.S.C. § 561 (creating the U.S. Marshal's Service and placing it in the Justice Department under the authority of the Attorney General); 28 U.S.C. § 599A (creating the Bureau of Alcohol, Tobacco, Firearms, and Explosives); 18 U.S.C. § 4041 (creating the federal Bureau of Prisons); Reorganization Plan No. 2 of 1973, 87 Stat. 1091 (1973) (codified as amended at 5 U.S.C. app. 1 (2018)) (creating the Drug Enforcement Administration); *see generally* U.S. Dep't of Just., Organizational Chart (Feb. 5, 2018), https://perma.cc/7NLD-TJQ3.

[152] *See* 28 U.S.C. §§ 506–507A (authorizing the President to appoint a deputy attorney general, associate attorney general, solicitor general, and 13 assistant attorneys general); 28 U.S.C. § 510 (authorizing the attorney general to delegate or reassign his authority to other department officers, employees, or agencies); U.S. Dep't of Just., FY 2021 Budget Request at a Glance (2021), https://www.justice.gov/doj/page/file/1246611/download (stating that there are 93 U.S. Attorneys responsible for more than 11,000 personnel); Larkin, *supra* note 27, at 775 ("The Attorney General has the legal authority to supervise criminal litigation in the federal courts, but, even aided by his lieutenants at the department, he cannot oversee every criminal prosecution that the department brings.").

combined work of a host of different actors a "system," it would be a mistake to assume that there is one supervisory official in control of the entire process whose motive defines the intent for the whole system.[153]

All that being true, we will still analyze the claim that the "criminal justice system" is systemically racist. In part, we will do so because that has been the claim made for more than a decade. In part, because we should not let the perfect be the enemy of the good. Like the debate over that system, this Article will review the macro-level operation of the machinery of criminal justice.[154]

B. Does the American Criminal Justice System Operate with a Discriminatory Intent?

Government officials can violate the Equal Protection Clause in either of two ways. They can enforce a statute that discriminates on its face based on an invidious characteristic such as race. No one challenges the federal or state criminal codes on that ground, however, and no such claim could succeed because neither set of laws facially discriminates against African-Americans. The texts of the criminal codes apply equally to all offenders, whether black or white.[155] Alternatively, an official could enforce a facially neutral statute in a racially discriminatory manner—viz., a government

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[153] Professor James Forman, Jr., made that point well. *See* FORMAN, *supra* note 119, at 13–14 (footnote omitted) ("Mass incarceration wasn't created overnight; its components were assembled piecemeal over a forty-year period. And those components are many. The police make arrests, pretrial service agencies recommend bond, prosecutors make charging decisions, defense lawyers defend (sometimes), juries adjudicate (in the rare case that doesn't plead), legislatures establish the sentence ranges, judges impose sentences within these ranges, corrections departments run prisons, probation and parole officers supervise released offenders, and so on. The result is an almost absurdly disaggregated and uncoordinated criminal justice system—or 'non-system,' as Daniel Freed once called it.").

[154] We are not alone in so analyzing those systems. *See, e.g.*, STEPHANOS BIBAS, THE MACHINERY OF CRIMINAL JUSTICE (2012); WILLIAM J. STUNTZ, THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE (2011); Herbert L. Packer, *Two Models of the Criminal Process*, 113 U. PA. L. REV. 1 (1964).

[155] *See* KENNEDY, *supra* note 1, at 375–76.

official could act based on discriminatory animus.[156] Another option—an effects test—is not available. As the Supreme Court has held repeatedly, a facially neutral statute is not unconstitutional simply because it has a disparate impact on a minority group unless the decision-maker acted at least in part to achieve that result.

In its 1976 decision in *Washington v. Davis*, the Supreme Court of the United States ruled that the Equal Protection and Due Process Clauses ban only intentional racial discrimination, not merely the disproportionate effect that a state action might have on a particular racial group.[157] For example, the "systematic exclusion" of blacks from juries can constitute an "unequal application of the law" so stark as to establish a prima facie case of intentional discrimination,[158] but the requirement of proving intentional discrimination nonetheless remains on the party asserting that claim.[159] As the Court later noted in *Personnel Administrator v. Feeney*, "even if a neutral law has a disproportionately adverse effect upon a racial minority, it is unconstitutional under the Equal Protection Clause only if that impact can be traced to a discriminatory purpose."[160] Moreover, combining

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[156] *See, e.g.*, United States v. Armstrong, 517 U.S. 456, 463–67 (1996); Yick Wo v. Hopkins, 118 U.S. 356 (1886).

[157] Washington v. Davis, 426 U.S. 229, 239 (1976).

> The central purpose of the Equal Protection Clause of the Fourteenth Amendment is the prevention of official conduct discriminating on the basis of race. It is also true that the Due Process Clause of the Fifth Amendment contains an equal protection component prohibiting the United States from invidiously discriminating between individuals or groups. *Bolling v. Sharpe*, 347 U.S. 497 (1954). But our cases have not embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional *solely* because it has a racially disproportionate impact.

Id.

[158] *Id.* (quoting Akins v. Texas, 325 U.S. 398, 403–04 (1945)).

[159] *See* Castaneda v. Partida, 430 U.S. 482, 493–95 (1977) (requiring a defendant to establish the intentional exclusion of grand jurors due to their race and describing the manner of proof).

[160] Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 272 (1979).

disparate effect with the presumption that a person intends to produce the natural consequences of his actions does not establish intent.[161] "Discriminatory purpose," the Court explained in *Feeney*, "implies more than intent as volition or intent as awareness of consequences"; it requires proof that "the decisionmaker . . . selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group."[162] The Supreme Court has reaffirmed that standard on a host of occasions since *Davis*. It is well settled law.[163]

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[161] *Id.* at 278–79.

[162] *Id.* at 279 (citation omitted).

[163] *See, e.g.*, Flowers v. Mississippi, 139 S. Ct. 2228, 2234, 2240–43 (2019); Foster v. Chatman, 578 U.S. 488, 498–50 (2016); Schuette v. Coal. to Def. Affirmative Action, 572 U.S. 291, 316, 318 (2014) (Scalia, J., concurring in the judgment); Felkner v. Jackson, 562 U.S. 594, 594, 598 (2011); Rivera v. Illinois, 556 U.S. 148, 153 (2009); Snyder v. Louisiana, 552 U.S. 472, 474, 476–77 (2008); Rice v. Collins, 546 U.S. 333, 338 (2006); Miller-El v. Dretke, 545 U.S. 231, 237–39 (2005); Johnson v. California, 545 U.S. 162, 168 (2005); Vieth v. Jubelirer, 541 U.S. 267, 317, 333 (2004) (Stevens, J., dissenting); Miller-El v. Cockrell, 537 U.S. 322, 338 (2003); Bd. of Trs. of Univ. of Ala. v. Garrett, 531 U.S. 356, 372–73 (2001); United States v. Martinez-Salazar, 528 U.S. 304, 304 (2000); M.L.B. v. S.L.J., 519 U.S. 102, 125–27 (1996); Lewis v. Casey, 518 U.S. 343, 364, 375–76 (1996) (Thomas, J., concurring); United States v. Armstrong, 517 U.S. 456, 465, 467 (1996); Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 213 (1995); Purkett v. Elem, 514 U.S. 765, 767 (1995); Georgia v. McCollum, 505 U.S. 42, 46–48 (1992); Edmonson v. Leesville Concrete Co., 500 U.S. 614, 618–19 (1991); Hernandez v. New York, 500 U.S. 352, 358–60 (1991) (plurality opinion); *id.* at 372–74 (O'Connor, J., concurring in the judgment); Powers v. Ohio, 499 U.S. 400, 404, 409 (1991); Holland v. Illinois, 493 U.S. 474, 486–87 (1990); McCleskey v. Kemp, 481 U.S. 279, 297–99 (1987); Batson v. Kentucky, 476 U.S. 79, 93–96 (1986); Wayte v. United States, 470 U.S. 598, 608–09 (1985); Guardians Ass'n v. Civ. Serv. Comm'n of N.Y., 463 U.S. 582, 590 (1983) (opinion of White, J.); Rogers v. Lodge, 458 U.S. 613, 617–18 (1982); Crawford v. Bd. of Educ. of City of L.A., 458 U.S. 527, 544 (1982); Washington v. Seattle Sch. Dist. No. 1, 458 U.S. 457, 484–85 (1982); City of Mobile v. Bolden, 446 U.S. 55, 66–68 (1980) (plurality opinion); Dayton Bd. of Educ. v. Brinkman, 433 U.S. 406, 413, 419–20 (1977); Columbus Bd. of Educ. v. Penick, 443 U.S. 449, 464–65 (1979); Sch. Dist. of Omaha v. United States, 433 U.S. 667, 668 (1977); Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 264–66 (1977). That standard was implicit in earlier decisions. *See, e.g.*, Keyes v. Sch. Dist. No. 1, 413 U.S. 189, 208 (1973); Alexander v. Louisiana, 405 U.S. 625, 628–29 (1972); Whitus v. Georgia, 385 U.S. 545, 549–50 (1967); Wright v. Rockefeller, 376 U.S. 52, 56–58 (1964); Akins v. Texas, 325 U.S. 398, 403–04 (1945); Snowden v. Hughes, 321 U.S. 1, 8 (1944); Norris v. Alabama, 294 U.S. 587, 589 (1935) (collecting cases); Ah Sin v. Wittman, 198 U.S. 500,

The Supreme Court has proved its receptivity to the claim that a government official acted with racist motives. Consider the series of cases dealing with a prosecutor's exercise of peremptory challenges—viz., the ability to excuse members of the jury venire without having to persuade the judge that they could not be impartial. In its 1986 decision in *Batson v. Kentucky*, the Court held that use of a peremptory challenge to dismiss members of the petit jury venire because of their race violates the Equal Protection Clause.[164] Since then, the Court has shown its receptivity to the claim that a prosecutor peremptorily dismissed potential jurors because of their race.[165]

What the Court has been unwilling to endorse is the use of generalized societal discrimination or racism in other cases to invalidate a guilty verdict in a particular case. That is the teaching of the Supreme Court's decision in *McCleskey v. Kemp*.[166] McCleskey alleged that the administration of capital punishment in Georgia was being done in a racially discriminatory manner. Relying on a complicated statistical study of the statewide differences in the imposition of the death penalty, McCleskey's argument was that there was a statistical disparity between the rates at which prosecutors sought and juries imposed the death penalty that could be explained only by the race of the victims or, albeit to a lesser extent, the race of the defendant.[167] According

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507–08 (1905); Gundling v. Chicago, 177 U.S. 183, 186–88 (1900); Yick Wo v. Hopkins, 118 U.S. 356, 373–74 (1886) (citation omitted) ("Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution."). *Davis* made it explicit.

164 Batson v. Kentucky, 476 U.S. 79, 79 (1986).

165 *See, e.g.*, *Chatman*, 578 U.S. at 498–505 (ruling in a defendant's favor); *Snyder*, 552 U.S. at 477–86 (ruling the same); *Dretke*, 545 U.S. at 253–66 (ruling the same).

166 *McCleskey*, 481 U.S. 279.

167 *Id.* at 286–87.

> In support of his claim, McCleskey proffered a statistical study performed by Professors David C. Baldus, Charles Pulaski, and George Woodworth (the Baldus study) that purports to show a disparity in the imposition of the death sentence in Georgia based on the race of the murder victim and, to a lesser extent, the race of the defendant. The

to the study, offenders who killed "white victims were 4.3 times as likely to receive a death sentence as" offenders who murdered black victims, and "black defendants were 1.1 times as likely to receive a death sentence as [white] defendants."[168] The district court found that the study was flawed

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> Baldus study is actually two sophisticated statistical studies that examine over 2,000 murder cases that occurred in Georgia during the 1970's. The raw numbers collected by Professor Baldus indicate that defendants charged with killing white persons received the death penalty in 11% of the cases, but defendants charged with killing blacks received the death penalty in only 1% of the cases. The raw numbers also indicate a reverse racial disparity according to the race of the defendant: 4% of the black defendants received the death penalty, as opposed to 7% of the white defendants.
>
> Baldus also divided the cases according to the combination of the race of the defendant and the race of the victim. He found that the death penalty was assessed in 22% of the cases involving black defendants and white victims; 8% of the cases involving white defendants and white victims; 1% of the cases involving black defendants and black victims; and 3% of the cases involving white defendants and black victims. Similarly, Baldus found that prosecutors sought the death penalty in 70% of the cases involving black defendants and white victims; 32% of the cases involving white defendants and white victims; 15% of the cases involving black defendants and black victims; and 19% of the cases involving white defendants and black victims.
>
> Baldus subjected his data to an extensive analysis, taking account of 230 variables that could have explained the disparities on nonracial grounds. One of his models concludes that, even after taking account of 39 nonracial variables, defendants charged with killing white victims were 4.3 times as likely to receive a death sentence as defendants charged with killing blacks. According to this model, black defendants were 1.1 times as likely to receive a death sentence as other defendants. Thus, the Baldus study indicates that black defendants, such as McCleskey, who kill white victims have the greatest likelihood of receiving the death penalty.

Id.

[168] *Id.* at 287.

and denied McCleskey relief.[169] The U.S. Court of Appeals for the Eleventh Circuit[170] and the Supreme Court both assumed that the study was valid,[171] but each one rejected McCleskey's claim on the merits. "Even a sophisticated multiple-regression analysis," the Court explained, "can only demonstrate a *risk* that the factor of race entered into some capital sentencing decisions and a necessarily lesser risk that race entered into any particular sentencing decision."[172] That was insufficient to establish a constitutional violation, the Court explained, because defendants must prove that invidious discrimination infected the decision in their case,[173] which even the study's authors admitted they could not do.[174] The Court distinguished its earlier decisions allowing statistics to establish a basis for inferring intentional discrimination in a particular case, such as employment decisions, because discrete juries make individual capital sentencing decisions based on all of the aggravating and mitigating factors in a particular case, thereby making each case unique.[175] The lesson of

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[169] McCleskey v. Zant, 580 F. Supp. 338, 350–80 (N.D. Ga. 1984), *rev'd* 580 F. Supp. 388 (11th Cir. 1985) , *aff'd* 481 U.S. 297 (1987).

[170] McCleskey v. Kemp, 753 F.2d 877, 886, 889–90, 895–96 (11th Cir. 1985), *aff'd* 481 U.S. 279 (1987).

[171] McCleskey v. Kemp, 481 U.S. 279, 291 n.7 (1987).

[172] *Id.*

[173] *Id.* at 293.

[174] *Id.* at 293 n.11 (alterations in original) (quoting *McCleskey*, 580 F. Supp. at 372) ("McCleskey's expert testified: 'Models that are developed talk about the effect on the average. They do not depict the experience of a single individual. What they say, for example, [is] that on the average, the race of the victim, if it is white, increases on the average the probability . . . (that) the death sentence would be given. Whether in a given case that is the answer, it cannot be determined from statistics.'").

[175] *Id.* at 294–95 (footnote omitted) ("[T]he nature of the capital sentencing decision, and the relationship of the statistics to that decision, are fundamentally different from the corresponding elements in the venire-selection or Title VII cases. Most importantly, each particular decision to impose the death penalty is made by a petit jury selected from a properly constituted venire. Each jury is unique in its composition, and the Constitution requires that its decision rest on consideration of innumerable factors that vary according to the characteristics of the individual defendant and the facts of the particular capital offense. *See Hitchcock v. Dugger*, [481 U.S. 393,] 398–399 [(1987)]; *Lockett v. Ohio*, 438 U.S. 586, 602–605 (1978) (plurality opinion of Burger, C.J.). Thus, the application of an inference drawn

McCleskey is that, while the Equal Protection Clause outlaws racist decision-making in the criminal justice system, it has only a case-specific application and cannot be used to challenge system-wide racism if, when, and where it exists. Accordingly, under well-settled Supreme Court case law, disparate results alone cannot be used to prove systemic racism.[176]

C. Does the American Criminal Justice System Have a Discriminatory Effect?

Some commentators argue that the American criminal justice system is beset with systemic racism without proving that individual Americans or the entire nation consciously harbors racist motives.[177] They do this by focusing solely on the effect of criminal law enforcement on black offenders and particularly emphasize the disproportionate number of black

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from the general statistics to a specific decision in a trial and sentencing simply is not comparable to the application of an inference drawn from general statistics to a specific venire-selection or Title VII case. In those cases, the statistics relate to fewer entities, and fewer variables are relevant to the challenged decisions.").

[176] Atop that, the evidence does not establish society-wide racial discrimination. *See* NAT'L RSCH. COUNCIL NAT'L ACADS., THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES 97 (Jeremy Travis et al. eds., 2014) ("The committee's review of the literature justifies the conclusion that racial bias and discrimination are not the primary causes of disparities in sentencing decisions or rates of imprisonment. There are differences, but they are relatively small. No doubt they result partly from the various forms of attribution and stereotyping discussed below. . . . Blacks and Hispanics are more likely than whites to be detained before trial[, which] . . . increases the probability that a prison sentence will be imposed," along with charging and plea bargaining decisions.).

[177] *See, e.g.*, KENDI, *supra* note 134, at 21 ("A racist policy is any measure that produces or sustains racial inequity or injustice."); Shasta N. Inman, *Racial Disparities in Criminal Justice*, AM. BAR ASS'N: YOUNG LAWS. DIV. (Sept. 18, 2020), https://www.americanbar.org/groups/young_lawyers/publications/after-the-bar/public-service/racial-disparities-criminal-justice-how-lawyers-can-help/ ("The net effects of history's injustices are staggering. According to statistics the NAACP examined, although Black people make up 13.4 percent of the population, they make up: . . . 22 percent of fatal police shootings, . . . 47 percent of wrongful conviction exonerations, and . . . 35 percent of individuals executed by the death penalty. African Americans are incarcerated in state prisons at five times the rate of whites. Black men face disproportionately harsh incarceration experiences as compared with prisoners of other races. Racial disparities are also noticeable with Black youth, as evidenced by the school-to-prison pipeline and higher rates of incarceration for Black juveniles.").

prisoners,[178] rather than consider the interests of the black community writ large, especially the victims of crime. Putting aside the fact that this approach is at odds with the case law discussed above, it is factually incorrect and unwise to boot.

1. The Mistaken Demand for Race-Neutral Results

Their first mistake is that it is not possible for every action, official or otherwise, in a modern, complex society to never have a disproportionate effect on some component group—whether that subset is defined by race, gender, age, religion, ideology, or home professional sports team preferences.[179] One reason why that is true is that the government and private sectors are each a collection of specialized entities with discrete missions. We do not grant every government agency the power to right every wrong, nor do we see a private company with that mission.[180] There is

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[178] *See, e.g.*, SPOHN, *supra* note 110, at 181–84 (discussing numerous authorities making that argument).

[179] *See* United States v. Armstrong, 517 U.S. 456, 469–70 (1996) (citation omitted) ("The Court of Appeals reached its decision in part because it started 'with the presumption that people of *all* races commit *all* types of crimes—not with the premise that any type of crime is the exclusive province of any particular racial or ethnic group.' It cited no authority for this proposition, which seems contradicted by the most recent statistics of the United States Sentencing Commission. Those statistics show: More than 90% of the persons sentenced in 1994 for crack cocaine trafficking were black, United States Sentencing Comm'n, 1994 Annual Report 107 (Table 45); 93.4% of convicted LSD dealers were white, *ibid.*; and 91% of those convicted for pornography or prostitution were white, *id.*, at 41 (Table 13). Presumptions at war with presumably reliable statistics have no proper place in the analysis of this issue."); Watson v. Fort Worth Bank and Trust, 487 U.S. 977, 992 (1988) (plurality opinion) ("It is completely unrealistic to assume that unlawful discrimination is the sole cause of people failing to gravitate to jobs and employers in accord with the laws of chance. *See Sheet Metal Workers v. EEOC,* 478 U.S. 421, 489 (1986) (O'Connor, J., concurring in part and dissenting in part). It would be equally unrealistic to suppose that employers can eliminate, or discover and explain, the myriad of innocent causes that may lead to statistical imbalances in the composition of their work forces."); THOMAS SOWELL, DISCRIMINATION AND DISPARITIES (2019).

[180] *But cf.* Ibram X. Kendi, *Pass An Anti-Racist Constitutional Amendment*, POLITICO (2019), https://www.politico.com/interactives/2019/how-to-fix-politics-in-america/inequality/pass-an-anti-racist-constitutional-amendment/ (demanding the creation

no government agency for Making Life Better Without Leaving Anyone Behind, and there is no firm named Omni Mega Corp that will make, sell, or buy anything and everything. The Constitution did not create agencies, and the ones Congress established have only the power Congress gave them.[181] Businesses have whatever product lines they can make, sell, or buy profitably in the market, and companies that try to be all things to all people do not last long. Even Walmart and Amazon do not design and manufacture complex technological devices, surgical equipment, or F-5EXs. They might *sell* them, but they leave to other, more specialized and skilled manufacturers the task of *building* them.

Yes, government institutions and businesses can and must ensure that their own exercise of authority does not violate federal law. But they have no legal authority to leave their lanes and tell other agencies or companies how to act. That job is for the President, as the federal government's chief executive officer,[182] or the market, which is every private company's jefe. Finally, we do not want every person in the government and private sector to be thinking about the racial effect of a decision whenever they act. Agencies and companies work best by focusing on their assigned tasks. We

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of a "Department of Anti-Racism" staffed only by "formally trained experts on racism" that would have the power to change "all local, state and federal policies").

[181] *See* Nat'l Fed'n of Indep. Bus. v. OSHA, 142 S. Ct. 661, 665 (2022) ("[A]gencies are creatures of statute. They accordingly possess only the authority that Congress has provided."); Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 208 (1988) ("It is axiomatic that an administrative agency's power to promulgate legislative regulations is limited to the authority delegated by Congress."); La. Pub. Serv. Comm'n v. FCC, 476 U.S. 355, 374 (1986) ("[A]n agency literally has no power to act . . . unless and until Congress confers power upon it.").

[182] *See* U.S. CONST. art. II, § 1 ("The Executive Power shall be vested in a President of the United States of America."); Seila L. LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183, 2191 (2020) ("Under our Constitution, the 'executive Power'—all of it—is 'vested in a President,' who must 'take Care that the Laws be faithfully executed.' Art. II, § 1, cl. 1; *id.*, § 3."). Of course, even the President must be able to ground any order in whatever power the Constitution or a statute affords him or her. *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 585 (1952) ("The President's power, if any, to issue the order must stem either from an act of Congress or from the Constitution itself."); *cf.* Ala. Ass'n of Realtors v. HHS, 141 S. Ct. 2485, 2490 (2020) ("[O]ur system does not permit agencies to act unlawfully even in pursuit of desirable ends.").

do not ask the Food and Drug Administration to send people into outer space and bring them home safely, nor do we task the National Aeronautics and Space Administration with ensuring that drugs are safe and effective for human and animal consumption. We ask manufacturers to build safe automobiles, but we do not demand that they use defective parts even if doing so might offer more jobs to members of one race or another. On the contrary, the tort system holds auto makers liable for building defective cars, and it would be no defense that the firm chose a minority-owned supplier to advance social justice concerns even though it knew that the supplier's parts are less safe than alternatives.

2. The Mistaken Adoption of an Offender-Oriented Perspective

The second mistake is to view the effect of the criminal justice system only from the *offender's* perspective and not consider that effect from the perspective of past or potential *victims* of crime. African-Americans are on each side of that equation—as victimizers and victims. Yet critics see the former as the latter and ignore the former's actual victims.[183] That approach—considering only the punishment side of the criminal justice system—is a category-level error for several reasons.

To start with, an offender-oriented approach collides with the foundational criminal law principle that the government may punish lawbreakers because every person has the free will to comply with or break the law. The criminal law creates narrow exceptions—the defenses of duress and necessity—for those limited circumstances where any reasonable

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[183] *See* KENNEDY, *supra* note 1, at 375–76; *cf.* Geduldig v. Aiello, 417 U.S. 484, 496 n.20 (1974) (ruling that an insurance policy affecting pregnant and nonpregnant women does not discriminate on the basis of sex because it affects only a subcategory of women). That is a postulate held by "progressives." *See* William Voegeli, *Criminal Negligence*, CLAREMONT REV. BOOKS, Summer 2021, at 27 ("Progressivism began, according to political scientist Harvey Mansfield, as 'an alliance of experts and victims.' In this alliance, however, victims are more numerous but less powerful. The experts' prerogatives include the right to make authoritative claims that, while all victims are victims, some victims are victimier than others. As a result, the progressive project of institutionalizing compassion has never mustered much empathy for *crime* victims, held to be among the least victimy of victims, decidedly less so that the victims of poor diets, schools, and housing, deprivations which all but force those afflicted to commit crimes.").

person would succumb to overwhelming human or physical forces to commit a crime.[184] Otherwise, the law does not supply offenders with an escape from responsibility, including one that allows a guilty party to evade responsibility simply because other people of the same race have also committed crimes.

An offender-oriented approach rests on the unstated, and therefore unsubstantiated, assumption that the perpetrators of crime stand in the same moral plane as their victims. Society is entitled to define neutral rules for the benefit of the entire polity and to punish whoever chooses to take the law into their own hands. The federal and state governments have adopted facially neutral criminal laws prohibiting murder, robbery, assault, and the like for just that purpose. If those laws are enforced neutrally with regard to race, offenders cannot cry "Foul!" if they are held accountable for their misdeeds.

As Professor Kate Stith has explained, the "logic of the criminal law" is to punish offenders to deter or incapacitate them from harming others.[185] That is because "imprisonment is both a burden and a benefit—a burden for those imprisoned and a good for those whose lives are bettered by the deterrence and confinement of criminals who might otherwise prey on them."[186] A focus on black offenders is also mistaken because the vast majority of African-Americans are not criminals. Professor James Forman noted that, "even in the most economically isolated pockets of black America, most people do not sell drugs or commit acts of criminal violence."[187] Finally, the principal potential remedies for the macro-level

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[184] *See, e.g.*, Dixon v. United States, 548 U.S. 1 (2006) (duress); United States v. Bailey, 444 U.S. 394 (1980) (necessity). Even then, the defenses do not justify killing an innocent party. *See* WAYNE R. LAFAVE, CRIMINAL LAW § 9.7(b), at 518, 520–21 (5th ed. 2010).

[185] Kate Stith, *The Government Interest in Criminal Law: Whose Interest Is It, Anyway?*, *in* PUBLIC VALUES IN CONSTITUTIONAL LAW 137, 158 (Stephen E. Gottlieb ed., 1993).

[186] KENNEDY, *supra* note 1, at 375–76.

[187] FORMAN, *supra* note 119, at 146 (describing the attitude of black resident in Washington, D.C., toward 1970s get-tough crime policies) ("Even neighborhoods portrayed by the media as 'drug-infested' are always much more than that: they are crowded, also, with mothers trying to avoid dealers while walking their children to school, small business owners struggling to keep their stoops clear and their stores open, grandparents wondering what happened to the neighborhood they grew up in, pastors working to keep their congregants

problems that most trouble critics—"mass incarceration" in an effort to win the "War on Drugs"—would make life *worse* for blacks if they were implemented, as explained in Part III.

Contemporary residential housing patterns in large urban communities reveal that, due to a host of factors—such as macro- and microeconomic changes (e.g., the disappearance of factories in central city areas) and different types of historical discrimination (e.g., education, housing)—African-Americans overpopulate blighted communities.[188] Violent crime is predominantly local, meaning that offenders and their victims generally live in the same neighborhoods.[189] Commentators have found that a small number of inner-city blacks are the perpetrators of violent crimes against a larger number of African-Americans living in the same neighborhoods.[190]

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safe. These people were as indignant as anyone else about crime and public drug markets—perhaps even more so. They and their families were under immediate threat. [D.C. Councilmember John] Ray and [D.C. Police Chief Burtell] Jefferson offered an answer, and in times of crisis, even a bad answer beats no answer at all."); EBERHARDT, *supra* note 74, at 85.

[188] KENNEDY, *supra* note 1, at 209; MARC MAUER, RACE TO INCARCERATE 164 (2d ed. 2006) (1999); RUTH D. PETERSON & LAUREN J. KRIVO, DIVERGENT SOCIAL WORLDS: NEIGHBORHOOD CRIME AND THE RACIAL-SPATIAL DIVIDE 26–33 (2010); MURRAY, *supra* note 39, at 89–91; Jeffrey Fagan, *Crime, Law, and the Community: Dynamics of Incarceration in New York City*, *in* THE FUTURE OF IMPRISONMENT 27, 35 (Michael Tonry ed., 2004); Jeffrey Fagan & Garth Davies, *Street Stops and Broken Windows:* Terry, *Race, and Disorder in New York City*, 28 FORDHAM URB. L.J. 457, 474 (2000).

[189] *See* William J. Stuntz, Terry*'s Impossibility*, 72 ST. JOHN'S L. REV. 1213, 1225–26 (1998).

[190] *See, e.g.*, Robert J. Sampson & William Julius Wilson, *Toward a Theory of Race, Crime, and Urban Inequality*, *in* CRIME AND INEQUALITY 37, 37 (John Hagan & Ruth D. Peterson eds., 1995) (citing a 1990 study) ("[A] resident of rural Bangladesh has a greater chance of surviving to age 40 than does a black male in Harlem."); *id.* at 38; KENNEDY, *supra* note 1, at 20 ("In terms of misery inflicted by direct criminal violence, blacks (and other people of color) suffer more from the criminal acts of their racial 'brothers' and 'sisters' than they do from the racial misconduct of white police officers."); *id.* at 22 ("That relative to their percentage of the population, blacks commit more street crimes than do whites is a fact and not a figment of a Negrophobe's imagination."); Loury, *supra* note 52, at 182 ("[T]here are about 17,000 homicides in the United States every year, *nearly half of which involve black perpetrators*. The vast majority of those have other blacks as victims. For every black killed by the police, more than twenty-five other people meet their end because of homicides

committed by other blacks."); JASON L. RILEY, FALSE BLACK POWER? 18–19 (2017); Robert J. Sampson & Janet L. Lauritsen, *Racial and Ethnic Disparities in Crime and Criminal Justice in the United States*, *in* 21 CRIME AND JUSTICE: ETHNICITY, CRIME, AND IMMIGRATION: COMPARTIVE AND CROSS-NATIONAL PERSPECTIVES 311, 311–74 (Michael Tonry ed., 1997); MICHAEL TONRY, MALIGN NEGLECT—RACE, CRIME, AND PUNISHMENT IN AMERICA 79 (1995) ("Thus the answer to the question, 'Is racial bias in the criminal justice system the principal reason that proportionately so many more blacks than whites are in prison?' is no, with one important caveat . . . concerning drugs. From every available data source, discounted to take account of their measurement and methodological limits, the evidence seems clear that the main reason that black incarceration rates are substantially higher than those for whites is that black crime rates for imprisonable crimes are substantially higher than those for whites."); WEITZER & TUCH, *supra* note 129, at 10 (citations omitted) ("It is true that African Americans are disproportionately involved in violent crime, according to both victimization surveys (where victims identify the offender's race) and self-report surveys[,] which ask respondents about their own involvement in crime. . . . [T]hey are overrepresented as violent offenders and that their neighborhoods experience more serious crime than other neighborhoods . . . ."); JAMES Q. WILSON, THINKING ABOUT CRIME 36–39 (First Vintage Books ed. 1985, 1983) (1975); BRUCE WESTERN, PUNISHMENT AND INEQUALITY IN AMERICA 49–50 (2006); FRANKLIN E. ZIMRING, THE CITY THAT BECAME SAFE: NEW YORK'S LESSONS FOR URBAN CRIME AND ITS CONTROL 203 (2012) ("[V]iolent crime in New York City remains intensely concentrated among minority males in socially isolated environments."); *id.* at 207–90; Michael Barone, *'Ferguson Effect' Is Real, and It Threatens to Harm Black Americans Most*, WASH. EXAM'R (May 19, 2016), https://www.aei.org/publication/ferguson-effect-is-real-and-it-threatens-to-harm-black-americans-most/ [https://perma.cc/M4AE-8NAE]; Lee A. Daniels, *Black Crime, Black Victims*, N.Y. TIMES MAG. (May 16, 1982), https://www.nytimes.com/1982/05/16/magazine/black-crime-black-victims.html; Randall Kennedy, *Suspect Policy*, NEW REPUBLIC (Sept. 13, 1999), https://newrepublic.com/article/63137/suspect-policy ("In recent years, for example, victims of crime report blacks as the perpetrators in around 25 percent of the violent crimes suffered, although blacks constitute only about twelve percent of the nation's population."); Lauren J. Krivo et al., *Segregation, Racial Structure, and Neighborhood Violent Crime*, 114 AM. J. SOCIO. 1765 (2009); Larkin & Rosenthal, *supra* note 1, at 210–11; John G. Malcolm, *The War on Cops (Heather Mac Donald)*, 17 FEDERALIST SOC'Y REV. 68, 71 (2016) ("If the body count is racking up in many of our inner cities, it is not because police officers are wantonly shooting black people; it is because black people, predominantly black men, are shooting each other. As [Heather] Mac Donald correctly notes, 'young black men commit homicide at nearly ten times the rate of young white and Hispanic males combined,' and their victims are overwhelmingly other black residents who live in their communities. In Chicago, for instance, in 2015, 2,460 African American people were shot (nearly seven each day), compared to only 78 white people (one every 4.6 days); in 2011 (the last year for which data was released by the Chicago police), 71% of those committing murder were black and 75% of murder victims were black.

Criminal justice professionals have long been aware of that phenomenon,[191] and the data supports their conclusions.[192] As former Professor Barry Latzer

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Homicide is now the number one cause of death among African Americans between the ages of 1 and 44. And, Mac Donald adds, 'until the black crime rate comes down, police presence is going to be higher in black neighborhoods, increasing the chance that when police tactics go awry, they will have a black victim.'"); Jeffrey D. Morenoff et al., *Neighborhood Inequality, Collective Efficacy, and the Spatial Dynamics of Urban Violence*, 39 CRIMINOLOGY 517 (2001); Robert J. Sampson et al., *Neighborhoods and Violent Crime: A Multilevel Study of Collective Efficacy*, 277 SCI. 918, 918 (1997); Walter E. Williams, Opinion, *Should Black People Tolerate This?*, TOWNHALL (May 23, 2012), https://townhall.com/columnists/walterewilliams/2012/05/23/should-black-people-tolerate-this-n1263867 [https://perma.cc/Z6UD-PQXD] ("Though blacks are 13 percent of the nation's population, they account for more than 50 percent of homicide victims. Nationally, black homicide victimization rate is six times that of whites, and in some cities, it's 22 times that of whites. Coupled with being most of the nation's homicide victims, blacks are most of the victims of violent personal crimes, such as assault and robbery. The magnitude of this tragic mayhem can be viewed in another light[:] . . . young black males have a greater chance of reaching maturity on the battlefields of Iraq and Afghanistan than on the streets of Philadelphia, Chicago, Detroit, Oakland, Newark and other cities.").

[191] Consider the views of Edward Conlon, a former member of the New York City Police Department: "It's not up to me to decide what activists should protest, but after years of dealing with the realities of street violence," wrote Conlon, "I don't understand how a movement called 'Black Lives Matter' can ignore the leading cause of death among young black men in the U.S., which is homicide by their peers." Edward Conlon, *The Racial Reality of Policing; Police Bias and Misconduct Are Serious Problems—But So Is the Epidemic of Homicide Among Young Black Men*, WALL ST. J. (Sept. 4, 2015, 2:23 PM), https://www.wsj.com/articles/the-racial-reality-of-policing-1441390980. In 2011, he noted, there were 129 instances in which a law enforcement officer killed a black man, but there were 6,739 black male homicide victims, the overwhelming majority of whom were murdered by other African-Americans. *Id.* From September 11, 2001, to September 4, 2015, "more than 90,000 black men in the U.S. have been killed by other black men," which means that "[e]very year, the casualty count of black-on-black crime is twice that of the death toll of 9/11." *Id.*

[192] Relying on homicide arrest data, Charles Murray recently found that the arrest-rate ratio between African-Americans and whites for violent crimes ranged from 9:1 to 19:1 in several large American cities. MURRAY, *supra* note 39, at 51–52; *id.* at 51 tbl. 2, 56 tbl. 3; *see id.* at 62 ("Across thirteen American cities, including four of the nation's most important ones, the African [American] arrest rate for violent crime was usually around 9 to 11 times the European [viz., white] rate, and the Latin arrest rate for violent crime was usually around 2 to 3 times the European rate."). In addition, African-Americans and Hispanics are much more likely to identify blacks and Latinos as perpetrators than whites or Asians do. *Id.* at 58–

explained in his 2022 book *The Myth of Overpunishment*,[193] for 40-plus years state prisons have been, and are still, filled with violent offenders.[194]

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59. Finally, New York City kept statistics from 2006 to 2017 on the number of shots fired that struck someone, whether or not the shooting resulted in a fatality, which amounted to 81% of the 21,626 shootings. Of the 1,906 African-Americans killed where the race of the perpetrator was known, 89% were shot by blacks. *Id.* at 59–60; *see also*, *e.g.*, RACHEL E. MORGAN & GRACE KENA, U.S. DEP'T OF JUST., BUREAU OF JUST. STAT., REVISED NCJ 252121, CRIMINAL VICTIMIZATION, 2016: REVISED 8 tbl. 5, 10 tbl. 8 (Oct. 2018), https://bjs.ojp.gov/content/pub/pdf/cv16.pdf (noting that blacks suffer from a higher violent crime victimization rate than whites or Hispanics for 2015–2016); ERIKA HARRELL, U.S. DEP'T OF JUST., BUREAU OF JUST. STAT., NCJ 239424, VIOLENT VICTIMIZATION COMMITTED BY STRANGERS, 1993–2010 (Dec. 2012) (surveying relationships, including neighbors, between victims and criminals); U.S. DEP'T OF JUST., BUREAU OF JUST. STAT., NCJ 227669, CRIMINAL VICTIMIZATION IN THE UNITED STATES, 2007 STATISTICAL TABLES tbl. 5 (Feb. 2010) (surveying intra-racial criminal victimization rates); Brendan O'Flaherty & Rajiv Sethi, *Homicide in Black and White*, 68 J. URB. ECONS. 215 (2010) ("African-Americans are roughly six times as likely as white Americans to die at the hands of a murderer, and roughly seven times as likely to murder someone; their victims are black 82% of the time."); FBI, 2015 CRIME IN THE UNITED STATES: EXPANDED HOMICIDE DATA tbl. 6 (2015) (noting that, of the 2,664 black victims of homicide, approximately 89% (2,380) were committed by black offenders); U.S. Dep't of Hous. and Urb. Dev., *Neighborhoods and Violent Crime*, EVIDENCE MATTERS, Summer 2016, at 16, 18 ("[I]n Boston, about 85 percent of gunshot injuries occur within a single network of people representing less than 6 percent of the city's total population."); HEATHER MAC DONALD, THE WAR ON COPS: HOW THE NEW ATTACK ON LAW AND ORDER MAKES EVERYONE LESS SAFE 17 (2016) ("In 2014 . . . there were 6,095 black homicide victims in the United States . . . . The killers of those black homicide victims are overwhelmingly other blacks—who are responsible for a death risk ten times that of whites in urban areas."); *id.* at 30 ("Black males between the ages of 14 and 17 die from shootings at more than six times the rate of white and Hispanic male teens combined, thanks to a ten times higher rate of homicide committed by black teens."); *id.* at 73 (describing statistics showing that, in 2009 in the nation's largest 75 counties, blacks disproportionately commit violent crimes); *id.* at 89 (same, Los Angeles); *id.* at 130 (same, Chicago); MAC DONALD, *supra*, at 153, 217.

193 BARRY LATZER, THE MYTH OF OVERPUNISHMENT (2022); *see also* PFAFF, *supra* note 1, at viii ("[A] majority of people in prison have been convicted of violent crimes, and an even greater number have engaged in violent behavior."); *id.* at 5–6, 13 (noting that, while half of federal prisoners and imprisoned for drug crimes, 87[%] of prisoners are in state custody, only 16[%] of state prisoners are incarcerated for drug crimes, and only 5–6[%] of that group are low-level and non-violent); *id.* at 11 ("[T]he incarceration of people who have been convicted of violent offenses explains almost two-thirds of the growth in prison populations since 1990. Similarly, almost all the people who actually serve long sentences have been convicted of serious violent crimes."); *supra* note 110.

[194] *See* LATZER, *supra* note 193, at viii, 73–75; *see also, e.g.*, FORMAN, *supra* note 119, at 220 ("[A]s a percentage of our nation's incarcerated population, those possessing small amounts of marijuana barely register. For every ten thousand people behind bars in America, only six are there because of marijuana possession."); *id.* at 228–29 ("Basing criminal justice reform on leniency for nonviolent drug offenders reinforces a deeply problematic narrative. First, consider the numbers. America's incarceration rates for nonviolent drug offenders are unprecedented and morally outrageous, but they are not 'the real reason our prison population is so high.' Roughly 20 percent of America's prisoners are in prison on drug charges. As a result, even if we decided today to unlock the prison door of every single American behind bars on a drug offense, tomorrow morning we'd wake up to a country that still had the world's largest prison population. And to be clear, when advocates speak of 'nonviolent drug offenders,' they are not talking about all, or even most, of the five hundred thousand incarcerated on drug offenses. . . . [T]he drug trade—especially during the crack era—was extraordinarily violent. Some of the people involved had no connection to violence, but it wasn't easy—pacifists didn't survive for long. In arguing for mercy and compassion for nonviolent drug offenders, and only for them, advocates are pursuing an approach that excludes not just the majority of prisoners, but even the majority of incarcerated drug offenders."); DANIELLE SERED, UNTIL WE RECKON: VIOLENCE, MASS INCARCERATION, AND A ROAD TO REPAIR 5–6 (2019) ("As consensus and momentum to end mass incarceration has grown, the current reform narrative, though compelling, has been based on a false narrative: that the United States can achieve large-scale transformative change (that is, reductions of 50 percent or more) by changing responses to non-violent offenses. That is impossible in a nation where 54 percent of people incarcerated in state prisons were convicted of violent crimes."); Stephanos Bibas, *The Truth about Mass Incarceration*, NAT'L REV. (Sept. 16, 2015, 8:00 AM), https://www.nationalreview.com/2015/09/mass-incarceration-prison-reform/ ("President Obama's and Alexander's well-known narrative, however, doesn't fit the facts. Prison growth has been driven mainly by violent and property crime, not drugs. As Fordham law professor John Pfaff has shown, more than half of the extra prisoners added in the 1980s, 1990s, and 2000s were imprisoned for violent crimes; two thirds were in for violent or property crimes. Only about a fifth of prison inmates are incarcerated for drug offenses, and only a sliver of those are in for marijuana. Moreover, many of these incarcerated drug offenders have prior convictions for violent crimes. The median state prisoner serves roughly two years before being released; three quarters are released within roughly six years. For the last several decades, arrest rates as a percentage of crimes—including drug arrests—have been basically flat, as have sentence lengths. What has driven prison populations, Pfaff proves convincingly, is that arrests are far more likely to result in felony charges: Twenty years ago, only three eighths of arrests resulted in felony charges, but today more than half do. Over the past few decades, prosecutors have grown tougher and more consistent."); Paul J. Larkin, Jr., *Crack Cocaine, Congressional Inaction, and Equal Protection*, 37 HARV. J.L. & PUB. POL'Y 241, 286 (2014) (footnote omitted) ("Moreover, as all criminal justice professionals know, the offense of

"The crime tsunami," as Professor Latzer put it, has not been either a "media-generated moral panic," a "by-product of fake statistics," or a "Republican plot to undo civil rights or the war on poverty."[195]

> More Americans were murdered in the crime boon than perished in World War II, the Korean War, the Vietnam War, and the conflicts in Iraq and Afghanistan *combined*. Between 1970 and 1995, a staggering 540,019 Americans were slain. War fatalities totaled only 507,340. And if we compare the war-wounded to those injured in criminal assaults, the total of the crime tsunami is even more shocking. Fewer than one million service personnel suffered nonfatal injuries in the foreign conflicts just named, whereas *2.2 million Americans per year* were injured by violent crime. Over 6 million of the assault injuries, 1973 to 1991, were considered serious, as they involved gunshot or knife wounds, broken bones, loss of consciousness, dislodged teeth, and internal damage. Many crime victims required hospitalization lasting two days or more. And these losses do not address the financial costs, which ran into the billions, and which usually had to be borne by the victims. The crime tsunami was a war on the American civilian population.[196]

African-Americans suffer more from violent crime than white Americans. Consider this 2018 and 2019 data compiled by the Department of Justice:[197]

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conviction can obscure the conduct that brought the defendant to the attention of law enforcement at the outset. . . . If one wants to learn what a defendant has actually done, the critical document is . . . the presentence report, which details the defendant's 'history and characteristics,' as well as any other information relevant to sentencing.").

[195] LATZER, *supra* note 193, at 74.

[196] *Id.* at 74–75.

[197] RACHEL E. MORGAN & BARBARA A. OUDEKERK, U.S. DEP'T OF JUST., BUREAU OF JUST. STAT., NCJ 253043, CRIMINAL VICTIMIZATION, 2018 13 tbl. 14 (Sept. 2019), https://bjs.ojp.gov/content/pub/pdf/cv18.pdf; RACHEL E. JENNIFER L. TRUMAN, U.S. DEP'T OF

Offender-Victim Race	2018	2019
White-White	2,224,024	1,722,773
Black-Black	396,449	346,227
White-Black	59,777	90,019
Black-White	547,948	472,643

Those figures have continued to rise since 2019. According to the FBI's data, murders increased by almost 50% from 2019 to 2020, and the number of black Americans killed "spiked" by more than 62% over that period.[198] In 2019, there were 3,595 black murder victims, but that number increased to 5,839 in 2020, meaning that 2,244 more black Americans were murdered than a year earlier.[199] The same difference can be seen as far back as 1991. For the past three decades, black Americans have routinely been murdered more than whites, and white homicide deaths barely surpassed those of blacks in the anomalous years—even though blacks are only about 13.6% of the population.[200] That is a tragedy, especially for the victims and their families. But the people killed or maimed are not the only ones damaged by

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JUST., BUREAU OF JUST. STAT., NCJ 253043, CRIMINAL VICTIMIZATION, 2019, 19 tbl. 16 (Sept. 2020), https://bjs.ojp.gov/content/pub/pdf/cv19.pdf.

198 *See* FBI: CRIME DATA EXPLORER, https://cde.ucr.cjis.gov/LATEST/webapp/#/pages/explorer/crime/crime-trend (last visited Oct. 7, 2023); Emma Colton, *Massive Increase in Black Americans Murdered Was Result of Defund Police Movement: Experts*, FOX NEWS (Apr. 19, 2022, 1:54 AM), https://www.foxnews.com/us/black-americans-paid-enormous-price-for-defund-the-police-movement.

199 FBI: CRIME DATA EXPLORER, *supra* note 198.

200 The FBI's data indicated the following: From 1985 to 1990, no data regarding the races of homicide victims is available. From 1991 to 1993, more blacks were killed than whites. That temporarily shifted from 1994 to 2005, white homicide deaths narrowly exceeded the number of black Americans killed. Since 2005, more blacks than whites have been murdered in *every reported year* besides 2014—when just 6 more white homicide victims were reported. From 2006 to 2008, no data is available. *Id.* The population percentage comes from the United States Census Bureau. *See* U.S. Census Bureau, *Quick Facts: Race and Hispanic Origin*, https://www.census.gov/quickfacts/fact/table/US/PST045221 (last visited Oct. 14, 2023).

violent crime; the fact and fear of it haunts entire communities.[201] The "traumatic nature" of public violence contributes to "a sense of an omnipresent threatening reality that extend[s] far beyond the statistical possibility of becoming a victim."[202] As Yale Professor Elijah Anderson put

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[201] *See* FORMAN, *supra* note 119, at 162 ("While murders quite rightly received the most [news] coverage, the ranks of the maimed and wounded were growing, too. For every person killed by a bullet, there were at least three others—by some estimates, more than four—who survived."); Jason L. Riley, Opinion, *The Economic and Human Costs of Protecting Criminals*, WALL ST. J. (Jan. 10, 2023, 5:52 PM), https://www.wsj.com/articles/the-economic-and-human-costs-of-protecting-criminals-police-shoplifting-arrest-violent-defendant-offenders-11673387450 ("Walmart is the nation's largest private employer, and it's known for locating its big-box stores in depressed areas that need well-paying jobs and low-price products. Social-justice advocates who want to make it harder to lock up repeat offenders are inadvertently raising costs and harming job prospects for law-abiding members of our most vulnerable communities. . . . A 2021 paper published by the University of Chicago's Journal of Law and Economics put annual spending on policing and corrections at about $250 billion. Meanwhile, a study released the same year by the Pacific Institute for Research and Evaluation 'conservatively estimated' that the yearly cost of personal and property crimes in the U.S. is $2.6 trillion. By that comparison, it's hard to conclude that we spend too much money on law enforcement. What's even harder is putting a price on the psychic burden of crime—the constant fear that you or a loved one will become a victim in neighborhoods where street gangs are in charge and gunshots are a familiar sound. Tying the hands of police, prosecutors and judges doesn't help the poor, who are the most likely victims of the criminals being coddled. Most poor people are law-abiding, and they don't deserve to be dismissed as an afterthought by social-justice advocates and their allies on the political left. Progressive policies that treat lawbreakers like victims and cops like suspects aren't only counterproductive but expensive. And some people will wind up paying with their lives.").

[202] PHILIPPE BOURGOIS, IN SEARCH OF RESPECT: SELLING CRACK IN EL BARRIO 34 (2d ed. 2003); Kevin Williamson, *Criminal-Justice Reformers Have a Murder Problem*, NAT'L REV. (May 30, 2021, 6:30 AM), https://www.nationalreview.com/2021/05/criminal-justice-reformers-have-a-murder-problem/ ("There were more than 20,000 murders in the United States in 2020—a 25 percent increase from the year before. That doesn't mean 'lock 'em up and throw away the key.' But it does mean operating in the knowledge that the people who have already committed violent crimes are the people who are most likely to commit more of them. Too many progressives act as though our violent-crime problem can be dealt with by having $10 per hour clerks at sporting-goods stores process a few more ATF forms. But those who can count understand that it's a bigger and deeper problem than that."); *cf.* Sean-Michael Pigeon, *San Francisco Chaos Proves It: Law and Order Is a Public Good*, NAT'L REV. (June 16, 2021, 2:26 PM), https://www.nationalreview.com/2021/06/san-francisco-chaos-proves-it-law-and-order-is-a-public-good/ ("[W]e often think of public goods as, well,

it, "In some of the most economically depressed and drug- and crime-ridden pockets of the city, the rules of civil law have been severely weakened, and in their stead [is] a 'code of the street'" governing "interpersonal violence," a code "that is currently undermining the quality of life of [far] too many urban neighborhoods."[203] Residents from the very young to the very old lose the feeling of personal security necessary to enjoy the present as well as any hope for an improvement in their plight.[204] That

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goods. Defense, roads, and environmental protection physically require tanks, concrete, or an EPA. But San Francisco shows why we need a more capacious definition of a 'public good.' Police officers and the justice system do more than simply arrest criminals; they create a social climate of order from which all citizens benefit. But because 'order' is not a tangible product, people can misunderstand it as something that is individually enforced. This is a mistake.").

[203] ELIJAH ANDERSON, CODE OF THE STREET: DECENCY, VIOLENCE, AND THE MORAL LIFE OF THE INNER CITY 9–11 (1999); *see id.* at 9–10 ("At the heart of the code is a set of prescriptions, or informal rules, of behavior organized around a desperate search for respect that governs public social relations, especially violence, among so many residents, particularly young men and women. Possession of respect—and the credible threat of vengeance—is highly valued for shielding the ordinary person from the interpersonal violence of the street. In this social context of persistent poverty and deprivation, alienation from broader society's institutions, notably that of criminal justice, is widespread. The code of the street emerges where the influence of the police ends and personal responsibility for one's safety is felt to begin, resulting in a kind of 'people's law,' based on 'street justice.' The code involves a quite primitive form of social exchange that holds would-be perpetrators accountable by promising an 'eye for an eye,' or a certain 'payback' for transgressions. In service to this ethic, repeated displays of 'nerve' and 'heart' build or reinforce a credible reputation for vengeance that works to deter aggression and disrespect, which are sources of great anxiety on the inner-city street.").

[204] *See* FORMAN, *supra* note 119, at 162 ("As a generation of black children grew up seeing friends shot over matters as serious as a drug debt—or as trivial as staring too long at the wrong person—the resulting trauma was as real as the physical harm. Children exposed to violence are less likely to attend school (and more likely to be disruptive when they do go to class). They are also more likely to carry weapons and to require less provocation before using them. Underlying these behaviors is usually a profound sense of hopelessness: Why sacrifice for a tomorrow that may never come?"); *id.* at 163 ("The toll of violence may manifest itself most acutely in children, but it is paid by the entire community. Exposure to violence breeds chronic anxiety, tension, and hypervigilance. Since violent neighborhoods are also more likely to be poor ones, these ills have myriad causes—but fear of violence is surely one. Then there are the more subtle effects, both psychological and economic: the

"dynamic" can "silence the peaceful majority of the population who reside in the district" and even lead the majority to "grow to hate those who participate in street culture—sometimes internalizing racist stereotypes in the process."[205]

Those conclusions militate in favor of aggressively enforcing the criminal code, especially the provisions addressing violent crime. That explains why police departments employ the race-neutral "Hot Spots" strategy of policing.[206] The strategy posits that crime is concentrated in certain neighborhood locations, which means that the best way to arrest offenders and curtail crime is to assign more law enforcement personnel to those sites, regardless of the community's racial makeup. An approach focusing on law enforcement's best judgment where crimes have occurred and are likely to recur is hardly racist; it is a legitimate strategy to protect the vast majority of law-abiding residents against crime.[207] As Professor Franklin Zimring has explained, "preventative street policing cannot be made more colorblind than the demographic patterns of violent crime."[208] The relationship between crime and race is coincidental, not causal, and not the

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office assistant who declines to work extra hours (and make much needed money) because she doesn't want to walk home alone at night; the would-be student who forgoes evening classes and never gets her GED; the higher prices charged at local convenience stores by shopkeepers passing along the cost of alarm systems, window bars, and floodlights.").

[205] BOURGOIS, *supra* note 202 at 34.

[206] *See generally* Larkin & Rosenthal, *supra* note 1, at 213–14 & n. 239 (discussing "Hot Spots" policing and collecting authorities).

[207] *See, e.g.*, Bibas, *supra* note 194 ("Nor is law enforcement simply a tool of white supremacy to oppress blacks. As several prominent black scholars have emphasized, law-abiding blacks often want more and better law enforcement, not less. Harvard law professor Randall Kennedy emphasized that 'blacks have suffered more from being left unprotected or underprotected by law enforcement authorities than from being mistreated as suspects or defendants,' though the latter claims often get more attention. Most crime is intra-racial, so black victims suffer disproportionately at the hands of black criminals. Yale law professors Tracey Meares and James Forman Jr. have observed that minority-neighborhood residents often want tough enforcement of drug and other laws to ensure their safety and protect their property values. The black community is far from monolithic; many fear becoming crime victims and identify more with them than they do with victims of police mistreatment.").

[208] ZIMRING, *supra* note 190, at 212.

result of a racist mentality.[209] In in his recent book *The Myth of Overpunishment*, former Professor Barry Latzer also made that point.

> [S]ince police are required to respond to civilian reports of crime incidents, if they get more calls from black neighborhoods, they will assign more police to those locations. Moreover, given the elevated black-on-black crime rates, calls to the police by black crime victims or witnesses are likely to result in the arrest of an African American suspect. When it comes to serious crimes and nondiscretionary arrests, police departments are not the driver. Rather, both arrests and deployments are driven by high African American crime victimization rates.[210]

Using data from a recent National Crime Victimization Survey (NCVS), Latzer made the same point from a different direction. Although many crimes are not reported to the police, in 2018 victims of violent crime reported that 29% of the offenders were African-American, which is more than twice the percentage of blacks in the United States.[211] Moreover, of the overall number of victim-reported crimes 35% involved black offenders, and 33% of the arrestees were black.[212] If the police were motivated by racism, the number of African-American arrestees would have been higher.[213]

If the strategy of assigning more police where there are more crimes is successful, law-abiding black residents of predominantly black communities will be the principal beneficiaries.[214] That might explain why African-

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[209] *See* Sherman, *supra* note 129, at 384 ("Policing for crime risks may create an appearance of racial profiling . . . but race is only a correlate, not the cause, of policing based on objective methods of offense analysis."); *id.* at 399 ("Crime risks based on place are often correlated with race, but the correlation is a coincidence rather than a cause.").

[210] LATZER, *supra* note 193, at 101.

[211] *Id.* at 93.

[212] *Id.*

[213] *Id.*

[214] "Violent crime is one of the most regressive taxes operating in the United States, with almost all of its negative effects concentrated among low-income minority groups and

Americans in poor communities want more aggressive enforcement of the criminal law in their neighborhoods.[215] Former U.S. Attorney General Bill

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residential areas. The dark-skinned poor pay twice for high rates of violent crime—with rates of victimization many times higher than middle-income white and Asian groups and with rates of imprisonment vastly higher than non-minority populations. So large declines in serious crimes should generate double benefits." ZIMRING, *supra* note 190, at 170; *see also, e.g.*, FORMAN, *supra* note 119, at 218 ("Black Americans benefit the most when violent crime drops. Since 90 percent of D.C.'s murder victims are black, the city's homicide decline overwhelming saved black lives—almost four hundred in a single year. The same story can be told in other cities. In New York, for example, the crime decline of the last two decades means that almost fifteen hundred fewer people were killed each year than would have died had murder rates remained at 1990 levels. Almost two-thirds of the lives saved—a thousand lives a year—were of black and Hispanic men between the ages of fifteen and forty-four."); Larkin & Rosenthal, *supra* note 1, at 215–16 (noting that black, inner-city, law-abiding residents "are the ones who suffer the effects of private violence, who endure the suffocating fear created by a community ruled by outlaws, who need a neighborhood that is a less frightening place"); Voegeli, *supra* note 183, at 34 ("Over the entire period of 1980 to 2008, for example, when blacks constituted about 12% of the U.S. population, they accounted for 52.5% of homicide offenders and 47.4% of homicide victims, according to the Bureau of Justice Statistics. The crime decline that began in 1991 significantly increased blacks' life expectancy, Patrick Sharkey found, improved poor families' upward mobility, and largely removed 'the constant threat of violence' from even the most impoverished communities.").

[215] MAC DONALD, *supra* note 192, at 32–33 ("No stronger proponents of public-order policing exist than law-abiding residents of high-crimes areas. Go to any police-and-community meeting in Brooklyn, the Bronx, or Harlem, and you will hear pleas such as the following: Teens are congregating on my stoop; can you please arrest them? SUVs are driving down the street at night with their stereos blaring; can't you do something? People have been barbecuing on the pedestrian islands of Broadway; that's illegal! The targets of those complaints may be black and Hispanic, but the people making the complaints, themselves black and Hispanic, don't care. They just want orderly streets."); *id.* at 38 ("[T]here is a huge, unacknowledged measure of support for the police in the inner city."). The same is true today. *See, e.g.*, Sarah Elbeshbishi & Mabinty Quarshie, *Fewer than 1 in 5 Support 'Defund the Police' Movement, USA TODAY/Ipsos Poll Finds*, USA TODAY, (Mar. 8, 2021, 6:10 PM), https://www.usatoday.com/story/news/politics/2021/03/07/usa-today-ipsos-poll-just-18-support-defund-police-movement/4599232001/ (noting that only 28% of African-Americans support defunding the police); Jocelyn Grzeszczak, *81% of Black Americans Don't Want Less Police Presence Despite Protests—Some Want More Cops: Poll*, NEWSWEEK (Aug. 5, 2020, 2:08 PM), https://www.newsweek.com/81-black-americans-dont-want-less-police-presence-despite-protestssome-want-more-cops-poll-1523093 ("A majority of Black Americans have said they want police presence in their area to either remain the same or increase, despite recent protests over police brutality, according to new polls. A

Barr poignantly expressed that reality in his 2022 book *One Damn Thing After Another* when he described the feelings of senior black residents in a New Jersey neighborhood in 1991:

> I will never forget a meeting I had in a neighborhood barbershop in Trenton, New Jersey. A group of seniors—all African Americans—expressed desperation about crime levels in their neighborhood. "Mr. Barr, we are in our golden years," one silver-haired gentleman said. "After a lifetime of hard work, we should be able to live in peace. Look down the street. See the bars on all the windows. We

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Gallup poll conducted from June 23 to July 6 surveying more than 36,000 U.S. adults found that 61 percent of Black Americans said they'd like police to spend the same amount of time in their community, while 20 percent answered they'd like to see more police, totaling 81 percent. Just 19 percent of those polled said they wanted police to spend less time in their area."); Jeffrey C. Mays, *Who Opposes Defunding the N.Y.P.D.? These Black Lawmakers*, N.Y. TIMES (Aug. 10, 2020), https://www.nytimes.com/2020/08/10/nyregion/defund-police-nyc-council.html ("It is a clash across racial, ideological and generational lines that is dividing Black and Latino council members in New York City. The discord illustrates how complicated the nation's struggle with its legacy of racial oppression and discriminatory policing has become after the killing of George Floyd and the coronavirus crisis magnified longstanding and widespread racial disparities."); Robert L. Woodson, Sr., Opinion, *The Deadly Results of Defunding the Police*, WALL ST. J. (June 9, 2021, 1:20 PM), https://www.wsj.com/articles/the-deadly-results-of-defunding-the-police-11623259226 ("The movement to 'defund the police,' which rose to prominence after Floyd's death, has actually gotten innocent black people killed. As police have pulled back, our neighborhoods have been left unprotected. Crime has skyrocketed. Major American cities saw a 33% increase in homicides last year as a pandemic swept across the country. Preliminary Federal Bureau of Investigation data show that the U.S. murder rate increased by 25% in 2020. Between Dec. 11, 2020, and March 28, 2021 (after the Minneapolis City Council unanimously approved a budget that shifted $8 million from the police department to other programs), murders in Minneapolis, where Floyd was killed, rose 46% compared with the same period the year before. Homicide rates in large cities are up 24% since January [2021]. . . . A recent Gallup poll found that 81% of black people say they don't want less police presence in their communities. As radical progressives continue to try to defund the police, our families, friends and neighbors have paid the price. And now, people like my friend Carl have to wonder whether a child's death could have been prevented if a police officer had been there to stop it. The defund-the-police movement has been a death sentence for innocent black children. Parents and grandparents suffer mightily from the grief.").

> are behind those bars. We live behind bars while these punks use our streets as a shooting gallery. We are the prisoners—afraid to go out. Please, can the federal government help us?" This was just one of many such encounters I had in cities around the country.[216]

In fact, refusing to focus on a high-crime locale because the neighborhood is predominantly African-American would promote the same racially-based refusal to enforce the law that has led to the past victimization of blacks.[217]

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[216] WILLIAM P. BARR, ONE DAMN THING AFTER ANOTHER: MEMOIRS OF AN ATTORNEY GENERAL 85–86 (2022).

[217] *See, e.g.*, Randall Kennedy, *The State, Criminal Law, and Racial Discrimination: A Comment*, 107 HARV. L. REV. 1255, 1259 (1994) (footnotes omitted) ("Although the administration of criminal justice has, at times, been used as an instrument of racial oppression, the principal problem facing African-Americans in the context of criminal justice today is not over-enforcement but *under*-enforcement of the laws. The most lethal danger facing African-Americans in their day-to-day lives is not white, racist officials of the state, but private, violent criminals (typically black) who attack those most vulnerable to them without regard to racial identity."). The physical victims of crime are not the only ones who suffer. The people who live in neighborhoods rife with drug trafficking and violence become imprisoned in their homes, fearful of venturing outside except for necessities due to their fear of being mugged. Here is one such story:

> In the face of community disruptions, some families isolate themselves from neighbors. In a series of interviews in the South Bronx, Andres Rengifo (2006) has observed that many residents seek to withdraw from their impoverished surroundings. One housing project resident, a single mother with four children (one of whom was attending Yale University and two of whom were in the prestigious Bronx High School of Science public school) said that although she had lived in the projects for seven years, "this place is a dump. I don't talk to anyone, I don't know anyone. That's how we made it here."

TODD R. CLEAR, IMPRISONING COMMUNITIES: HOW MASS INCARCERATION MAKES DISADVANTAGED NEIGHBORHOODS WORSE 103 (2007). Those residents see businesses close, making even the purchase of groceries or medicine a greater chore. Children are forced to sleep in bathtubs to avoid being shot by stray bullets. *See, e.g.,* MAC DONALD, *supra* note 192, at 2; Kennedy, *supra*, at 1259 ("The most lethal danger facing African-Americans in their day-to-day lives is not white, racist officials of the state, but private, violent criminals

A historical example is found in the race riots that accompanied the Black Power movement. Beginning with the Watts Riot in Los Angeles, which broke out on August 11, 1965, a wave of violence swept primarily over African-American communities and took an enormous toll on the black people living there.[218] More than 150 riots took aim at "symbols of white authority," but the sad irony was that their main victims were blacks themselves.[219] More than 2,700 business were sacked or burned, and a total of fourteen square miles mostly of black neighborhoods were burned.[220]

(typically black) who attack those most vulnerable to them without regard to racial identity."). As Professor Kennedy has explained:

> Unfortunately, efforts to address the danger crime poses to minority communities are confused and hobbled by a reflexive, self-defeating resort to charges of racism when a policy, racially neutral on its face, gives rise to racial disparities when applied. Such overheated allegations of racism obscure analysis of a wide range of problems in the criminal justice system. Consider, for instance, the stifling of intelligent debate over drug policy by the rhetoric of paranoia. On the one hand, some condemn as "genocide" the punitive "war on drugs" because a disproportionate number of those subjected to arrest, prosecution, and incarceration for drug use are black. At the same time, others, including Representative Charles Rangel and Director of the Office of National Drug Control Policy Lee Brown, condemn proposals for decriminalizing drug use on the grounds that such policies would amount to genocide because racial minorities would constitute a disproportionate number of those allowed to pursue their drug habits without deterrent intervention by the state. No one in either of these camps has come forward with credible evidence to suggest that American drug policy is truly genocidal—that is, deliberately designed to eradicate a people. Yet the rhetoric of racial genocide clearly influences the public debate about this aspect of criminal law enforcement policy.

Kennedy, *supra*, at 1260–61 (footnotes omitted). Ignoring the interests of law-abiding residents because offenders are black would hardly be a step forward in race relations.

[218] WOODWARD, *supra* note 118, at 189–95 (discussing the riots, their causes, and their effects).

[219] *Id.* at 190–91.

[220] *Id.* at 190.

Despite the recent cries to "*Defund the Police!*," it should be a given that society must enforce the laws prohibiting violent crime. Former President Barack Obama made that point in a 2015 speech to the National Association for the Advancement of Colored People. Contrasting non-violent offenders with "violent criminals" who "need to be in jail," he said that "[m]urderers, predators, rapists, gang leaders, drug kingpins—we need some of those folks behind bars."[221] Explaining the next day why he had limited his 2014 clemency program to non-violent offenders, Obama said, "I tend not to have a lot of sympathy when it comes to violent crime."[222] The need to resort to the criminal justice system has come into sharp focus over the past few years, given the dramatic number of homicides that we have witnessed since the pandemic arrived on our shores.[223]

Racially diverse law enforcement officials have concluded that, to save black lives, it was necessary to pursue aggressive enforcement of the criminal law in African-American communities even though it would incarcerate a disproportionately large number of black offenders. In 1994, Eric Holder, U.S. Attorney for the District of Columbia (and later U.S. Attorney General), created Operation Ceasefire to halt gun-related homicides in Washington. An essential feature was the use of "pretext policing"[224]—viz., stopping people on the basis of reasonable suspicion that they had committed *Offense A* (a vehicle moving violation, like speeding) that in fact is done to question someone and obtain consent to search for

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[221] FORMAN, *supra* note 119, at 221 (quoting Barack Obama, Speech to NAACP (July 14, 2015)).

[222] *Id.* (quoting Barack Obama, "Press Conference by the President, July 15, 2015" (Office of the Press Secretary)).

[223] *See, e.g.*, John Podhoretz, *Bill de Blasio and the Decline of New York City*, NAT'L REV. (Jul. 29, 2021, 11:49 AM), https://www.nationalreview.com/magazine/2021/08/16/bill-de-blasio-and-the-decline-of-new-york-city/ ("By the end of 2019, the murder rate had risen by 7 percent, with other violent crimes also increasing at a comparably modest rate. Then, in 2020, everything went south. Shootings increased by 97 percent (that is not a typo), the homicide rate by 44 percent, the burglary rate by 42 percent, and the number of car thefts by 67 percent."); *supra* notes 24–26.

[224] FORMAN, *supra* note 119, at 203.

Offense B (the illegal possession of weapons).[225] When the strategy proved effective,[226] white and black police chiefs outside the District of Columbia "embraced" it.[227] In 2015, FBI Director Jim Comey made the same point

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[225] *See* Whren v. United States, 517 U.S. 806 (1996) (describing and upholding that practice on the ground that an officer's subjective motivation is not relevant under the Fourth Amendment to the legitimacy of a seizure); FORMAN, *supra* note 119, at 203 (quoting Holder) ("'I'm not going to be naïve about it,' he told an audience at a community meeting on upper Georgetown Avenue. 'The people who will be stopped will be young black males, overwhelmingly.' But, as he had done in his King Day speech, Holder argued that such concerns were outweighed by the need to protect blacks from crime.").

[226] FORMAN, *supra* note 119, at 203 ("[Holder] took a similar tack when celebrating the first anniversary of Operation Ceasefire with officers from the city's gun squads, which had seized 768 guns and $250,000 in cash and had made 2,300 arrests. Holder acknowledged that most of the arrestees were black. But he had no regrets, he told the assembled officers, and neither should they. 'Young black males are 1 percent of the nation's population but account for 18 percent of the nation's homicides,' he said. 'You all are saving lives, not just getting guns off the streets.'").

[227] *Id.* at 204 (alteration in original) ("In response to allegations that police were engaged in racial profiling, Bernard Parks, the African American police chief in Los Angeles, said that racial disparities resulted from the choices of criminals, not police bias. 'It's not the fault of police when they stop minority males or put them in jail,' said Parks. 'It's the fault of the minority males for committing the crime. In my mind it is not a great revelation that if officers are looking for criminal activity, they're going to look at the kind of people who are listed on crime reports.' Charles Ramsey, who became D.C.'s police chief in 1998, agreed. 'Not to say that [racial profiling] doesn't happen, but it's clearly not as serious or widespread as the publicity suggests,' Ramsey said. 'I get so tired of hearing that 'Driving While Black' stuff. It's just used to the point where it has no meaning. I drive while black—I'm black. I sleep while black too. It's victimology."). Some academic studies support that conclusion. For example, assuming that there is a non-racist correlation between arrests and convictions for homicide and robbery, Professor Alfred Blumstein concluded that 80% of the racial imprisonment disparity is due to different rates of offending and suggested some possible nonracial explanation for the other 20%, such as a difference in offenders' criminal histories. *See* Alfred Blumstein, *On the Racial Disproportionality of United States' Prison Populations*, 73 J. CRIM. L. & CRIMINOLOGY 1259, 1280–81 (1982) [hereinafter Blumstein, *Racial Disproportionality*] ("This paper has explored the troubling question of the gross disproportionality between black and white incarceration rates, which stand at a ratio of more than seven to one. It was found that the differential involvement of blacks as arrestees, particularly for the offenses of homicide and robbery, which together comprise a major fraction (over 40%) of prison populations, accounts for 80% of the disproportionality between black and white incarceration rates. These observations hold generally for the race

when describing his experience as a U.S. Attorney.[228] That strategy was not racist then, and it should not be so labeled now.

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ratios in arrest and the crime-type distributions in prison that prevailed throughout the decade of the 1970's. The remaining 20% of the disproportionality may be attributable to a variety of other explanations that are at least arguably legitimate, but may also reflect some unknown degree of discrimination based on race. Exploration of crime-type-specific racial distributions at arrest and in prison indicates that, as the seriousness of the offense decreases, blacks are disproportionately represented in prison. This does suggest that blacks become increasingly disadvantaged as the amount of permissible criminal-justice discretion increases, and discrimination must remain a plausible explanation for an important fraction of that effect. Other possible explanations include the greater saliency in such cases of socioeconomic considerations about the defendant, such as his employment status, and the fact that many such factors are correlated with race. Even if the relatively large racial differences in handling these offenses were totally eliminated, however, that would not result in a major shift in the racial mix of prison populations."); *see also* Alfred Blumstein, *Racial Disproportionality of U.S. Prison Population Revisited*, 64 U. COLO. L. REV. 743, 750 (1983) [hereinafter Blumstein, *Racial Disproportionality Revisited*] ("The principal conclusion of the earlier Blumstein paper was not that racial discrimination does not exist—there are too many anecdotal reports of such discrimination to dismiss that possibility—but, rather, that the bulk of the racial disproportionality in prison is attributable to differential involvement in arrest, and probably in crime, in those most serious offenses that tend to lead to imprisonment."). In a later study, Professor Blumstein found that the new, additional data did not materially change his earlier conclusions, but there was a greater difference regarding drug offenses. Blumstein, *Racial Disproportionality Revisited*, *supra*, at 754 ("Thus, the racial disproportionality situation for the crimes other than drugs is roughly comparable in 1991 to what it was in 1979. The situation appears to have improved for homicide, but the greatly increased prevalence of drug offenders in prison and the race differences in arresting and imprisoning black offenders for drug offenses combine to make the disproportionality in 1991 worse than in the earlier period. The concern over this situation is aggravated by the fact that drug arrests are not necessarily indicative of offending patterns and probably are associated with over-arresting of blacks compared to whites. These facts, combined with the high prevalence of young black males under control of the criminal justice system, must raise serious questions about the degree to which the policy associated with the drug war has significantly exacerbated the racial disproportionality in prisons."); *id.* at 759 ("The futile supply-side war on drugs has contributed significantly to the growth in prison populations and to its racial disproportionality."). We address the distinct drug problem in Part III. We note that there is academic disagreement over the best explanation for the racial disparities in drug and non-drug offenses. *See generally* SPOHN, *supra* note 110, at 181–84 (discussing the competing theories).

[228] *See* James B. Comey, Dir., FBI, Remarks at the University of Chicago Law School, Law Enforcement and the Communities We Serve: Bending the Lines Toward Safety and

Justice (Oct. 23, 2015), https://www.fbi.gov/news/speeches/law-enforcement-and-the-communities-we-serve-bending-the-lines-toward-safety-and-justice [https://perma.cc/TP4H-ZMH7].

> When I worked as a prosecutor in Richmond, Virginia, in the 1990s, that city, like so much of America, was experiencing horrific levels of violent crime. But to describe it that way obscures an important truth: for the most part, white people weren't dying; black people were dying. Most white people could drive around the problem. If you were white and not involved in the drug trade as a buyer or a seller, you were largely apart from the violence. You could escape it. But if you were black and poor, it didn't matter whether you were a player in the drug trade or not, because violent crime dominated your life, your neighborhood, your world. There was no way to drive around the violence that came with the drug trade and the drug trade was everywhere in your neighborhood. And that meant the violence was everywhere. The notion of a "non-violent" drug gang member would have elicited a tired laugh from a resident of Richmond's worst neighborhoods. Because the entire trade was a plague of violence that strangled Richmond's black neighborhoods. The lookouts, runners, mill-workers, enforcers, and dealers were all cut from the same suffocating cloth. Whether they pulled the trigger or not, those folks were killing the community. Like so many in law enforcement in the 1980s and 1990s, we worked hard to try to save lives in those Richmond neighborhoods—in those black neighborhoods—by rooting out the drug dealers, the predators, the gang bangers, the killers. Of course, we also worked "up the chain" to lock up big-time dealers all the way to Colombia. But we felt a tremendous urgency to try to save lives in the poor neighborhoods of Richmond.
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> . . . I remember being asked why we were doing so much prosecuting in black neighborhoods and locking up so many black men. After all, Richmond was surrounded by areas with largely white populations. Surely there were drug dealers in the suburbs. My answer was simple: We are there in those neighborhoods because that's where people are dying. These are the guys we lock up because they are the predators choking off the life of a community. We did this work because we believed that all lives matter, especially the most vulnerable. But the people asking those questions were not the black ministers or community leaders in the poorest neighborhoods. Those good people in those bad neighborhoods already knew why we were there locking up felons with guns and drug addicts with guns. They supported it because

Sadly, homicides have increased dramatically in America's largest cities since March 2020,[229] especially in predominantly black neighborhoods.[230] Two factors might be at least partially accountable.

> they, too, dreamed of a future of freedom and life for their neighborhoods. Those leaders and ministers were the seeders, who hoped to grow something in the safe space created by our weeding—something that would be healthy and that would last.

Id.

[229] *See, e.g.*, *America Should Reform Its Police Forces, Not Defund Them*, ECONOMIST (Sept. 15, 2022), https://www.economist.com/leaders/2022/09/15/america-should-reform-its-police-forces-not-defund-them ("[M]urders have surged in America. In 2020 the number of people killed was 28% higher than it was in 2019—the single biggest increase recorded in more than a century. In 2021 many cities saw further rises. Almost nowhere has been spared, including suburbs and rural areas."); Hon. Tom Cotton, *The Only Good Soros Prosecutor Is a Defeated Soros Prosecutor*, NAT'L REV. (July 19, 2021, 6:30 AM), https://www.nationalreview.com/2021/07/the-only-good-soros-prosecutor-is-a-defeated-soros-prosecutor/ ("Last year [viz., 2020], the United States suffered a 25 percent increase in murder, the largest single-year rise in history. The murder rate has now reached the highest level since the 1990s. Soros prosecutors are not simply negligent; they are culpable in this disintegration of public safety. Indeed, their jurisdictions have disproportionally contributed to the violent crime wave. Philadelphia District Attorney Larry Krasner systematically reduced his jurisdiction's prison population by 30 percent through aggressive criminal leniency policies—and that was before COVID protocols resulted in additional reductions. Predictably, murder in the city skyrocketed over 40 percent after Krasner took office, reaching the highest level in three decades. This year, murder in Philadelphia is on pace to rise another 34 percent. Other Soros prosecutors have delivered similar results. Last year, murder rose 50 percent in Chicago, and 38 percent in Los Angeles. In New York City, murder increased 44 percent and shootings soared 97 percent. In 2020, the murder rate in Baltimore was higher than El Salvador's or Guatemala's—nations from which citizens can claim asylum purely based on gang violence and murder. In California, America's richest and most populous state, murder rose 31 percent."); Barry Latzer, Opinion, *Will the Crime Wave Soon Crest?*, WALL ST. J. (Jan. 2, 2022, 5:05 PM), https://www.wsj.com/articles/will-crime-wave-crest-chicago-new-york-los-angeles-homicide-felon-bail-reform-2021-shooting-killing-demographics-immigration-11641152861?st=fxck5ht1loc1og5&reflink=article_email_share ("Across the U.S., 2021 was a bad year for crime. The New York City Police Department reported a 4.1% increase in homicides over 2020. Chicago's increase was 5% and Los Angeles suffered a 13% rise in killings. The 2021 figures follow a scary 2020, when the nationwide homicide rate (6.5 per 100,000) was the highest in 23 years.").

[230] *See, e.g.*, COUNCIL CRIM. JUST., PANDEMIC, SOCIAL UNREST, AND CRIME IN U.S. CITIES: 2020 YEAR-END UPDATE 3 (Richard Rosenfeld et al. eds., Jan. 2021) ("Homicides rose sharply

in 2020, and rates of aggravated assaults and gun assaults increased as well. Homicide rates were 30% higher than in 2019, an historic increase representing 1,268 more deaths in the sample of 34 cities than the year before. . . . Homicides increased in nearly all of the 34 cities in the sample."); *id.* at 6–7 & fig. 1 ("In January and February, the average city homicide rate increased by 32.5% over the same period in 2019. From March through May, the rate was 19.4% higher. For the summer months of June through August, the homicide rate was 37.2% higher. For September through December, the rate was 28.2% higher. From the declaration of emergencies in March through the end of the year, the average city homicide rate increased by 28.6% over the same period in 2019. Across the entire year of 2020, the homicide rate was 29.6% higher in 2020 than the year before. That translates to an additional 1,268 homicides across the 34-city sample."); *How to Stop the Killing*, ECONOMIST (Sept. 12, 2022), https://www.economist.com/special-report/2022/09/12/how-to-stop-the-killing ("According to the Centres for Disease Control and Prevention, a government agency, there were 24,500 homicides in America in 2020. That was a 28% rise on 2019, the biggest one-year jump in over a century. Murder rates spiked almost everywhere—in big cities, suburbs and rural areas. There were more victims of both sexes, almost every race and ethnicity, and of every age group. But the fastest-growing number, both proportionately and in absolute terms, was of young black men living in big cities. Of all homicides, 19,350 involved guns. Black people, of whom 12,000 were killed in that year, accounted for 70% of the increase in gun homicides. More recent data nationwide is not yet available, but city-by-city figures suggest that the spike has not reversed itself. In 2021 Chicago saw over 800 homicides, the highest number since 1994, when America's previous big wave of violent crime was beginning to subside. The murder rate in black neighbourhoods reached its highest-ever level. New York, although still among the safest cities in America, recorded its most murders in a decade. Cities as far afield as Austin in Texas and Portland in Oregon have passed all-time records for homicide. So far this year several cities, including Chicago and New York, have seen their murder rates dip a little. But they remain far higher than before the pandemic. Almost no cities have escaped unscathed. As well as murders, other violent crimes such as carjacking have soared even as less violent crimes such as burglary have declined."); *An Anatomy of Hard Times in the City*, ECONOMIST (Sept. 12, 2022), https://www.economist.com/special-report/2022/09/12/an-anatomy-of-hard-times-in-the-city ("The homicide rate for black men in America is roughly 13 times higher than for white men, and seven times higher than for black women. . . . Why do a minority of young black men resort to violence so often? Guns are present in almost every part of American society; and everyone gets into arguments. One explanation comes from Elijah Anderson, a sociologist at Yale University, whose book 'Code of the Street' looked at inner-city violence in Philadelphia. Mr Anderson argues that a violent culture has arisen among a minority of young black men in the poorest areas in response to racist, ineffective policing and entrenched inequality. In the poorest black neighbourhoods, he argues, young men with few economic options compete for status in a deeply competitive, unequal society, in which the ownership of physical goods (such as cars or expensive clothes) signals success. According to

One is the "*Defund the Police!*" movement that arose in response to the murder of George Floyd in 2020. The movement is openly hostile to police

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Mr Anderson, using violence, even in response to modest slights, can be a way to build 'street credibility'. A reputation for being tough is protection from being victimised by others. But such a reputation must be maintained. 'It becomes the coin that you use to negotiate your own security,' he says. This may explain why young men join gangs, which are responsible for an outsized share of shootings. Most gangs are not big organised-crime groups with clear hierarchies, like those in 'The Wire'. They are more often informal cliques of perhaps half a dozen young men and teenagers, who have probably known each other from childhood. To make money they get involved in selling drugs or stealing. But that is not their primary purpose, which is to provide protection to their members."); Sohrab Ahmari, *Anti-Anti-Crime Policies Are Ruining American Cities*, SPECTATOR WORLD (July 22, 2021, 3:33 PM), https://spectatorworld.com/topic/anti-anti-crime-policies-ruining-american-cities/ ("In Atlanta, homicides climbed by nearly 60 percent in 2020, and shootings by 40 percent. In Los Angeles, homicides were up by 20 percent, shootings by more than 50 percent. In Portland, homicides shot up by an eye-watering 533 percent, and shootings by 126 percent. To call these statistics an urban crisis would be a gross understatement."); Lois Beckett & Abené Clayton, *US Saw Estimated 4,000 Extra Murders in 2020 Amid Surge in Daily Gun Violence*, GUARDIAN (Mar. 24, 2021), https://www.theguardian.com/us-news/2021/mar/24/us-murders-extra-4000-everyday-gun-violence ("Many of the homicides are concentrated in communities of color that have historically seen the worst burden of daily gun violence, including in Philadelphia, St Louis, Chicago, and Oakland."); Emma Colton, *Massive Increase in Black Americans Murdered Was Result of Defund Police Movement: Experts*, FOX NEWS (April 19, 2022, 1:54 AM), https://www.foxnews.com/us/black-americans-paid-enormous-price-for-defund-the-police-movement; Paige Fry, *Nearly 40 People Shot in Chicago Over the Weekend as July Goes Down as the Most Violent Month in 28 Years*, CHI. TRIB. (Aug. 3, 2020, 6:44 PM), https://www.chicagotribune.com/news/breaking/ct-weekend-shooting-20200803-xkevk64unvdijfzboyyn4vowly-story.html; Jon Hilsenrath, *Homicide Spike Hits Most Large U.S. Cities*, WALL ST. J. (Aug. 2, 2020), https://www.wsj.com/articles/homicide-spike-cities-chicago-newyork-detroit-us-crime-police-lockdown-coronavirus-protests-11596395181; Weihua Li & Beth Schwartzapfel, *Murders Rose Last Year. Black and Hispanic Neighborhoods Were Hit the Hardest*, MARSHALL PROJECT (Apr. 8, 2021), https://www.themarshallproject.org/2021/04/08/murders-rose-last-year-black-and-hispanic-neighborhoods-were-hit-hardest ("From 2019 to 2020, homicides in nine U.S. cities[—Atlanta, Baltimore, Chicago, Dallas, Detroit, Los Angeles, New York, Philadelphia, Washington, D.C.—]rose by 722, according to police data. More than 85% of the increase took place in predominantly Black and Hispanic neighborhoods, where homicide rates were already higher that White and Asian neighborhoods. . . . In these cities, Black neighborhoods had the largest increase in lives lost—406 more than 2019—and Hispanic neighborhoods had almost 200 more homicides than last year. White neighborhoods in every city except Dallas also saw an increase in homicides.").

officers and law enforcement generally.[231] As a result, officers have throttled back on their use of the controversial stop-question-and-frisk investigative method often used to determine whether someone is illegally in possession of a firearm. A stop is lawful under the Fourth Amendment if a police officer has a "reasonable suspicion of criminality," which is a lower level of justification than the probable cause needed for an arrest,[232] which itself need not satisfy the more-likely-than-not standard.[233] The practice is controversial because, given that low threshold for legality, the stop-question-and-frisk tactic leads to a high number of false positives. Nonetheless, scholars such as Professors Paul Cassell, Richard Fowles, and Lawrence Rosenthal have argued that police officers' reluctance to use that technique is at least partially responsible for the nationwide increase in gun-related violence that began after Floyd's death.[234]

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[231] *See supra* note 14 and accompanying text.

[232] *See* United States v. Sokolow, 490 U.S. 1, 7 (1989) (citations omitted) ("The officer, of course, must be able to articulate something more than an 'inchoate and unparticularized suspicion or "hunch."' The Fourth Amendment requires some 'minimal level of objective justification' for making the stop. That level of suspicion is considerably less than proof of wrongdoing by a preponderance of the evidence. We have held that probable cause means 'a fair probability that contraband or evidence of a crime will be found,' and the level of suspicion required for a *Terry* stop is obviously less demanding than that for probable cause.").

[233] *See* Illinois v. Gates, 462 U.S. 213, 235, 238 (1983) (citations omitted) ("Finely-tuned standards such as proof beyond a reasonable doubt or by a preponderance of the evidence, useful in formal trials, have no place in the magistrate's decision. While an effort to fix some general, numerically precise degree of certainty corresponding to 'probable cause' may not be helpful, it is clear that 'only the probability, and not a prima facie showing, of criminal activity is the standard of probable cause.' . . . The task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the 'veracity' and 'basis of knowledge' of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place.").

[234] The 1990s decline in the murder rate is undeniable. *See, e.g.*, ZIMRING, *supra* note 190, at ix–x, 1, 4–14, 46. As Berkeley Professor Franklin Zimring colorfully described it, the drop was "as close to the miracle of the loaves and the fishes as criminology has come in the past half-century." *Id.* at 153. The extent to which the stop-question-and-frisk tactic contributed to that decline is the subject of considerable debate. *See generally* Larkin & Rosenthal, *supra* note 1, at 166–71 & nn.8–31 (collecting arguments and authorities pro and con). Recent

Another likely factor is the decision by some large-city prosecutors to reject the "broken windows" theory of crime control,[235] which, some have argued, cities like New York had successfully used to reduce violent crime.[236] Those factors might be a cause of the upsurge in pandemic-era

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scholarship has found that the 2020 increase in gun-related violence is attributable to police reluctance to use the stop-question-and-frisk tactic because of the current, widespread hostility toward the police. *See*, *e.g.*, Cassell, *supra* note 25; Rosenthal, *supra* note 25; *cf.* Eric L. Piza & Vijay F. Chillar, *The Effect of Police Layoffs on Crime: A Natural Experiment Involving New Jersey's Two Largest Cities*, 4 JUST. EVALUATION J. 163 (2021), https://www.tandfonline.com/doi/full/10.1080/24751979.2020.1858697 (finding an increase in crime when there are police layoffs); *see also* Paul G. Cassell & Richard Fowles, *What Caused The 2016 Chicago Homicide Spike? An Empirical Examination of The "ACLU Effect" and the Role of Stop and Frisks in Preventing Gun Violence*, 2018 U. ILL. L. REV. 1581 (2018) (finding that the decline in stop-and-frisk stops is the most likely explanation for the spike in homicides and shootings in Chicago in 2016).

[235] James Q. Wilson and George L. Kelling set forth an order-maintenance policing theory in their now-famous article entitled *Broken Windows: The Police and Neighborhood Safety*. James Q. Wilson & George L. Kelling, *Broken Windows: The Police and Neighborhood Safety*, ATLANTIC, Mar. 1982, at 29. Wilson defined "order maintenance" as the absence of "disorder," with disorder being defined as an individual or a neighborhood condition that "disturbs or threatens to disturb the public peace or that involves face-to-face conflict among two or more persons." JAMES Q. WILSON, VARIETIES OF POLICE BEHAVIOR 16 (1968). "Broken Windows" policing advocates for maintaining community order by addressing actions that, though not felonies, corrode neighborhood life (such as public urination). The theory is that enforcement of such quality-of-life infractions is as important a police responsibility as apprehending felons. Aggressive order-maintenance policing eliminates the public disorder serving as a breeding ground for increasingly serious crime. It also leads to the arrest of serious criminals, who commit minor offenses and felonies, and it helps deter crime by encouraging citizens to be in public spaces. *See* WESLEY G. SKOGAN, DISORDER AND DECLINE: CRIME AND THE SPIRAL OF DECAY IN AMERICAN NEIGHBORHOODS (1990); Larkin & Rosenthal, *supra* note 1, at 166 & n.8.

[236] *See, e.g.*, ZACK SMITH & CHARLES D. SIMPSON, ROGUE PROSECUTORS (2023); Anthony A. Braga, *New Perspectives in Policing: Crime and Policing Revisited*, NAT'L INST. JUST. 6, 21 n.1 (2015) (citations omitted) ("Research suggests that incivilities generate fear and are correlated with serious crime."); George L. Kelling, *How New York Became Safe: The Full Story*, CITY J. (July 17, 2009), https://www.city-journal.org/article/how-new-york-became-safe-the-full-story; CHARLES D. STIMSON & ZACK SMITH, HERITAGE FOUND., MEMORANDUM NO. 275, "PROGRESSIVE" PROSECUTORS SABOTAGE THE RULE OF LAW, RAISE CRIME RATES, AND IGNORE VICTIMS 26 (Oct. 29, 2020), https://www.heritage.org/sites/default/files/2

violence. Remember: the politically powerful, especially elected officials, and the wealthy can afford to pay for their own protection, either with taxpayers' dollars, their campaign funds, or their personal accounts; the poor cannot.[237] For them, it is the police or nothing.[238] Whatever the reason,

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020-10/LM275.pdf; Matt DeLisi, *Broken Windows Works*, CITY J. (May 29, 2019), https://www.city-journal.org/broken-windows-policing-works.

[237] *See, e.g.*, Jon Levine, *AOC Has Spent Thousands on Security, Including $4k-Plus to Ex-Blackwater Contractor*, N.Y. POST (July 31, 2021, 12:19 PM), https://nypost.com/2021/07/31/aoc-has-spent-thousands-on-personal-security-including-ex-blackwater-contractor/ ("AOC's campaign dropped at least $4,636 at Tullis Worldwide Protection for 'security services' between January and June of this year according to the filings."); Liz Navratil, *Minneapolis Has Paid $63,000 to Private Security Firms for 3 Council Members*, STAR TRIB. (June 30, 2020, 9:37 AM), https://www.startribune.com/mpls-has-paid-63k-to-protect-for-three-council-members/571555642/ ("The council members have been under increasing scrutiny since they and some of their colleagues gathered in Powderhorn Park earlier this month and promised to begin the process of ending the Minneapolis Police Department."); Dorothy Moses Schulz, *'Defund Police' Squad Members Are Biggest Spenders on Private Security*, N.Y. POST (Sept. 13, 2021, 2:43 PM), https://nypost.com/2021/09/13/defund-police-squad-members-spend-on-private-security/ ("It's a tight race among 'defund the police' Democrats in this year's chutzpah Olympics, but New York representative Alexandria Ocasio-Cortez and other House members of 'the Squad' are well-positioned to take home the gold. Fully embracing the politics of 'good for thee, but not for me,' AOC, Minnesota's Ilhan Omar, Massachusetts's Ayanna Pressley, and the newest Squad member, Missouri's Cori Bush, are among the most vocal advocates for defunding—while also being, according to Federal Election Commission reports, among the biggest spenders on personal security.").

[238] And nothing it would be if elected officials order the police to stand down in the face of violence by groups those officials favor. *See, e.g.*, SETH BARRON, THE LAST DAYS OF NEW YORK: A REPORTER'S TRUE TALE xiv–xv (2021); David E. Bernstein, *The Right to Armed Self-Defense in Light of Law Enforcement Abdication*, 19 GEO. J.L. & PUB. POL'Y 177, 185–202 (2021) (describing the breakdown of law and order in cities during the summer of 2020 due to the refusal of mayors in those cities to support police efforts to quell civil unrest); Eric L. Piza & Nathan T. Connealy, *The Effect of the Seattle Police-Free CHOP Zone on Crime: A Microsynthetic Control Evaluation*, 21 CRIMINOLOGY & PUB. POL'Y 35, 35 (2022) (finding that crime increased significantly in the Seattle "Capitol Hill Occupation Protest" (CHOP) zone because police generally did not respond to calls for service); Bret Stephens, Opinion, *Undeterred Criminals Plus Demoralized Cops Equals More Crime*, N.Y. TIMES (Apr. 18, 2023), https://www.nytimes.com/2023/04/18/opinion/crime-policing-chicago.html ("[L]ax enforcement when it comes to petty criminality has led to big-time criminality. And the consequence of supposedly 'victimless' crimes like shoplifting has created a palpable sense of disorder, menace and fear—each conducive to the anything-goes atmosphere in which crime invariably flourishes. Will things

African-Americans, Hispanics, other minorities, and the poor of any color are most in need of protection by law enforcement regardless of the racial effect of neutral enforcement of the criminal law.[239]

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get better? Eventually, yes, when a critical mass of voters recovers the simple combination of common sense and political will. But whether it occurs sooner or later is a difference that will be measured in thousands of lives, harmed or ended by the crime we collectively let happen.").

[239] *See, e.g.*, COUNCIL CRIM. JUST., *supra* note 230; Ahmari, *supra* note 230 ("[D]espite attempts by blue politicians and blue-check media to gaslight and spin the American people, the cause is no mystery: last year's anti-police movement enabled, and is thus complicit in, this slaughter. Each of the above-mentioned cities embraced a policy mix designed to make life easier for criminals and harder for law abiders and enforcers, from bail 'reform' to lax or nonexistent enforcement of so-called lifestyle crimes [e.g., public urination] from district attorneys who refuse to prosecute an ever-widening range of crimes to severe police budget cuts."); Barry Latzer, *When Black Lives Don't Matter*, NAT'L REV. (Sept. 9, 2022, 6:30 AM), https://www.nationalreview.com/2022/09/when-black-lives-dont-matter/ ("Whatever the solution, one thing is clear: If we really care about black lives—unlike BLM—we won't be looking for ways to limit the police."); Nicole Gelinas, Opinion, *Data Proves It: Pandemic Is No Excuse for NYC's Rising Tide of Violent Crime*, N.Y. POST (May 10, 2021, 4:02 PM), https://nypost.com/2021/05/09/pandemic-is-no-excuse-for-nycs-rising-tide-of-violent-crime/; Daniel Henninger, Opinion, *NYC Voted. It Was About Crime*, WALL ST. J. (June 23, 2021, 5:52 PM), https://www.wsj.com/articles/nyc-voted-it-was-about-crime-11624485176 ("Two years ago, Chicagoans elected progressive Lori Lightfoot as their mayor. They're still in civil-disorder hell. Over Father's Day weekend, 65 people were shot and 10 killed. A woman living in Humboldt Park told the ABC affiliate: 'I am scared. I am getting out of Chicago. It's a wrap, I'm leaving.' . . . For some 20 years, the New York City Police Department's fix was hundreds of plainclothes cops trained to identify and arrest guys with guns before they started shooting. It worked, until the units were declared illegal or disbanded. The city lived in peace. No longer."). That result should surprise no one. A reduction in the number of, or aggressive enforcement by, police officers naturally leads to an increase in gun-related crimes.

Factors such as the rise in crime since 2020 has persuaded numerous politicians, including President Biden, that the "*Defund the Police!*" movement is politically suicidal. *See* Joseph R. Biden Jr., President, United States, State of the Union Address (Mar. 1, 2022) (transcript available at https://www.whitehouse.gov/state-of-the-union-2022/). "We should all agree the answer is not to defund the police. It's to fund the police. Fund them. Fund them. Fund them with the resources and training—resources and training they need to protect our communities." *Id.* But *Defund*'s advocates might be only hibernating until a more advantageous time appears.

The existence of black-on-black crime cannot be dismissed as "jargon, violence to language," because it ignores the people who created the ghettos in which black-on-black crime occurs.[240] *They*, so the argument goes, are the parties ultimately responsible for such offenses, not the particular individuals who robbed a fellow ghetto resident or who pulled the trigger to shoot a neighbor.[241] That might be an allegorical or poetic description of moral responsibility, although there certainly are other factors that even the critics recognize might play a causal role too.[242]

That description, however, does not serve as a legal excuse for crime. American law has never recognized what is technically known as the "severe

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[240] COATES, *supra* note 38, at 110–11.

[241] Ta-Nehisi Coates makes that argument:

> "Black on-black crime" is jargon, violence to language, which vanishes the men who engineered the covenants, who fixed the loans, who planned the projects, who built the streets and sold red ink by the barrel. . . .
>
> The killing fields of Chicago, of Baltimore, of Detroit, were created by the policy of the Dreamers, but their weight, their shame, rests solely upon those who are dying in them. There is a great deception in this. To yell 'black-on-black crime' is to shoot a man and then shame him for bleeding. And the premise that allows for these killing fields—the reduction of the black body—is no different than the premise that allowed for the murder of Prince Jones. The Dream of acting white, of talking white, of being white, murdered Prince Jones as sure as it murders black people in Chicago with frightening regularity. Do not accept the lie. Do not drink from poison. The same hands that drew red lines around the life of Prince Jones drew red lines around the ghetto.

Id.

[242] *See id.* at 27 ("Fully 60 percent of all young black men who drop out of high school will go to jail."); *see also* W. BRADFORD WILCOX ET AL., AM. ENTER. INST., LESS POVERTY, LESS PRISON, MORE COLLEGE: WHAT TWO PARENTS MEAN FOR BLACK AND WHITE CHILDREN (June 17, 2021), https://www.aei.org/research-products/report/less-poverty-less-prison-more-college-what-two-parents-mean-for-black-and-white-children/ (comparing income, incarceration rates, and education among black and white children from single- and two-parent homes, and finding that black children from two-parent homes outperform white children from single-parent homes).

environmental depredation" defense,[243] a defense that is also (and more colorfully) known as the "rotten social background" defense.[244] That defense would exculpate, or mitigate punishment for, impoverished and socially deprived offenders who, due to "racial and ethnic discrimination, dysfunctional family lives, substandard housing in violent neighborhoods, inadequate education, chronic unemployment, and so on[,]" suffer from dysfunctional reasoning skills that are akin to the types of mental disorders that qualify for the insanity defense.[245] Inner-city residents, lacking any legitimate employment opportunity, the argument goes, turn to crime, including illegal drug trafficking, as the only available option.[246]

At bottom, the "rotten social background" defense is irreconcilable with the elementary criminal law principle of individual responsibility.[247] As

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[243] *See* Stephen J. Morse, *Severe Environmental Deprivation (aka RSB): A Tragedy, Not a Defense*, 2 ALA. C.R. & C.L. L. REV. 147 (2011).

[244] D.C. Circuit Court of Appeals Judge David Bazelon famously endorsed the latter term. *See* United States v. Alexander, 471 F.2d 923, 926, 957–62 (D.C. Cir. 1972) (Bazelon, C.J., dissenting) (quoting defense counsel's closing argument) ("Counsel's strategy was to bypass the troublesome term 'mental illness,' and invite the jury to focus directly on the legal definition of that term. He conceded to the jury that Murdock 'did not have a mental disease in the classic sense,' *i.e.*, he did not have a psychosis. But, counsel argued, the expert testimony showed that at the critical moment Murdock did not have control of his conduct, and the reason for that lack of control was a deep-seated emotional disorder that was rooted in his 'rotten social background.'").

[245] Erik Luna, *Spoiled Rotten Social Background*, 2 ALA. C.R. & C.L. L. REV. 23, 23–24 (2011); *see Alexander*, 471 F.2d at 926, 957–62 (Bazelon, C.J., dissenting).

[246] *See, e.g.*, ALEXANDER, *supra* note 1, at 51 ("The decline in legitimate employment opportunities among inner-city residents increased incentives to sell drugs—most notably crack cocaine."); SERED, *supra* note 194, at 3 (footnotes omitted) ("Most violence is not just a matter of individual pathology—it is created. Poverty drives violence. Inequity drives violence. Lack of opportunity drives violence. Shame and isolation drive violence. And like so many conditions known all too well to public health professionals, violence itself drives violence.").

[247] *See, e.g.*, Andrew E. Taslitz, *The Rule of Criminal Law: Why Courts and Legislatures Ignore Richard Delgado's Rotten Social Background*, 2 ALA C.R. & C.L. L. REV. 79, 82 (2011) (footnotes omitted) ("The rotten social background defense . . . overtly argues that part of the blame for a crime rests on society. It insists that society can collectively be held responsible by paying the price of reducing the offender's crime and sentence, and it confers on jurors the power to hear wide-ranging evidence whose ultimate justification is the individualized

Professor Stephen Morse put it, "[C]riminal law defenses to responsibility are crucial to the just adjudication of guilt or innocence, but they are not an appropriate means to remedy undoubted social, biological, and psychological problems."[248] The defense is also irreconcilable with the government's part of the "social contract." By assuming a monopoly over the use of force, the government has the responsibility to enforce the criminal law, which the Equal Protection Clause requires to be done in a race-neutral fashion.[249] It thus should be no surprise that, while a small number of academics and one judge have endorsed that defense,[250] American criminal law has not.[251]

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worthiness of a particular defendant to receive the blessings of compassion. Accordingly, the rotten social background defense violates every major assumption of the modem American rule of criminal law and thus cannot be recognized as law without calling into question the bedrock political beliefs that define the current system."). There are other problems with a "rotten social background" defense. *See, e.g.*, Luna, *supra* note 245, at 25 (footnote omitted) ("[T]he RSB defense could transform the often misunderstood and misapplied concept of 'free will,' permitting exculpatory claims in contexts where such arguments have been historically rejected. It might even open up the door for other defenses that have had little traction outside of academe, such as claims of addiction and brainwashing.").

[248] Morse, *supra* note 243, at 148.

[249] Yes, there are exceptions. The government grants immunity from criminal prosecution to foreign diplomats present in the United States in exchange for receiving the same immunity for our foreign diplomats serving overseas. That immunity, however, is not based on race.

[250] *See Alexander*, 471 F.2d at 926, 957–62 (Bazelon, C.J., dissenting); David L. Bazelon, *The Morality of the Criminal Law*, 49 S. CAL. L. REV. 385, 385, 393–94 (1976); Richard Delgado, *The Wretched of the Earth*, 2 ALA. C.R. & C.L. L. REV. 1, 22 (2011); Richard Delgado, *"Rotten Social Background": Should the Criminal Law Recognize a Defense of Severe Environmental Deprivation?*, 3 L. & INEQ. 9, 90 (1985). Others are sympathetic to this view. *See, e.g.*, Angela P. Harris, *Rotten Social Background and the Temper of the Times*, 2 ALA. C.R. & C.L. L. REV. 131 (2011).

[251] *See, e.g.*, *Alexander*, 471 F.2d at 967–68; GEORGE FLETCHER, RETHINKING CRIMINAL LAW 801 (1978); Paul H. Robinson, *Are We Responsible for Who We Are? The Challenge for Criminal Law Theory in the Defenses of Coercive Indoctrination and "Rotten Social Background"*, 2 ALA. C.R. & C.L. L. REV. 53, 58–61 (2011); Taslitz, *supra* note 247, at 82; Peter Arenella, *Demystifying the Abuse Excuse: Is There One?*, 19 HARV. J.L. & PUB. POL'Y 703, 704 (1996) (stating that the only "abuse excuse" for which a defendant may use evidence of past victimization to negate legal responsibility is the insanity defense). Professor Stephen Morse

There is no material difference between the substance of the "rotten social background" defense and the argument that systemic racism has caused inner-city blacks to sell illicit drugs and commit violent crimes. The only difference is in the manner of their presentation. The systemic racism defense is like a David Copperfield trick. Rather than overtly ask for an exemption from the criminal law based on race, which the Supreme Court would not endorse in that bald-faced fashion, critics argue that the same offenders should be held blameless because of society's wrongdoing in the form of systemic racism.[252] The latter theory, however, leads to the same result as the former; it's just less honest about its approach. By seeking to decriminalize pathologies, by placing the victim and the criminal on a similar moral plane, and by contemplating whether it is more rational for black communities to want non-violent black criminals to escape incarceration than to be held legally accountable for law-breaking[253]—by

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has written several articles explaining why the criminal law does not and should not endorse the "rotten social background" defense. *See, e.g.*, Stephen J. Morse, *Deprivation and Desert*, *in* FROM SOCIAL JUSTICE TO CRIMINAL JUSTICE: POVERTY AND THE ADMINISTRATION OF CRIMINAL LAW 114 (William C. Heffernan & John Kleinig eds., 2000); Stephen J. Morse, *Justice, Mercy, and Craziness*, 36 STAN. L. REV. 1485, 1489–90 (1984); Stephen J. Morse, *The Twilight of Welfare Criminology: A Reply to Judge Bazelon*, 49 S. CAL. L. REV. 1247, 1267 (1976).

[252] Want another example? President Biden has ordered the Executive Branch to implement policies designed to replace "systemic racism" with the equally amorphous principle of "equity." *See* Exec. Order No. 14091, 88 Fed. Reg. 10825 (Feb. 16, 2023); Exec. Order No. 13985, 86 Fed. Reg. 7009 (Jan. 20, 2021). What does "equity" mean, and how is it different from "equality," the goal toward which the nation's public policy has always striven? Executive Order 13985 makes a stab at a definition by defining "equity" as

> the consistent and systematic fair, just, and impartial treatment of all individuals, including individuals who belong to underserved communities that have been denied such treatment, such as Black, Latino, and Indigenous and Native American persons, Asian Americans and Pacific Islanders and other persons of color; members of religious minorities; lesbian, gay, bisexual, transgender, and queer (LGBTQ+) persons; persons with disabilities; persons who live in rural areas; and persons otherwise adversely affected by persistent poverty or inequality.

Id. at 7009. That is a long-winded, lawyerly way of saying that straight white males need not apply.

[253] As Professor Paul Butler argues in a 1995 essay:

doing all that, the "rotten social background" defense would corrode the respect for the law necessary for people to comply with it.[254]

Only one federal judge, D.C. Circuit Judge David Bazelon, has ever said in a judicial opinion that the defense should be recognized, and he would have treated it as an application of the insanity defense.[255] No other federal

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> [T]he race of a black defendant is sometimes a legally and morally appropriate factor for jurors to consider in reaching a verdict of not guilty or for an individual juror to consider in refusing to vote for conviction.
>
> My thesis is that, for pragmatic and political reasons, the black community is better off when some nonviolent lawbreakers remain in the community rather than go to prison. The decision as to what kind of conduct by African-Americans ought to be punished is better made by African-Americans themselves, based on the costs and benefits to their community, than by the traditional criminal justice process, which is controlled by white lawmakers and white law enforcers.

Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 YALE L.J. 677, 679 (1995) (footnote omitted).

[254] Some scholars believe that more people follow the law out of respect than fear. *See, e.g.*, TYLER, *supra* note 130, at 46; YEAGER, *supra* note 130, at 9; Larkin & Rosenthal, *supra* note 1, at 206. That is important. As Charles Murray recently explained:

> When a government loses legitimacy, it loses some of the allegiance of its citizens. That weakened allegiance means, among other things, a greater willingness to ignore the law. The federal government has enacted thousands of laws and regulations. Many of them apply to every family and business in the nation. They cannot possibly be enforced by the police or courts without almost universal voluntary compliance. When a government is seen as legitimate, most citizens voluntarily comply because it is part of being a citizen; they don't agree with every law and regulation, but they believe it is their duty as citizens to respect them. When instead people see laws and regulations as products of the illegitimate use of power, the sense of obligation fades.

MURRAY, *supra* note 39, at 119.

[255] *See Alexander*, 471 F.2d at 926, 959 (Bazelon, C.J., dissenting) ("[Alexander's counsel] asked the trial court to omit the term 'mental disease or defect' from the jury instructions. I think his proposal was ingenious; the trial court might well have framed a suitable instruction asking the jury to consider whether Murdock's act was the product, not of 'mental illness,' but of an 'abnormal condition of the mind that substantially affects mental

judge has agreed with him since he set forth that view fifty years ago. Yet, unlike today's critics, who do not address the consequence of freeing offenders under this defense, Judge Bazelon at least mused about how the criminal justice system should treat someone found not guilty by reason of insanity due to a "rotten social background."[256] Do we confine them like

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or emotional processes and substantially impairs behavior controls.'"); *id.* at 960 ("It may well be that the trial judge was motivated by a reasonable fear that the jury would reach its decision on the basis not of the law but of sympathy for the victims of a racist society. Nevertheless, I think that the quoted instruction was reversible error. It had the effect of telling the jury to disregard the testimony relating to Murdock's social and economic background and to consider only the testimony framed in terms of 'illness.' Such an instruction is contrary to law, and it clearly undermined Murdock's approach to the insanity defense in this case. For Murdock's strategy had two parts: first, he sought to convince the jury to disregard Dr. Williams' finding of no 'mental illness,' and then he sought to persuade them to find mental illness in the legal sense of the term. The jury could hardly consider the issue of mental illness without considering Murdock's background, in view of the fact that all the witnesses traced such disabilities as they found at least in part to his background.").

[256] Chief Judge Bazelon writes:

> It does not necessarily follow, however, that we should push the responsibility defense to its logical limits and abandon all of the trappings of the medical or disease model. However illogical and disingenuous, that model arguably serves important interests. Primarily, by offering a rationale for detention of persons who are found not guilty by reason of "insanity," it offers us shelter from a downpour of troublesome questions. If we were to facilitate Murdock's defense, as logic and morality would seem to command, so that a jury might acquit him because of his "rotten social background" rather than any treatable mental illness, the community would have to decide what to do with him.
>
> If acquitted because he lacked responsibility, Murdock would automatically have been committed to St. Elizabeth's Hospital for further examination. He could then obtain an unconditional release only upon the certification of the hospital superintendent "(1) that such person has recovered his sanity, (2) that, in the opinion of the superintendent, such person will not in the reasonable future be dangerous to himself or others * * *." Plainly, the Hospital would find it difficult to justify holding Murdock on the grounds that he was insane in any conventional sense. None of the psychiatrists who testified at trial, including those from St. Elizabeths, suggested that his "sanity" had ever been lost.

offenders acquitted on the ground that they are insane even though they suffer from no recognized mental disease or defect? Do we incapacitate them because we know that, having been granted a lifetime supply of "Get Out of Jail Free" cards, they will assuredly commit more of the same crimes? Or do we free them and suffer the consequences of continued violent offenses in the neighborhoods that criminals haunt? Advocates of the systemic racism theory do not offer a solution as to how drug offenders, let alone murderers, should be treated. The logic of their theory, however, demands that all such offenders be acquitted, that the blame be placed on

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> Nevertheless, Murdock may well be dangerous. We have no carefully-crafted technique for resolving the complex of legal, moral, and political questions concealed in the determination of dangerousness. Regrettably, those questions are now decided, at least in the first instance, by psychiatrists. We can only speculate on the outcome of their inquiry.
>
> They might conclude that Murdock s rage and resentment were burned off by the explosion in the restaurant; the cathartic effect of his violent outburst may have made its repetition unlikely. On the other hand, the crime Murdock committed is a prototype of the crimes that arouse the greatest public anxiety. He seems to be a man whose bitterness and racial hostility have turned into blasting powder which can be touched off by a spark. Since there is no obvious way to insulate him from further sparks, and since the powder is not being deactivated, further explosions may be unavoidable. It would not be surprising if the psychiatrists took the view that Murdock is now, and is likely to remain, extremely dangerous.
>
> However accurate the prediction of dangerousness, it is not at all clear that the statute would permit Murdock's confinement. Read literally, the statute seems to establish a return to sanity and an absence of dangerousness as independent pre-conditions of unconditional release. D.C. Code § 24-301(e). That reading would require the hospitalization of a dangerous person who lacked any mental illness whatsoever. Our cases have made it clear, however, that "dangerousness" refers to "dangerousness by reason of mental illness." Thus, a defendant who was dangerous but no longer insane could not be involuntarily hospitalized. If Murdock cannot be considered insane, the hospital would have to release him.

Id. at 961–62 (footnotes omitted) (citations omitted).

the rest of society, and that the innocent victims of crime be made to suffer for wrongs they never committed.

However attractive that theory might be in academia, absolving inner-city offenders from responsibility for drug-trafficking and the associated violent crimes would clearly disserve the interests of the community residents who do *not* break the law.[257] The ninety-seven percent of inner-city neighborhood residents who keep their end of the social contract[258]—viz., comply with the criminal law and the government will protect you against anyone who breaks the rules[259]—are entitled to expect—even

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[257] *See, e.g.*, Jim Quinn & Hannah E. Meyers, Opinion, *These Policies Were Supposed to Help Black People. They're Backfiring*, N.Y. TIMES (Feb. 15, 2022), https://www.nytimes.com/2022/02/15/opinion/nyc-black-victims-crime.html ("[R]eleasing thousands of inmates and hindering the ability to detain potentially dangerous defendants has been followed by increasing levels of crime, especially in largely Black neighborhoods."). Some critics, like Professor Alexander, recognize that residents in areas riven by crime have an interest in the same peaceful communities that everyone wants. *See, e.g.*, ALEXANDER, *supra* note 1, at 170 ("Poor people of color, like other Americans—indeed like nearly everyone around the world—want safe streets, peaceful communities, healthy families, good jobs, and meaningful opportunities to contribute to society."); *id.* at 216 ("[R]esidents of all communities have a basic human right to safety and security. The intuition underlying moral-uplift strategies is fundamentally sound: our communities will never thrive if we fail to respect ourselves and one another."). Their mistake is subordinating the interests of law-abiding residents to offenders.

[258] Professor Eberhardt used that number, EBERHARDT, *supra* note 74, at 85, so we will too.

[259] *See, e.g.*, Gregg v. Georgia, 428 U.S. 153, 183 (1976) (Opinion of Stewart, J.) (quoting Furman v. Georgia, 408 U.S. 238, 306, 308 (1972) (Stewart, J., concurring)) ("The instinct for retribution is part of the nature of man, and channeling that instinct in the administration of criminal justice serves an important purpose in promoting the stability of a society governed by law. When people begin to believe that organized society is unwilling or unable to impose upon criminal offenders the punishment they 'deserve,' then there are sown the seeds of anarchy—of self-help, vigilante justice, and lynch law."); Paul J. Larkin, Jr. & GianCarlo Canaparo, *Are Criminals Bad or Mad? Premeditated Murder, Mental Illness, and* Kahler v. Kansas, 43 HARV. J.L. & PUB. POL'Y 85, 149 (2020) (footnote omitted) ("The government must have punishments available to advertise the importance of compliance, and the government must inflict those punishments on offenders to display its enforcement resolve and thereby educate the public that it means what it says. Punishing offenders is also critical to demonstrate societal concern for the damage that offenders inflict on their victims. The legislative budgetary process demonstrates that people are important by funding their

demand—that the government will keep its end of the bargain,[260] and the government has a compelling interest in doing so.[261] For a court, legislature, or executive official to endorse the "systemic racism" defense would break that social contract just as accepting the "rotten social background" defense would do so.[262]

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interests; the criminal justice system demonstrates that people are important by punishing their victimizers.").

[260] *See, e.g.*, Larkin, *supra* note 194, at 282–83 (footnotes omitted) ("Crack dealers largely sell their wares in urban communities. Given contemporary housing patterns, the residents in those communities, like the dealers themselves, are predominantly black. Residents who are victims of crime will far outnumber those who are perpetrators. Those victims suffer the effects of violence brought on by drug trafficking, and they endure the fear consequent upon living in a community haunted by outlaws. Punishments, even severe ones, may be necessary to protect innocent third parties in the communities where crack trafficking flourishes. By deterring crime and imprisoning offenders, the system reduces the harms that innocent residents suffer and, over time, makes the community a less frightening place. The benefits for residents, particularly those who have nowhere else to go, are immeasurable.").

[261] *See* United States v. Salerno, 481 U.S. 739, 749 (1987). That interest is even greater once a defendant has been convicted. *See Gregg*, 428 U.S. at 207, 226 (White, J., concurring) ("[O]ne of society's most basic tasks is that of protecting the lives of its citizens and one of the most basic ways in which it achieves the task is through criminal laws against murder."); *see also, e.g.*, Chapman v. United States, 500 U.S. 453, 465 (1991) (citations omitted) ("Every person has a fundamental right to liberty in the sense that the Government may not punish him unless and until it proves his guilt beyond a reasonable doubt at a criminal trial conducted in accordance with the relevant constitutional guarantees. But a person who *has* been so convicted is eligible for, and the court may impose, whatever punishment is authorized by statute for his offense, so long as that penalty is not cruel and unusual, and so long as the penalty is not based on an arbitrary distinction that would violate the Due Process Clause of the Fifth Amendment.").

[262] The city of Baltimore is an example of what could happen. First elected in 2015, Baltimore City State's Attorney Marilyn Mosby decided not to charge low-level offenses to "end the 'war on drug users.'" Roya Hanna, Opinion, *Is Baltimore State's Attorney Marilyn Mosby Too Distracted to Fulfill Her Duties? These Statistics Suggest She Is*, BALT. SUN (June 16, 2021, 11:36 AM), https://www.baltimoresun.com/opinion/op-ed/bs-ed-op-0617-mosby-prosecution-20210616-hxptnsdkfzeardgoynx7bdedja-story.html. Nonetheless, drug overdose fatalities have increased by twelve percent since she implemented her policy, from 851 in 2019 to 954 in 2020. *Id.* Moreover, Baltimore is now the nation's second most dangerous city (behind St. Louis). While "the State's Attorney's Office is only charging half of the cases that they were seven years ago[,]" Baltimore "ha[s] not had a 50% decrease in robberies, drug dealing, shootings and murders." *Id.* From 2014 to 2020, there was an increase in homicides

from 211 to 335 with more than 300 homicides every year she has held office. *Id.* The number of homicides as of March 29, 2021—69—exceeds the number for the same period in 2020. *See, e.g.*, Mikenzie Frost, *Has Violent Crime Decreased During the Pandemic like Baltimore's Top Prosecutor Claims?*, FOX 45 NEWS (Mar. 30, 2021, 2:55 PM), https://foxbaltimore.com/news/local/crime-data-has-violent-crime-decreased-during-pandemic-like-citys-top-prosecutor-claims; Chris Kolmar, *The 10 Murder Capitals of America For 2021,* RD. SNACKS (Jan. 14, 2021), https://www.roadsnacks.net/murder-capitals-of-america/; Shelley Orman, *Is Progressive Prosecution Impacting Violent Crime in Baltimore?*, FOX 45 NEWS (May 2, 2021, 7:48 PM), https://foxbaltimore.com/news/local/is-progressive-prosecution-impacting-violent-crime-in-baltimore ("The city is on pace to see even more deadly violence than last year when 335 people lost their lives. 'Ever since she took office, murders exploded in Baltimore. There have been over 300 every year since she took office. It was in the 200s before that,' says Cully Stimson, a senior legal fellow at The Heritage Foundation. 'This experiment is failing. When you don't enforce the law even misdemeanors, then you don't have leverage over people who do break the law and flip them to solve the murders. The murder closure rate is really low and that's the reason why. She's just not enforcing the law,' he says. . . . 'Enforcing the law does not mean putting people in jail. In fact it means holding them accountable, creating alternatives to incarceration which independent prosecutors created decades ago drug court, domestic violence court, etc. And then try to get them on the straighten and narrow so that they become productive members of society,' he says. 'She's just taking her foot off the gas completely and said it's a free-for-all. So you don't enforce the law, people break the law. And that's what's happening.'"); Tim Prudente, *2019 Closes with 348 Homicides in Baltimore, Second Deadliest Year on Record*, BALT. SUN (Jan. 1, 2020, 6:35 PM), https://www.baltimoresun.com/news/crime/bs-md-ci-cr-2019-homicide-final-count-20200101-jnauuumukbdh3edsyypspsm3he-story.html; Stephen J.K. Walters, Opinion, *Baltimore Is Conducting a Dangerous Experiment in Law and Disorder*, WASH. POST (Apr. 16, 2021, 9:00 AM), https://www.washingtonpost.com/opinions/local-opinions/baltimore-marilyn-mosby-low-level-crimes/2021/04/15/09bff31a-9c81-11eb-b7a8-014b14aeb9e4_story.html ("Not a good time to announce that, though elected as a prosecutor, she would not prosecute what she labeled 'low-level crimes,' making permanent her policy of dismissing all criminal charges for the possession of drugs and attempted drug distribution, prostitution, trespassing and other 'minor' offenses. . . . And there's every reason to worry her strategy will, in the long run, make her jurisdiction more violent. She has invited sellers and buyers of drugs and sex to converge on Baltimore, where their costs will no longer include risk of prosecution. We know that the gangs supplying these products often compete for market share by violent means; their customers sometimes fund their habits with muggings and assaults. We know that a little disorder usually breeds more. Mosby's strategy is, then, a roll of the dice—with lives at stake. How many Baltimoreans will continue to tolerate this experiment, and how many will say 'goodbye' to their increasingly disorderly, dangerous city?").

At the same time, no one wants to hang a banner across the entry to inner-city neighborhoods saying: "Abandon all hope, you who live here."[263] Insofar as violence is the product of long-term discrimination, residential segregation, disregard for the plight of black ghettoes, or other factors labeled as "root causes" for crime, private individuals and organizations, as well as the federal, state, and local governments, should take steps to redress the conditions that can trigger despair-inspired drug trafficking and violence. State efforts to do so are justified to satisfy the government's end of the social contract. Even if that were not the case, preventing members of the public from criminal victimization, especially through violent crime, is a noble goal, justifiable as an exercise in charity for those less fortunate if for no other reason.

Consider this example. Some social scientists have argued that children exposed to violence as victims and witnesses in families subjected to interfamily or interpartner violence or in high-crime neighborhoods are at greater risk of displaying early childhood behavioral problems and aggressive behavior themselves because of the effect on their psychological development of what they have suffered or witnessed.[264] Whether or not a provable causal relation exists, the state may make the moral judgment that the interests of the law-abiding population and those unable to protect themselves—not only children, but also adolescents, the aged, the infirm, and so forth—justify use of the criminal law to punish lawbreakers. The common law certainly did; from the seventh century onward, English

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[263] DANTE ALIGHIERI, INFERNO canto III, l. 9, at 23 (Stanley Lombardo trans., 2009) ("Abandon all hope, you who enter.").

[264] *See, e.g.*, Concetta Esposito et al., *Effortful Control, Exposure to Community Violence, and Aggressive Behavior: Exploring Cross-Lagged Relations in Adolescence*, 43 AGGRESSIVE BEHAV. 588, 595–96 (2017); L. Oriana Linares et al., *A Mediational Model for the Impact of Exposure to Community Violence on Early Child Behavior Problems*, 72 CHILD DEV. 639, 648 (2001); Betsy McAlister Groves, *Growing Up in a Violent World: The Impact of Family and Community Violence on Young Children and Their Families*, 17 TOPICS EARLY CHILDHOOD SPECIAL EDUC. 74, 90 (1997); Rashelle J. Musci et al., *Negative Consequences Associated with Witnessing Severe Violent Events: The Role of Control-Related Beliefs*, 63 J. ADOLESCENT HEALTH 739, 740, 742–43 (2018); Andreas Reif et al., *Nature and Nurture Predispose to Violent Behavior: Serotonergic Genes and Adverse Childhood Environment*, 32 NEUROPSYCHOPHARMACOLOGY 2375, 2379–80 (2007).

customs and law authorized penalties for wrongdoing.[265] The Constitution does not forbid the federal or state governments from making that judgment and vigorously implementing it. On the contrary, the Constitution recognizes that the states will have their own separate criminal justice systems;[266] it empowers the federal government to create one to protect uniquely national interests,[267] and the First Congress did just that.[268] In short, the government's interest in protecting the public is "both legitimate and compelling."[269]

That is why first things must come first. Just as the initial step in treating a gunshot victim is to stop him or her from bleeding out, so too the first step to fix a disadvantaged community is to stop the violence afflicting it. As several commentators have presciently noted, that is the critical first step in the long-term repair of ghetto communities. Professors Tracey Meares and Dan Kahan have explained that "crime enfeebles social structures, enfeebled social structures produce more crime, and crime destroys African-Americans' wealth and security."[270] Accordingly, it is critical to disrupt that "self-reinforcing dynamic" because it "constitutes one of the largest impediments to improving the economic and social standing of African-Americans today."[271] Thomas Abt agrees: "High rates of violent crime are the structural linchpin of urban poverty, trapping poor people in neighborhoods of concentrated disadvantage."[272] Violence "perpetuates

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[265] *See* Paul J. Larkin, Jr., *The Lost Due Process Doctrine*, 66 CATH. U. L. REV. 293, 327–30 (2016).

[266] And they did. *See, e.g.*, DOUGLAS GREENBERG, CRIME AND LAW ENFORCEMENT IN THE COLONY OF NEW YORK, 1691–1776 (1976); HUGH F. RANKIN, CRIMINAL TRIAL PROCEEDINGS IN THE GENERAL COURT OF COLONIAL VIRGINIA (1965).

[267] *See* Larkin & Canaparo, *supra* note 259, at 96–99.

[268] *See* An Act for the Punishment of certain Crimes against the United States, ch. 9, 1 Stat. 112 (1790).

[269] United States v. Salerno, 481 U.S. 739, 749 (1987) (citing De Veau v. Braisted, 363 U.S. 144, 155 (1960)).

[270] TRACEY L. MEARES & DAN M. KAHAN, URGENT TIMES: POLICING AND RIGHTS IN INNER-CITY COMMUNITIES 13–14 (1999).

[271] *See id.* at 14.

[272] THOMAS ABT, BLEEDING OUT: THE DEVASTATING CONSEQUENES OF URBAN VIOLENCE—AND A BOLD NEW PLAN FOR PEACE IN THE STREETS 13 (2019).

poverty,"[273] requiring us to work backward to create conditions for any long-term socioeconomic improvement—a "Marshall Plan for urban America"[274]—to help residents.[275]

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Where does that leave us? With this: Critics' use of the term systemic racism rests on the mistaken assumption that we should analyze the effect of the criminal justice system only on *offenders* and not *actual and potential victims*. That might make sense from a public relations, media, or political perspective. Why? Because critics can always point to real-life offenders who are arrested and imprisoned, because they are known and identifiable. By contrast, people who are *not* murdered, robbed, raped, or mugged—because the criminal justice system deters or incapacitates offenders who otherwise would victimize them—are not visible and cannot be identified in press conferences or congressional hearings.[276] Yet, only a fool would assume that they do not exist, and only an utterly heartless character would be indifferent to their plight. If either of those conclusions is true, critics' use of the term systemic racism tells us more about their willingness to play politics by tossing a hand grenade into the debate than it does about the nature of the criminal justice system.

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[273] *Id.*

[274] *See* FORMAN, *supra* note 119, at 12.

[275] ABT, *supra* note 272, at 13; *see also, e.g.*, MURRAY, *supra* note 39, at 92 (noting that, in large urban areas, "disproportionate minority crime rates deter developers from building office space in minority neighborhoods unless gentrification is already well underway" and "raise the costs of doing business for retailers of all kinds"); *id.* at 92-93 ("[T]he small locally owned retailers in a big city minority neighborhood also have a hard time making a profit because of shoplifting, the threat of robbery, high insurance costs, and banks' reluctance to make high-risk loans. The locally owned stores tend to be poorly stocked, with few amenities, and over priced relative to stores selling the same goods elsewhere."); *id.* at 94 ("Attempts to stimulate economic growth in places with high crime rates work only in places that are gentrifying or can be gentrified.").

[276] *See* Comey, *supra* note 228 ("A problem we face today is that nobody speaks for those who have not been victimized by crime in recent years because those 'victims' don't exist. There are tens of thousands of people who were not murdered or raped or robbed or intimidated because crime dropped in our country. The victims don't exist, so they can't form a constituency, they can't talk to the press, they can't talk to Congress.").

III. IS THE "WAR ON DRUGS" SYSTEMICALLY RACIST?

Perhaps critics of the criminal justice system, like President Joe Biden,[277] do not seek to impugn anyone's intent or the entire criminal justice system, only the effect that the "War on Drugs" has had on African-Americans. Maybe they believe that drug laws are systemically racist because of the adverse effect that enforcement of a race-neutral legal code has on the black community, regardless of a decisionmaker's intent.[278] If so, they have again failed to recognize that there are two sides to the equation: the effect of law enforcement on drug traffickers *and* on law-abiding residents in a neighborhood blighted by drug trafficking.

A. The Problem of Drug Use in the Twentieth Century

The "War on Drugs" is a twentieth century invention.[279] From the nation's founding until early in the 1900s, authority over the distribution

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[277] Haines & Summers, *supra* note 5; Nilsen, *supra* note 5; Finnegan, *supra* note 5; Biden, *Root Out Systemic Racism*, *supra* note 5; Watson, *supra* note 5; Joseph R. Biden Jr., Acceptance Speech at the 2020 Democratic National Convention (Aug. 20, 2020) (transcript available at https://www.cnn.com/2020/08/20/politics/biden-dnc-speech-transcript/index.html); Milloy, *supra* note 5; Biden, Inaugural Address, *supra* note 5; Shalal, *supra* note 5.

[278] Some have defined "systemic racism" in that manner. *See, e.g.*, Radley Balko, Opinion, *There's Overwhelming Evidence that the Criminal Justice System Is Racist. Here's the Proof.*, WASH. POST (June 10, 2020), https://www.washingtonpost.com/graphics/2020/opinions/systemic-racism-police-evidence-criminal-justice-system/ ("Of particular concern to some on the right is the term 'systemic racism,' often wrongly interpreted as an accusation that everyone in the system is racist. In fact, systemic racism means almost the opposite. It means that we have systems and institutions that produce racially disparate outcomes, regardless of the intentions of the people who work within them. When you consider that much of the criminal justice system was built, honed and firmly established during the Jim Crow era—an era almost everyone, conservatives included, will concede rife with racism—this is pretty intuitive. The modern criminal justice system helped preserve racial order—it kept black people in their place. For much of the early 20th century, in some parts of the country, that was its primary function. That it might retain some of those proclivities today shouldn't be all that surprising."); DUKE & GROSS, *supra* note 20. That definition confuses "effect" with "intent," and it is only the latter that the law prohibits. *See supra* text accompanying notes 157–63.

[279] For a history of federal drug policy, see, for example, *Gonzales v. Raich*, 545 U.S. 1, 10–15 (2005); THOMAS F. BABOR ET AL., DRUG POLICY AND THE PUBLIC GOOD (2d ed. 2018)

and use of drugs, like the practice of medicine, was entirely in the hands of the states, specifically their medical boards.[280] In 1906, Congress entered the field by adopting the Pure Food and Drug Act to regulate the distribution and labeling of drugs intended for the treatment of disease.[281] Eight years later, Congress decided to prohibit or closely regulate the distribution of narcotics through its taxing power by passing the Harrison Narcotics Tax Act of 1914.[282] The Act required a license to distribute opiates and, as interpreted by the Department of the Treasury, the agency responsible for its enforcement, prohibited the distribution of heroin for any purpose, even for the maintenance treatment of already addicted patients.[283] Two decades later, Congress adopted the Marihuana Tax Act of 1937 to stifle the distribution of cannabis for any medical or recreational use through a similar regulatory scheme.[284]

(2010); MARK A.R. KLEIMAN ET AL., DRUGS AND DRUG POLICY: WHAT EVERYONE NEEDS TO KNOW (2011); DAVID F. MUSTO, THE AMERICAN DISEASE: ORIGINS OF NARCOTIC CONTROL (Oxford University Press, 3d ed. 1999) (1973); John Kaplan, *Taking Drugs Seriously*, 92 PUB. INT. 32 (1988); James Q. Wilson, *Against the Legalization of Drugs*, 89 COMMENT. 21 (1990).

[280] *See, e.g.*, Linder v. United States, 268 U.S. 5, 22–23 (1925) (narrowly construing a federal law regulating narcotics distribution so as not to interfere with the practice of medicine); Dent v. West Virginia, 129 U.S. 114, 128 (1889) (upholding state regulation of the practice of medicine over a constitutional challenge).

[281] *See* Pure Food and Drug Act of 1906, ch. 3915, §§ 2, 8, 34 Stat. 768, 770–71 (outlawing the sale of adulterated or misbranded drugs and requiring labels identifying "the quantity or proportion" of "alcohol, morphine, opium, cocaine, heroin, . . . cannabis indicia, . . . or any derivative or preparation" of those substances); *see also* Savage v. Jones, 225 U.S. 501, 530 n.1 (1912). For the background to the 1906 law, see JAMES HARVEY YOUNG, PURE FOOD: SECURING THE FEDERAL FOOD AND DRUGS ACT OF 1906 (1989).

[282] *See* Harrison Narcotics Tax Act, ch. 1, 38 Stat. 785 (1914).

[283] *See, e.g.*, JOHN KAPLAN, THE HARDEST DRUG: HEROIN AND PUBLIC POLICY 63 (1983); ALFRED R. LINDESMITH, THE ADDICT AND THE LAW 3–34 (1965).

[284] Marihuana Tax Act of 1937, ch. 553, 50 Stat. 551 (repealed 1970). That law did not technically ban cannabis distribution; it merely barred anyone from distributing marijuana without registering with the federal government and paying a tax. By 1937, however, every state had outlawed cannabis distribution, so the effect of the Marihuana Tax Act was to make it a federal offense to distribute cannabis without registering as a distributor, and the registration requirement compelled a party to incriminate himself under state law. It was for that reason that the Supreme Court held the Marihuana Tax Act unconstitutional under the

Today, two different federal laws establish the framework for drug regulation. One is the "Federal Food, Drug, and Cosmetic Act," which authorizes the Commissioner of Food and Drugs to determine what is a "drug" and whether it is "safe" and "effective" for its intended use.[285] The other law is the Controlled Substances Act of 1970,[286] which created five "schedules" of "controlled substances" whose manufacture, distribution, or possession is illegal in all cases or is permissible only with a physician's prescription.[287] Schedules I and II are the most regulated. Schedule I controlled substances, such as heroin, have a high potential for abuse, no currently accepted domestic medical use, and no accepted safe use.[288] No physician may prescribe a Schedule I substance for any purpose.[289] A

Fifth Amendment Self Incrimination Clause. *See* Leary v. United States, 395 U.S. 6, 16, 26 (1969).

[285] Federal Food, Drug, and Cosmetic Act, ch. 675, § 1, 52 Stat. 1040–41 (1938) (codified as amended at 21 U.S.C. §§ 301–399); Drug Efficacy Amendment of 1962, Pub. L. No. 87-781, 76 Stat. 780 (requiring a manufacturer to prove that a drug is effective before the company can market it in interstate commerce). *See generally* PAUL J. LARKIN, HERITAGE FOUND., Special Report No. 275, TWENTY-FIRST CENTURY ILLICIT DRUGS AND THEIR DISCONTENTS: WHY THE FDA COULD NOT APPROVE RAW CANNABIS AS A "SAFE," "EFFECTIVE," AND "UNIFORM" DRUG (Aug. 30, 2023).

[286] Controlled Substances Act, Pub. L. No. 91-513, 84 Stat. 1242 (codified as amended at 21 U.S.C. §§ 801–904). The Controlled Substances Act was Title II of the Comprehensive Drug Abuse Prevention and Control Act of 1970. *See id.*; 84 Stat. 1236. Title I addressed prevention and treatment of narcotics addiction, and Title III dealt with the import and export of controlled substances. *See* Gonzales v. Raich, 545 U.S. 1, 13 n.19 (2005); Paul J. Larkin, Jr., *Reconsidering Federal Marijuana Regulation*, 18 OHIO STATE J. CRIM. L. 99, 102 & n.9 (2020). ("A 'controlled substance' is 'a drug or other substance, or immediate precursor, included in Schedule I, II, III, IV, or V of part B of this title,' except for 'distilled spirits, wine, malt beverages, or tobacco, as those terms are defined or used in subtitle E of the Internal Revenue Code of 1954.' 21 U.S.C. § 802(6) (2018). The Controlled Substances Act incorporates the definition of a 'drug' from the Federal Food, Drug, and Cosmetic Act, 21 U.S.C. § [321](g)(1) (2019).").

[287] *See, e.g.*, 21 U.S.C. §§ 811 to 812; Chapman v. United States, 500 U.S. 453, 460 (1991); Touby v. United States, 500 U.S. 160 (1991).

[288] 21 U.S.C. § 812(b)(1)(A)–(C); 21 C.F.R. § 1308.11 (2023).

[289] *See* 21 U.S.C. § 841; 21 C.F.R. §§ 1308.01, 1308.11 (2023); Ruan v. United States, 142 S. Ct. 2370 (2022) (ruling that a physician can be convicted for distributing a Schedule II

Schedule II substance, such as morphine, fentanyl, or cocaine, is a drug that has a currently accepted domestic medical use but also has a high potential for abuse and, if abused, may lead to severe physical or psychological dependence.[290] Drugs listed on Schedule II can only be dispensed by a pharmacist based on a physician's prescription issued "in the usual course of his professional practice."[291]

Fearful of the effects that drugs such as heroin—and now fentanyl[292]—can have on society,[293] since 1970, the nation has sought to deter drug

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controlled substance outside the boundaries of professional medical practice); United States v. Moore, 423 U.S. 122 (1975) (holding the same).

[290] 21 U.S.C. § 812(b)(2)(A)–(C); 21 C.F.R. § 1308.12 (2023).

[291] 21 C.F.R. §§ 1306.03–1306.04 (2023). The Comprehensive Drug Abuse Prevention and Controlled Substances Act does not repeal the FDA's authority to ensure that a drug is safe and effective. *See, e.g.*, *Cannabis Policies for a New Decade: Hearing Before the Subcomm. on Health of the H. Comm. on Energy & Com.*, 116th Cong. 1–4 (2020) (statement of Douglas C. Throckmorton, Deputy Director for Regulatory Programs, Ctr. for Drug Evaluation & Rsch.) [hereinafter *House Cannabis Hearing*]; Scott Gottlieb, *Statement from FDA Commissioner Scott Gottlieb, M.D., on Signing of the Agriculture Improvement Act and the Agency's Regulation of Products Containing Cannabis and Cannabis-derived Compounds*, U.S. FOOD & DRUG ADMIN. (Dec. 20, 2018), https://www.fda.gov/news-events/press-announcements/statement-fda-commissioner-scott-gottlieb-md-signing-agriculture-improvement-act-and-agencys [hereinafter Gottlieb Statement]; *Warning Letters and Test Results for Cannabidiol-Related Products*, U.S. Food & Drug Admin., https://www.fda.gov/news-events/public-health-focus/warning-letters-and-test-results-cannabidiol-related-products (July 26, 2023) (compiling warning letters issued from 2015–2023 to companies selling unapproved new drugs containing cannabidiol, a non-psychoactive substance in marijuana that the FDA has not approved for use in any drug for any purpose); Sean M. O'Connor & Erika Lietzan, *The Surprising Reach of FDA Regulation of Cannabis, Even after Descheduling*, 68 AM. U. L. REV. 823, 851–96 (2019) (concluding that the FDA has authority to regulate cannabis edibles as a food additive or a drug); Patricia J. Zettler, *Pharmaceutical Federalism*, 92 IND. L.J. 845, 878–79 (2017) (concluding that FDA can regulate cannabis as a drug).

[292] *See, e.g.*, PAUL J. LARKIN, TWENTY-FIRST CENTURY ILLICIT DRUGS AND THEIR DISCONTENTS: THE SCOURGE OF ILLICIT FENTANYL (2022), http://report.heritage.org/lm313; *infra* notes 477–480 and accompanying text (discussing fentanyl).

[293] *See, e.g.*, Carmona v. Ward, 576 F.2d 405, 411–12 (2d Cir. 1978) (citation omitted) ("Defendants would minimize drug trafficking by arguing that it is not a crime of violence. Because of their illegal occupation, however, drug traffickers do often commit crimes of violence against law enforcement officers and, because of the high stakes, engage in crimes of

violence among themselves. More significant, of course, are the crimes which drug traffickers engender in others. The seller often introduces the future addict to narcotics. The addict, to meet the seller's price, often turns to crime to 'feed' his habit. Narcotics addicts not only account for a sizable percentage of crimes against property; they commit a significant number of crimes of violence as well. Thus the [New York] Legislature could reasonably have found that drug trafficking is a generator of collateral crime, even violent crime. And violent crime is not, of course, the only destroyer of men and the social fabric. Drug addiction degrades and impoverishes those whom it enslaves. This debilitation of men, as well as the disruption of their families, the Legislature could also lay at the door of the drug traffickers. Measured thus by the harm it inflicts upon the addict, and, through him, upon society as a whole, drug dealing in its present epidemic proportions is a grave offense of high rank. . . . As Judge Marvin Frankel has pointed out, 'Drug abuse . . . may be our most harrowing problem today.' Drug abuse has become epidemic, particularly in New York City which has more than half of all the drug addicts in the nation."); United States v. Magnano, 443 F. Supp. 876, 877 (S.D.N.Y. 1978) (denying offenders' motions for a reduction of their sentence of consecutive terms of fifteen years imprisonment for the distribution of "enormous quantities heroin bought and sold on an almost daily basis") ("Let's face it. So inhuman, ruthless and cold blooded was their approach to the execution of their nefarious schemes that we sat aghast at the unfolding of the enormity of their horrifying indifference to life's values."); State v. Flowers, 316 A.2d 564, 566 (Del. Super. Ct. 1973) ("[T]here can be little debate about proper public policy in the case of hard drugs such as heroin. No legitimate concern over expanding police power by the use of informers can overbalance the illegal, profit-making, addict-creating and people-killing evil of heroin traffic. Persons who participate in such traffic from the helpless addict to the financial kingpin are a public menace and their apprehension, conviction and confinement are a public necessity. If those who administer the law fail to judge with full recognition of the highly dangerous factual context, they fail to recognize the very function of law and justice."); State v. Mallery, 364 So. 2d 1283, 1285 (La. 1978) ("It is no defense to this prosecution that distribution of drugs is not a violent crime and consequently punishment for this offense should not be on a par with second-degree murder and aggravated kidnapping. Assuming the punishments are equal, traffic in narcotics is an insidious crime which, although not necessarily violent, is surely as grave. Indeed, the effect upon society of drug traffic is pernicious and far-reaching. For each transaction in drugs breeds another and in the case of heroin the degeneracy of the victim is virtually irreversible. Compared to the effect of drug traffic on society, isolated violent crimes may well be considered the lesser of the two evils."); People v. Broadie, 332 N.E.2d 338, 342 (N.Y. 1975) ("The Legislature, in making this assessment, could properly view criminal narcotics sales not as a series of isolated transactions, but as symptoms of the widespread and pernicious phenomenon of drug distribution. Social harm in drug distribution is great indeed. The drug seller, at every level of distribution, is at the root of the pervasive cycle of destructive drug abuse."); People v. Junco, 351 N.Y.S.2d 1, 3 (N.Y. App. Div. 1974) (quoting sentencing judge) ("Nothing is more destructive to a community's well

trafficking through aggressive use of criminal law enforcement. The federal and state governments have authorized (or required) lengthy terms of confinement for trafficking.[294] Presidents have seen drug trafficking by

being than widespread drug abuse. More young people in our city die from drug abuse than from any other single cause. Hard drugs are indeed a cancer to our community. Society has mounted a massive effort to blot out this destructive evil."); VANESSA BARKER, THE POLITICS OF IMPRISONMENT: HOW THE DEMOCRATIC PROCESS SHAPES THE WAY AMERICA PUNISHES OFFENDERS 145 (2009) ("By 1966, [New York Governor Nelson] Rockefeller, key law enforcement officials, and various expert commissions became even more concerned with the 'collateral effects' of drug addiction: crime. Drug addiction was perceived to be criminogenic—addiction causes crime. According to Rockefeller and expert officials, as more addicts turned to petty theft, random assaults, and prostitution to support their habits, crime increased across the state. In the mid-1960s, the New York State Commission of Investigation launched a major investigation into the drug-crime nexus and found similar results as the New York [City] police commissioner. Both commissions concluded that narcotics addiction increased dramatically throughout the state and had increased crime.").

[294] *See, e.g.*, 21 U.S.C. § 841 (defining mandatory minimum penalties of ten years imprisonment, and an authorized term of life imprisonment for the distribution of a controlled substance based on the weight of a defined amount of any "mixture or substance" containing the substance); *id.* § 846 (imposing the same penalties on the attempted distribution or conspiracy to distribute illicit drugs); *id.* § 848(a) (defining a mandatory minimum term of twenty years imprisonment and authorizing a term of life imprisonment, for anyone who engages in a "continuing criminal enterprise"); *id.* § 848(b) (requiring a mandatory sentence of life imprisonment for an offender who was the "principal administrator, organizer, or leader of the enterprise or is one of several such principal administrators, organizers, or leaders" and trafficked in "300 times the quantity of a substance" defined in 21 U.S.C. § 841(b)(1)(B)); Larkin, *supra* note 194, at 241–43 (describing the sentencing provisions of the Anti-Drug Abuse Act of 1986); Paul J. Larkin, Jr., *Swift, Certain, and Fair Punishment: 24/7 Sobriety and HOPE: Creative Approaches to Alcohol- and Illicit Drug-Using Offenders*, 105 J. CRIM. L. & CRIMINOLOGY 39, 48 (2015) (footnotes omitted) ("Society did not begin to fear and condemn opiate use until early in the twentieth century. Since then, the nation has followed a path materially different from the one it has used for alcohol. Beginning with the Harrison Narcotics Tax Act of 1914, the emphasis has been on aggressive use of the criminal justice system to deter and punish drug trafficking and use. Society has apparently concluded that drugs such as heroin and crack cocaine are more addictive, debilitating, and dangerous than alcohol and thus are a greater threat to the social fabric than 'demon rum.' In fact, for some it is not an exaggeration to say that heroin and crack cocaine, like the plagues that Yahweh rained down on the Egyptians, have destroyed lives, splintered families, and ravaged communities through their powerful addictive effects. Atop that, the distribution and use of modern-day illicit drugs such as crack cocaine has led to crimes and violence that victimize individuals and communities,

domestic and international criminal organizations as a menace,[295] so the Department of Justice has made the investigation and prosecution of drug offenses a priority.[296] States have followed the federal government's lead.[297] As a result, from 1970 to 1985, some drug offenders received lengthy terms of incarceration, including life imprisonment, whether convicted in federal or state courts.[298]

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particularly in poor, urban, largely African-American neighborhoods already suffering from economic deprivation and social despair.").

[295] *See, e.g.*, *Attorney General's Trip to the Far East: Hearing Before the Subcomm. on Asian & Pac. Affs. of the H. Comm. on Foreign Affs.* (1982) (statement of William French Smith, Att'y Gen.) ("As President Reagan has said, the problem of drug trafficking in combination with organized crime is one of the most serious menaces facing American society.").

[296] *See, e.g.*, William P. Barr, Att'y Gen., Remarks at a Press Conference Announcing the Results of Operation Crystal Shield (Sept. 10, 2020) (transcript available at https://www.justice.gov/opa/speech/remarks-attorney-general-william-p-barr-press-conference-announcing-results-operation); *Attorney General Sessions Announces New Measures to Fight Transnational Organized Crime*, U.S. DEP'T OF JUST.: OFF. OF PUB. AFFS. (Oct. 15, 2018), https://www.justice.gov/opa/pr/attorney-general-sessions-announces-new-measures-fight-transnational-organized-crime; U.S. DEP'T OF JUSTICE, PROGRESS REPORT 7 (Apr. 2009) ("In the past 100 days, the Department of Justice has developed a new initiative to aggressively combat Mexican drug cartels in the United States and to help Mexican law enforcement battle cartels in their own country."); Griffin B. Bell, Att'y Gen., Address Before the International Asociation of Chiefs of Police (Oct. 8, 1978) (transcript available at https://www.justice.gov/sites/default/files/ag/legacy/2011/08/23/10-08-1978.pdf) ("President Carter and I have designated four areas of criminal activity for top federal priority. They are: white-collar crime, public corruption, narcotics trafficking, and organized crime.").

[297] *See, e.g.*, *Broadie*, 332 N.E.2d 338, 342 (N.Y. 1975) (quoted *supra* note 293); BRUCE A. JACOBS, DEALING CRACK: THE SOCIAL WORLD OF STREETCORNER SELLING 85 (1999) (noting police use of "[s]aturation patrol, neighborhood crackdowns, intensified surveillance, [and] periodic drug sweeps" against drug traffickers).

[298] *See, e.g.*, Hutto v. Davis, 454 U.S. 370, 370 (1982) (sentencing offender to imprisonment of two consecutive twenty-year terms for possession of nine ounces cannabis with the intent to distribute it); United States v. Lewis, 759 F.2d 1316, 1323 (8th Cir. 1985) (sentencing three defendants to two terms of imprisonment for ten years, to be served consecutively; one offender to imprisonment for life); United States v. Darby, 744 F.2d 1508, 1516 (11th Cir. 1984) (sentencing two defendants to imprisonment for sixty years; one for twenty-five years); United States v. Robinson, 635 F.2d 981, 983 n.1 (2d Cir. 1980) (sentencing one offender to imprisonment of thirty-five years, for participation in a

continuing criminal drug enterprise; another offender to imprisonment of twenty years, for unlawfully distributing heroin); United States v. Valenzuela, 646 F.2d 352, 353 (9th Cir. 1982) (sentencing defendant to a total imprisonment of fifteen years on each of eight counts of conviction, to be served consecutively, and to life imprisonment on the other count); United States v. Barnes, 604 F.2d 121 (2d Cir. 1979) (sentencing several defendants to imprisonment of fifteen years; one for life); Gregory v. United States, 585 F.2d 548, 549 (1st Cir. 1978) (sentencing offender to imprisonment of twenty-five years for possession of heroin); Carmona v. Ward, 576 F.2d 405, 406–07 (2d Cir. 1978) (sentencing offenders to six years to life for the possession of three and three-eighths ounces of cocaine and four years to life for the sale of twenty dollars worth of cocaine); United States v. Bolts, 558 F.2d 316, 319 (5th Cir. 1977) (sentencing offender to imprisonment of fifteen years on each of three counts of conviction, to be served consecutively, and life imprisonment on a different count); Peters v. Quick, 567 F. Supp. 331, 332 (S.D.N.Y. 1983) (sentencing offender to six years to life imprisonment for the distribution of 3.5 grams of cocaine); Davis v. State, 577 P.2d 690, 691 (Alaska 1978) (sentencing offender to imprisonment of twenty years without eligibility for parole until having served five years for the possession and sale of heroin); *Ex parte* Robinson, 474 So. 2d 685, 685 (Ala. 1985) (sentencing defendant to imprisonment of fifteen years for drug trafficking); People v. Fritz, 89 Cal. Rptr. 844, 846 (Cal. Ct. App. 1970) (sentencing offender to five years to life imprisonment for the sale of three barbiturate pills); People v. Bergman, 458 N.E.2d 1370, 1373 (Ill. App. Ct. 1984) (sentencing offender to imprisonment of twenty-five years for the possession and distribution of 30 grams of cocaine); People v. Wilbur, 290 N.E.2d 17, 18 (Ill. App. Ct. 1972) (sentencing defendant to imprisonment of ten to twenty years on each of eight counts of conviction for the sale of narcotics, all sentences to run concurrently); Carter v. State, 471 N.E.2d 1111, 1112 (Ind. 1984) (sentencing offender to twenty-five years imprisonment for the distribution of LSD and one pound of cannabis); Dodson v. State, 381 N.E.2d 90, 91 (Ind. 1978) (sentencing offender to imprisonment of twenty years for the sale of phencyclidine); State v. Whitehead, 622 P.2d 665, 672 (Kan. 1981) (sentencing offender to imprisonment of fifteen years to life for possession of ten balloons of heroin, before recidivist enhancement); State v. Benoit, 477 So. 2d 849, 850–51 (La. Ct. App. 1985) (sentencing defendant to life imprisonment at hard labor on two counts of the distribution of narcotics, the sentences to run concurrently); State v. Mallery, 364 So. 2d 1283, 1283–84 (La. 1978) (sentencing offender to life imprisonment for the distribution of heroin); Wright v. Bannan, 104 N.W.2d 509, 509 (Mich. 1960) (sentencing offender to imprisonment of twenty years to life for the sale of narcotics); People v. Ward, 351 N.W.2d 208, 209 (Mich. Ct. App. 1984) (sentencing offender to life imprisonment for possession of 650 grams of cocaine with the intent to distribute it); Steeves v. State, 178 N.W.2d 723, 725 (Minn. 1970) (sentencing offender to imprisonment of ten years for possession of narcotics); Turner v. State, 478 So. 2d 300, 301 (Miss. 1985) (sentencing offender to imprisonment of twenty years for drug trafficking); State v. Morrison, 557 S.W.2d 445, 448 (Mo. 1977) (sentencing offender to imprisonment of thirty years for the distribution of 1,000 amphetamine pills); Abell v. State, 606 S.W.2d 198, 199

Nonetheless, law enforcement agencies dramatically ramped up their drug enforcement efforts in 1986. The reason was the emergence of a new form of cocaine colloquially known as "crack" (so labeled for the sound it makes when created).[299] Made by heating powder cocaine with water and baking soda, crack expanded the customer base for cocaine because it could be sold more cheaply in smaller quantities—known as "rocks"—than in its powdered form.[300] Congress perceived that crack—"the fast-food version of powder cocaine"[301]—was a serious threat because, given its lower price, crack "democratized the cocaine high," as Professor Randall Kennedy put it.[302] Crack was also believed to be more addictive than powder cocaine.[303]

(Mo. Ct. App. 1980) (ordering reinstatement of a sentence of imprisonment of fifty years for the possession of cannabis); State v. Karathanos, 493 P.2d 326, 326 (Mont. 1972) (sentencing offender to imprisonment of twenty years for the sale of Dexedrine); Pickard v. State, 585 P.2d 1342, 1344 (Nev. 1979) (sentencing offender to life imprisonment for distribution of one ounce of cannabis to a minor); *Broadie*, 332 N.E.2d at 341 (sentencing six offenders were sentenced to life imprisonment for distribution of "street sales" of heroin or cocaine, two offenders received the same sentence for distribution of one-eighth of an ounce of cocaine or possession of one ounce of heroin); *Junco*, 351 N.Y.S.2d at 3 (sentencing offender to twenty years to life imprisonment for drug trafficking); State v. Chaffin, 282 N.E.2d 46, 48 (Ohio 1972) (sentencing offender to imprisonment of twenty to fourty years for selling cannabis); *see also, e.g.*, State v. Benson, 276 P.2d 516, 516 (Ariz. 1954) (sentencing offender to imprisonment of ten to fifteen years for the fraudulent procurement of narcotics).

[299] *See, e.g.*, Terry v. United States, 141 S. Ct. 1858, 1860 n.2 (2021); JACOBS, *supra* note 297, at 3–4; MARK A.R. KLEIMAN, AGAINST EXCESS: DRUG POLICY FOR RESULTS 295–96 (1992) ("In 1978, cocaine was something between a curiosity and a menace . . . . By 1988, cocaine had become the drug problem par excellence, with a retail market nearly equal to those for heroin and marijuana combined. . . . How did a minor drug become so major, a seemingly benign drug so horrible? In a word, crack happened.").

[300] *See Terry*, 141 S. Ct. at 1860; KENNEDY, *supra* note 1, at 373–74.

[301] JACOBS, *supra* note 297, at 4.

[302] KENNEDY, *supra* note 1, at 373–74; *see also* United States v. Singleterry, 29 F.3d 733, 740 (1st Cir. 1994) ("Congress could rationally seek to strengthen the deterrent effect of the narcotics laws by increasing the 'cost' to a criminal of using or selling a cocaine substance that, like cocaine base, is sold at a cheaper unit price than other cocaine substances."); James A. Inciardi et al., *The Origins of Crack*, *in* THE AMERICAN PIPE DREAM: CRACK COCAINE AND THE INNER CITY 7–8 (Dale D. Chitwood et al. eds., 1996); JACOBS, *supra* note 297, at 4 ("Crack is the fast-food version of powder cocaine . . . .").

Atop that, congressional members believed that crack "and other factors spurred violent crime."[304] It was seen as a predicate for violence among

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[303] *See* JACOBS, *supra* note 297, at 4 (noting that crack "deliver[s] within five seconds a 'penetrating euphoria' that has been likened to an all-over body orgasm," that crack's rush "is unmatched by any other substance," and that it "seems to provide no satiation point"); *id.* ("As one crack user put it, . . . 'You can't have just one. Once you take the first blast, then the whole night is going to be an adventure into madness.'").

[304] *Terry*, 141 S. Ct. at 1860; *see also* Mary Comerford et al., *Inner-City Crack Houses*, *in* THE AMERICAN PIPE DREAM, *supra* note 302, at 28–29; Duane C. McBride & James E. Rivers, *Crack and Crime*, *in* THE AMERICAN PIPE DREAM, *supra* note 302, at 39 ("As the 1980s progressed, researchers found increasingly that cocaine use was related to violent confrontational crime among men and women. Research also indicated that cocaine use may be related not only to committing a violent offense, but also to being a victim of violent crime.") (citations omitted); Paul J. Goldstein et al., *Crack and Homicide in New York City: A Case Study in the Epidemiology of Violence*, *in* CRACK IN AMERICA: DEMON DRUGS AND SOCIAL JUSTICE 113–15 (Craig Reinarman & Harry G. Levine eds., 1997). For additional proof of the relationship between drug trafficking and violence during the 1980s and 1990s, see, for example, U.S. SENT'G COMM'N, REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY 5–6, 9–10 n.31 (2002); *"Crack" Cocaine: Hearing Before the Permanent Subcomm. on Investigations of the S. Comm. on Governmental Affs.*, 99th Cong. 5–6, 10, 94 (1986); FORMAN, *supra* note 119, at 178–79 ("As [D.C. Police Chief Isaac] Fulwood saw it, in D.C. during the crack years, murder had become no big deal; instead of the ultimate step, to be taken only in the most extreme circumstances, it had become a routine option 'for valueless people without a soul.'"); Maureen M. Black & Izabel B. Ricardo*, Drug Use, Drug Trafficking, and Weapon Carrying Among Low-Income, African-American, Early Adolescent Boys*, 93 PEDIATRICS 1065, 1065–67 (1994) (footnotes omitted) ("Early involvement in drug trafficking is particularly dangerous because it exposes youth to violence, illegal activity, and the overt or covert enticement to become a drug user. Reports regarding drug trafficking in large urban areas describe male adolescents as active participants. . . . Violence associated with weapons is the leading cause of mortality among African-American, male adolescents."); David Altschuler & Paul Brounstein, *Patterns Of Drug Use, Drug Trafficking, And Other Delinquency Among Inner-City Adolescent Males In Washington, D.C.*, 29 CRIMINOLOGY 589 (1991); Alfred Blumstein, *Youth Violence, Guns, and the Illicit-Drug Industry*, 86 J. CRIM. L. & CRIMINOLOGY 10 (1995); Bonita Stanton & Jennifer Galbraith, *Drug Trafficking Among African-American Early Adolescents: Prevalence, Consequences, and Associated Behaviors and Beliefs*, 93 PEDIATRICS 1039, 1040 (1994) (footnotes omitted) ("[T]he relationship between drug use and homicide remains suggestive but inconclusive. By contrast, evidence for an association of drug trafficking with homicide is more substantial, with strong evidence provided by a prospective study of homicides committed in New York City. . . . Four hundred fourteen homicide events were included in the study (one quarter of the 1896 homicides occurring overall in New York in 1988). There were 490 perpetrators

dealers seeking geographic monopolies over the sale of a new illicit drug, by "professional" armed robbers seeking an easy score, by users seeking money for an additional "hit," and even with customers who committed violence for fear of becoming victims.[305] Stories of crack-related fatalities flooded the

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and 434 victims. Eighty-three percent of the perpetrators were African-American and 95% were males. One hundred seventy-nine (43%) of the homicides resulted from drug trafficking. The most common issues resulting in the ensuing fights were territorial disputes, robbing of the drug dealer, and assaults to collect debts. An additional 39 homicides (10%) were related to other aspects of substance abuse ([i.e.], robbery to obtain funds to purchase drugs, irrational behavior resulting from intoxication). One hundred forty (29%) of the perpetrators were drug traffickers, and 148 (34%) of the victims were drug traffickers. Data that are less conclusive but supportive of the association between drug trafficking and homicide are available from other cities. For example, in Baltimore, of the 522 homicides committed in 1990, 166 (31%) were attributed to 'narcotics drug laws' ([e.g.], drug trafficking)."); *id.* at 1042 (noting that drug trafficking might "account for more than one third of all homicides"); Judith Cummings, *Increase In Gang Killings On Coast Is Traced To Narcotics Trafficking*, N.Y. TIMES (Oct. 29, 1984), https://www.nytimes.com/1984/10/29/us/increase-in-gang-killings-on-coast-is-traced-to-narcotics-trafficking.html; Lee A. Daniels, *Black Crime, Black Victims*, N.Y. TIMES (May 16, 1982), https://www.nytimes.com/1982/05/16/magazine/black-crime-black-victims.html; Kristin Helmore, *Drug Trade in the Inner City: Trying to Halt a Cause of Crime*, CHRISTIAN SCI. MONITOR (Nov. 19, 1986), https://www.csmonitor.com/1986/1119/zpov4b.html; Nicholas M. Horrock, *Crack Wars Push Murder Rate to Record Level in Washington*, CHI. TRIB. (Nov. 6, 1988) https://www.chicagotribune.com/news/ct-xpm-1988-11-06-8802130346-story.html; George James, *Crime Totals Confirm Fears in Queens*, N.Y. TIMES (Apr. 21, 1988), https://www.nytimes.com/1988/04/21/nyregion/crime-totals-confirm-fears-in-queens.html; Peter Kerr, *A Crack Plague in Queens Brings Violence and Fear*, N.Y. TIMES (Oct. 19, 1987), https://www.nytimes.com/1987/10/19/nyregion/a-crack-plague-in-queens-brings-violence-and-fear.html; Michael Massing, *Crack's Destructive Sprint Across America*, N.Y. TIMES (Oct. 1, 1989), https://www.nytimes.com/1989/10/01/magazine/crack-s-destructive-sprint-across-america.html; Linda Wheeler & Keith Harriston, *Jamaican Gangs Wage War Over Drugs, Area Police Say*, WASH. POST (Nov. 19, 1987), https://www.washingtonpost.com/archive/politics/1987/11/19/jamaican-gangs-wage-war-over-drugs-area-police-say/4d35de9d-7e95-4df8-979b-26b3e7dfa162/.

[305] *See Terry*, 141 S. Ct. at 1860 n.2; FORMAN, *supra* note 119, at 174 ("Rampant violence associated with crack markets became a way of justifying harsh treatment all the way down the line."); JACOBS, *supra* note 297, at 5 ("Epidemic levels of homicides and assaults resulted, not surprisingly given the drug's pharmacology, fights over territorial boundaries, and sellers bent on propagating a fearsome 'don't mess with me' reputation. Community institutions were woefully unprepared for the crisis. Social controls, both formal and informal, broke

media.[306] Sellers and buyers were both deemed responsible.[307] Fearing that crack would engulf and decimate poor, black communities,[308] Congress

down. Coupled with a high level of residential mobility and loss of economic opportunity, the wholesale destruction of communities and individuals took on a life of its own. Once peaceful neighborhoods were transformed into urban badlands that persons traversed at their own peril."); *id.* at 43 (footnote omitted) ("Though crack is legally proscribed—a 'tarnished good'—it is bought and sold in the marketplace like any other good. The crack market, however, has certain distinguishing characteristics. There is constant exposure to violence. Transactions are highly vulnerable to exploitation. Duplicity on the part of customers and sellers is so common as to be institutionalized. Overall, instability reigns, and predatory arrangements thrive between actors at all levels."); *id.* at 66 (footnotes omitted) ("There are few settings more anomic than the streetcorner drug market. Burns, ripoffs, and violence are everyday occurrences in a world that is systematically organized around predation and mutual exploitation. It is a 'crime attractor' in the true sense of the term, a context that offers 'easy, safe, and profitable' criminal opportunities to motivated offenders bent on victimizing others. The epidemic levels of assault, theft, and violence experienced between 1984 and 1991 were fueled primarily by crack's emergence onto the street scene. Psychopharmacological, economically compulsive, and systemic factors were all causally related. Crack alters mood in users, resulting in increased excitability, irrationality, and aggressiveness. Smoking crack rapidly becomes costly, compelling users to commit income-generating crime to sustain their habits. Predation and violence, finally, and intrinsic to crack market participation. These stem from conflicts over, money, quality, and territory."); *id.* at 67 ("Coupled with the explosion of firearm availability that coincided with crack's emergence, the widespread arming of drug market participants, the casual way in which many participants used these weapons, and the diffusion of guns to persons peripherally involved in the scene, it is not surprising that the street crack landscape came to resemble something out of the Wild West."); *id.* at 76 ("Point-of-sale hustles and straight burns are the more innocuous ways by which sellers are separated from their valued contraband. More ominous and threatening are the armed robberies that victimize streetcorner crack dealers. Street crack dealers make particularly good robbery victims. They are out in the open, have ready cash, hold valuable and portable contraband, may be wearing expensive luxury items, and generally will not report the offense to the police. There is, after all, 'no 911 for [street] criminals.") (alteration in original); *id.*at 80 ("In general, crimes against other criminals—crack sellers or not—are decidedly risky. Fellow criminals are more likely than regular citizens 'to resist hold-up efforts and to seek out the perpetrators of [thefts].' Violence and, more important, the threat of it through retaliation are instrumental in maintaining order on the streets, where blood cancels all debts.") (alteration in original); *id.* at 126 (noting the "violence that accompanies drug markets during expansionary phases").

[306] *See, e.g.*, JACOBS, *supra* note 297, at 3; KENNEDY, *supra* note 1, at 377–80; PROVINE, *supra* note 1, at 105–07; Jeff Kunerth, *Miami Boys Export Terror Drugs, Death Come With Territory For Gang In Atlanta*, ORLANDO SENTINEL, https://www.orlandosentinel.com/n

reacted to the crisis in the only way it knew how to stop disfavored conduct: by passing new criminal legislation with stiff penalties, the Anti-Drug Abuse Act of 1986.[309]

The new law imposed mandatory minimum penalties for distributing various controlled substances and authorized district courts to impose even lengthier terms than the statute requires.[310] Most importantly for present purposes, the amount that triggered the mandatory minimum for crack was 100 times less than the amount of the powdered version of the same drug.[311] Two years later, Congress returned to this subject. It passed the Anti-Drug Abuse Act of 1988, which made mere possession of a small quantity of crack subject to a mandatory minimum sentence of five years imprisonment.[312]

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ews/os-xpm-1988-05-09-0040050287-story.html (July 28, 2021, 5:50 PM); Lauren Ritchie & Kirsten Gallagher, *Drug Buy Becomes Deadly Deal Woman Was Victim Of Rising Cocaine Violence In Orlando*, ORLANDO SENTINEL, https://www.orlandosentinel.com/news/os-xpm-1988-06-26-0050110172-story.html (July 28, 2021, 6:27 PM).

[307] *See, e.g.*, FORMAN, *supra* note 119, at 175–76 ("[D.C. Police Chief] Fulwood agreed that users should face tough consequences, reasoning that 'the buyers are the financiers of the whole narcotics enterprise.' Without them, he said, drug trafficking would not exist.' In an editorial, the *Afro* cheered Fulwood's remarks, saying, 'Truer words were never spoken.'").

[308] *See, e.g.*, Craig Reinarman & Harry G. Levine, *Crack in Context: America's Latest Demon Drug*, *in* CRACK IN AMERICA: DEMON DRUGS AND SOCIAL JUSTICE, *supra* note 304, at 1–5; Larkin, *supra* note 194, at 241–42, 246–47, 251.

[309] Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207 (1986) (codified as amended at 21 U.S.C. § 841); *see* FORMAN, *supra* note 119, at 60–61 (noting that, beginning in the 1970s, "what was becoming the standard response in American criminal justice: When you want to stop people from doing something, take away discretion and impose more prison time"); *infra* text accompanying notes 378, 379, 381. The vote in the House of Representatives was 392 to 16; in the Senate, 97 to 2. *Terry*, 141 S. Ct. at 1860 n.2.

[310] *See, e.g.*, 21 U.S.C. § 841 (defining mandatory minimum penalties of imprisonment of either five or ten years, and an authorized term of either forty years or life imprisonment, for the distribution of a controlled substance based on the weight of two different defined quantities (e.g., 100 grams versus 1 kilogram of heroin, 28 grams versus 280 grams of crack, 5 grams versus 50 grams of methamphetamine, etc.) of any "mixture or substance" containing the drug).

[311] *See id.*; KENNEDY, *supra* note 1, at 301, 371–72; Larkin, *supra* note 194, at 241–42, 251.

[312] Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181 (codified as amended at various sections of 5 and 21 U.S.C.); 21 U.S.C. § 841(b)(1)(A)(iii) & (B)(iii).

States followed by enacting similar legislation.[313] From there, federal and state prosecutors used their new tools to prosecute crack offenses.[314] Over the following years, a considerable number of black offenders were convicted of crack offenses and sentenced to lengthy terms of imprisonment.[315] Since 1988, as explained below, Congress has revisited the two Anti-Drug Abuse Acts on a few occasions and has changed the penalty structure to close the crack-powder ratio. The Controlled Substances Act of 1970, however, remains the cornerstone of the federal illicit-drug laws.

The result was an outcry that the treatment was worse than the disease. The Anti-Drug Abuse Act of 1986, critics said, accomplished what Congress feared crack would do. It robbed individual black males of their freedom, often for a decade or more; it denied them any opportunity to escape their plight by giving them a criminal record that made them life-long pariahs for employment purposes; it deprived neighborhoods of the fathers and brothers necessary to enforce non-legal norms; it dissolved the cohesiveness necessary for neighborhood residents to enjoy physical security and a sense of pride in their community; and it further marginalized already cast-away black inner-city residents by condemning them to live in war zones.[316]

B. The Critics' Position

According to critics, the government has used the War on Drugs—in particular, the lengthy sentences required or authorized by the Anti-Drug Abuse Act of 1986—to legally re-enslave African-Americans. In the critics' view, the government has effectively reimposed the same conditions forced on blacks during slavery or the Jim Crow era[317] via the "mass incarceration" and disenfranchisement of predominantly black male drug offenders in unprecedented numbers, even for a nation that practiced legal slavery.[318]

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313 PROVINE, *supra* note 1, at 120.

314 *Id.*

315 *See, e.g.*, ALEXANDER, *supra* note 1, at 180, 185–86; PROVINE, *supra* note 1, at 120–21.

316 *See, e.g.*, ALEXANDER, *supra* note 1, at 158–65.

317 *Id.* at 31; *see supra* note 17; Ruffin v. Commonwealth, 62 Va. 790, 795–96 (1871).

318 *See* ALEXANDER, *supra* note 1, at 232 ("The drug war is largely responsible for the prison boom and the creation of the new undercaste, and there is no path to liberation for communities of color that includes this ongoing war. So long as people of color in ghetto

The Jim Crow Era has been reborn in the form of conviction, imprisonment, and a scarlet "F" for felons.[319] The reason is that racial profiling leads to arrest, conviction, and imprisonment for lengthy prison terms for violations of the Anti-Drug Abuse Act of 1986 based on the weight of the drugs sold. Even offenders released carry with them the permanent scar of being labeled a "felon," which disentitles them to numerous government benefits (such as access to public housing and educational funds) that might help them escape their status, along with the right to vote, which could help them change the law to escape their legal restraints.[320]

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communities are being rounded up by the thousands for drug offenses, carted off to prisons, and then released into a permanent undercaste, mass incarceration as a system of control will continue to function well.").

[319] *See id.* at 2 ("What has changed since the collapse of Jim Crow has less to do with the basic structure of our society than with the language we use to justify it. In the era of colorblindness, it is no longer socially permissible to use race, explicitly, as a justification for discrimination, exclusion, and social contempt. So we don't. Rather than rely on race, we use our criminal justice system to label people of color 'criminals' and then engage in all the practices we supposedly left behind. Today it is perfectly legal to discriminate against criminals in nearly all ways that it was once legal to discriminate against African Americans. Once you're labeled a felon, the old forms of discrimination—employment discrimination, housing discrimination, the denial of the right to vote, denial of educational opportunity, denial or food stamps and other public benefits, and exclusion from jury service—are suddenly legal. As a criminal, you scarcely have more rights, and arguably less respect, than a black man living in Alabama at the height of Jim Crow. We have not ended racial caste in America; we have merely redesigned it.").

[320] *See, e.g.*, *id.* at 158–61; U.S. COMM'N ON CIVIL RIGHTS, COLLATERAL CONSEQUENCES: THE CROSSROADS OF PUNISHMENT, REDEMPTION, AND THE EFFECTS ON COMMUNITIES (2019); JAMES B. JACOBS, THE ETERNAL CRIMINAL RECORD (2015); DEVAH PAGER, MARKED: RACE, CRIME, AND FINDING WORK IN AN ERA OF MASS INCARCERATION (2007); KATHERINE IRENE PETTUS, FELONY DISENFRANCHISEMENT IN AMERICA: HISTORICAL ORIGINS, INSTITUTIONAL RACISM, AND MODERN CONSEQUENCES (2d ed. 2013); Elisha Jain, *The Mark of Policing: Race and Criminal Records*, 73 STAN. L. REV. ONLINE 162 (2021); Becky Pettit & Bruce Western, *Mass Imprisonment and the Life Course: Race and Class Inequality in U.S. Incarceration,* 69 AM. SOC. REV. 151, 151, 156 (2004); John G. Malcolm, *Collateral Consequences: Protecting Public Safety or Encouraging Recidivism*, HERITAGE FOUND. (Oct. 31, 2017), https://www.heritage.org/testimony/collateral-consequences-protecting-public-safety-or-encouraging-recidivism.

According to Professor Michelle Alexander, the argument that the criminal justice system is systemically racist, as well as the concept of "structural racism," is "fairly straightforward."[321] Like "a birdcage with a locked door," the criminal justice system consists of "a set of structural arrangements that locks a racially distinct group into a subordinate political, social, and economic position, effectively creating a second-class citizenship."[322] The War on Drugs is the "vehicle" through which the criminal justice system works to force "extraordinary numbers of black men" into "the cage."[323] "More black men are imprisoned today than at any

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[321] ALEXANDER, *supra* note 1, at 184.

[322] *Id.* at 185.

[323] According to Professor Alexander:

> The entrapment occurs in three distinct phases . . . . The first stage is the roundup. Vast numbers of people are swept into the criminal justice system by the people who conduct drug operations primarily in poor communities of color. They are rewarded in cash—through drug forfeitures and federal grant programs—for rounding up as many people as possible, and they operate unconstrained by constitutional rules of procedure that once were considered inviolate. Police can stop, interrogate, and search anyone they choose for drug investigations, provided they get "consent." Because there is no meaningful check on the exercise of police discretion, racial biases are granted free rein. In fact, police are allowed to rely on race as a factor in selecting whom to stop and search (although people of color are no more likely to be guilty of drug crimes than whites)—effectively guaranteeing that those who are swept into the system are primarily black and brown.
>
> The conviction marks the beginning of the second phase: the period of formal control. Once arrested, defendants are generally denied meaningful legal representation and pressured to plead guilty whether they are or not. Prosecutors are free to "load up" defendants with extra charges, and their decisions cannot be challenged for racial bias. Once convicted, due to the drug war's harsh sentencing laws, drug offenders in the United States spend more time under the criminal justice system's formal control . . . than drug offenders elsewhere in the world. . . . This period of control may last a lifetime, even for those convicted of entirely minor, nonviolent offenses, but the vast majority of those swept into the system are eventually released. They are transferred from their prison cells to a much larger, invisible cage.

other moment in our nation's history."[324] In fact, more African-American men are under the thumb of the criminal justice system today—whether in custody, on probation, or on parole—"than were enslaved in 1850, a decade before the Civil War began."[325] Whether they are in custody in a prison or jail or burdened by a raft of collateral consequences that prevent them from walking the straight and narrow,[326] offenders can never hope to escape their new shackles. "They become members of an undercast"—viz., "an enormous population of predominantly black and brown people who, because of the drug war, are denied basic rights and privileges of American citizenship and are permanently relegated to an inferior status."[327]

The critics are correct that the nation has aggressively investigated and prosecuted drug offenses since Congress enacted the Controlled Substances Act of 1970. Critics are also correct that drug offenses are subject to very stiff penalties. And critics are correct that the federal and state governments have convicted numerous African-Americans for drug crimes. But, the critics go wrong in attributing that outcome to systemic racism. The following section explains why that is so.

> The final stage has been dubbed by some advocates as the period of "invisible punishment." This term, first coined by Jeremy Travis, is meant to describe the unique set of criminal sanctions that are imposed on individuals after they step outside the prison gates, a form of punishment that operates largely outside of public view and takes effect outside the traditional sentencing framework. . . . These laws operate collectively to ensure that the vast majority of convicted offenders will never integrate into mainstream, white society. They will be discriminated against, legally, for the rest of their lives—denied employment, housing, education, and public benefits. Unable to surmount these obstacles, most will eventually return to prison and then be released again, caught in a closed circuit of perpetual marginality.

Id. at 185–86 (footnote omitted).

[324] *Id.* at 180.

[325] *Id.*

[326] *Id.* at 163 ("When someone is convicted of a crime today, their 'debt to society' is never paid. The 'cruel hand' that Frederick Douglas spoke of more than 150 years ago has appeared once again.").

[327] ALEXANDER, *supra* note 1, at 187.

C. Problems with the Critics' Position

1. Racism as Intentional Discrimination

Critics make a persuasive case that mandatory minimum sentences—particularly *lengthy* mandatory minimum sentences—might play an unfortunate and outsized role at sentencing.[328] The principal virtue of such laws seems to be certainty: they make it easy for a sentencing court to decide what punishment is appropriate by taking the decision away from the judge. "It is a commonplace," Justice Felix Frankfurter once wrote, "that no more difficult task confronts judges than the determination of punishment not fixed by statute."[329] By 1984, asking hundreds of federal judges to handle that difficulty led to terms of imprisonment that were all over the map. To prevent arbitrariness in federal sentencing, Congress adopted the Sentencing Reform Act of 1984.[330] The Act chartered a U.S. Sentencing Commission and empowered it to promulgate sentencing guidelines that, under current constitutional law, regulate and guide a district court's sentencing discretion without denying him or her the ability to depart from whatever sentencing range the guidelines recommend.[331] When crack emerged in 1985, Congress could have waited for the U.S. Sentencing Commission to devise a sentencing range for that drug in its first set of Sentencing Guidelines, which were scheduled to be released in 1987. Instead, facing a November 1986 election, Congress panicked and precipitously passed the Anti-Drug Abuse Act of 1986 almost unanimously and with considerable support among black leaders.[332] The standard challenge to that statute, like to all other mandatory minimum laws, is that it is overbroad, lumping together disparate types of offenders and

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[328] For a comprehensive discussion of arguments pro and con on the wisdom of mandatory minimum sentences, see Erik Luna & Paul G. Cassell, *Mandatory Minimalism*, 32 CARDOZO L. REV. 1 (2010).

[329] Carter v. Illinois, 329 U.S. 173, 178 (1946).

[330] *See* Mistretta v. United States, 488 U.S. 361, 363–70, 371–79 (1989).

[331] *See* Kimbrough v. United States, 552 U.S. 85, 96 n.7, 109 (2007); United States v. Booker, 543 U.S. 220, 233 (2005).

[332] *See infra* text accompanying notes 375–84.

mechanically treating each one as the worst of the worst by imposing unduly harsh penalties on everyone.[333]

The 1986 Act has come in for special criticism, however, for an additional reason. The ratio in the original bill started low but wound up being 100:1 because members of Congress, in a real-life version of the *Saturday Night Live* game of "*¿Quien Es Mas Macho?*"[334] bid up the ratio to show that they were "tougher on crime" than their colleagues across the aisle.[335] That is not how the railroad should be run.

Congress was right to lower the ratio in the Fair Sentencing Act of 2010, and eight years later to make that reduction retroactive in the First Step Act. Congress also might eliminate the difference between crack and powdered cocaine altogether, as the Sentencing Commission recommended in 1995.[336]

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[333] *See, e.g.*, Rachel E. Barkow, *Categorical Mistakes: The Flawed Framework of the Armed Career Criminal Act and Mandatory Minimum Sentencing*, 133 HARV. L. REV. 200, 201 (2019).

[334] *Saturday Night Live: S04E12 – Rick Nelson* at 40:40 (NBC television broadcast Feb. 2, 1979), https://archive.org/details/saturday-night-live-s-04-e-12-rick-nelson-judy-collins-02-17-1979.

[335] *See, e.g.*, Michael Isikoff & Tracy Thompson, *Getting Too Tough on Drugs*, WASH. POST (Nov. 4, 1990), https://www.washingtonpost.com/archive/opinions/1990/11/04/getting-too-tough-on-drugs/2b616e5c-e450-47d9-ad6d-09e0c83d449b/ ("The way in which these sentences were arrived—it was like an auction house,' recalls Eric Sterling, a staff member of the House Judiciary Committee when the laws were being written and currently president of the Criminal Justice Policy Foundation. 'It was this frenzied, panicked atmosphere—I'll see your five years and I'll raise you five years. It was the crassest political poker game. Nobody looked and said these sentences were going to have the following effect on the courtrooms around the country, on street corners and on the prisons."); David C. Morrison, *Anti-Crack Bias*, WASH. CITY PAPER (Sept. 8, 2000), https://washingtoncitypaper.com/article/266556/anti-crack-bias/ ("[Eric] Sterling . . . still recalls with rueful amazement the arbitrary process whereby committee staffers simply plucked numbers out of thin air in setting sentencing guidelines for possession or distribution of different quantities of different drugs."). The dramatic ratio corresponded to similarly dramatic differences in sentences handed down for crack and powder cocaine offenders, contributing, over the years and as the frenzy surrounding the bill subsided, to the perception of unfairness.

[336] *See* U.S. SENT'G COMM'N, SPECIAL REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY 198 (1995); KENNEDY, *supra* note 1, at 381–82. As one of us previously wrote:

Reconsidering the severity of the current federal drug sentencing laws is a subject worth debating.[337] Congress and the states also need to adopt other criminal justice reforms. For example, they should consider shifting funds now used for equity training to augment the number of federal and state public defenders and ancillary personnel, such as investigators. Doing so is necessary to ensure that defendants have a fighting chance to establish their

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> The ultimate irony of the *Blewett* decision is that the Sixth Circuit was so intent on voiding the 100:1 ratio that it failed to consider whether the new 18:1 ratio suffered from the same defects that it identified in the 100:1 ratio. Each ratio, after all, treats crack cocaine trafficking more harshly than business in the powdered form. The difference is just marginal, not categorical. If the problem is that drug laws impose mandatory minimum penalties for cocaine distribution, the flaw in the system applies to both crack and powdered cocaine. Each offense carries a mandatory minimum prison term; only the length differs. If the problem is a matter of principle, not arithmetic—that is, if the crack laws offend our commitment to equal justice under law because they mandate the imprisonment of an unduly large number of blacks for an exceptionally long period of time—it is difficult to understand why the equally mandatory imprisonment of the same number of blacks for a somewhat shorter period of time is not equally objectionable. If the promise of equal protection policy (though not equal protection law) or the demand for sound drug policy urges us to consider not merely the decisionmaker's intent, but also the results of his or her decisions, we must explain how we have done any more than kick the can down the road to the day when the numbers resulting from the 18:1 ratio also haunt our conscience.

Larkin, *supra* note 194, at 292.

[337] And in the process, Congress should consider the harmful sequela of proposals to legalize cannabis, such as the problem of drug-impaired driving, a problem that legalization advocates steadfastly refuse to acknowledge, let alone address. *See, e.g.*, Paul J. Larkin, *Driving While Stoned in Virginia*, 59 AM. CRIM. L. REV. ONLINE 16, 24 (2022); Paul J. Larkin, Jr., *The Problem of "Driving While Stoned" Demands an Aggressive Public Policy Response*, 11 J. DRUG POL'Y ANALYSIS 1, 2 (2018); Paul J. Larkin, Jr., *Medical or Recreational Marijuana and Drugged Driving*, 52 AM. CRIM. L. REV. 453, 461, 498 (2015); Paul J. Larkin, Jr., Robert L. DuPont & Bertha K. Madras, *The Need to Treat Driving under the Influence of Drugs as Seriously as Driving under the Influence of Alcohol*, THE HERITAGE FOUND., BACKGROUNDER No. 3316 (May 16, 2018).

innocence. But the critics do not make a convincing case that the War on Drugs is suffused with systemic racism.

Anglo-American law has used criminal sanctions as a regulatory tool for more than a millennium,[338] and numerous other nations today make it a crime to traffic in illicit drugs.[339] Indeed, a large percentage of the African-American community has supported the use of lengthy prison terms for drug trafficking because the violence that accompanies it turns their neighborhoods into "free fire zones."[340] Unless you start from the position that it is obligatory to favor the interests of drug traffickers over the interests of law-abiding community residents or to discount the views of the victims of drug trafficking's many ills, there is no good reason to assume that any use of the criminal law is necessarily racist.

There is a critical point to keep in mind. Advocates of the view that the United States overuses imprisonment "attach scary labels like 'mass incarceration'" to the sentencing practices in criminal cases, including drug prosecutions.[341] Tag lines such as "rounding up as many people as possible,"[342] to use Professor Alexander's phrase, certainly imply that the

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[338] *See, e.g.*, THEODORE F.T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 424–502 (Liberty Fund, 5th ed. 1956); Larkin, *supra* note 265, at 327–29.

[339] The United States is a party to several international treaties that require the signatories to combat international trafficking in dangerous drugs. *See* Single Convention on Narcotic Drugs, Mar. 30, 1961, 18 U.S.T. 1407, *amended by* 1972 Protocol, Mar. 25, 1972, 26 U.S.T. 1439, 976 U.N.T.S. 3; Convention on Psychotropic Substances, Feb. 21, 1971, 32 U.S.T. 543, 1019 U.N.T.S. 175; United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, Dec. 20, 1988, 1582 U.N.T.S. 95; ROBIN ROOM ET AL., CANNABIS POLICY: MOVING BEYOND STALEMATE 3, 7–8, 75–76 (Oxford Univ. Press, 2010). The U.N. Commission on Narcotic Drugs is responsible for overseeing international compliance with those treaties. *See* U.N. OFF. OF DRUGS & CRIME, COMMISSION ON NARCOTIC DRUGS, VIENNA: 2019 MINISTERIAL DECLARATION 5 (July 2019). The United States is not alone in its reliance on criminal law to halt drug trafficking. Other nations also use criminal law, although how aggressively they prosecute drug cases naturally varies. *See, e.g.*, Chester R. Hardt & Ruth Brooks, *Social Policy on Dangerous Drugs: A Study of Changing Attitudes in New York and Overseas*, 48 ST. JOHN'S L. REV. 48, 57–59 (Japan), 66–68 (United Kingdom), 79–81 (Sweden) (1973).

[340] *See infra* notes 377, 384.

[341] LATZER, *supra* note 193, at viii.

[342] ALEXANDER, *supra* note 1, at 185, 241.

police have arrested and brought in for questioning a vast number of blacks that the arresting officers and reviewing prosecutors know are innocent and that, despite the arrestees' innocence, are determined to see them thrown into prison.[343] The implication is that "swaths of people are being indiscriminately rounded up and herded into prisons in scenes reminiscent of concentration camps."[344] Yet, critics do *not* argue that a sizeable number of black offenders imprisoned for drug trafficking or possession are *innocent* of those offenses. No one makes the claim that federal or state law enforcement officers have arrested and convicted thousands of Solomon Northups, people who are entirely innocent of any crime.[345] That fact does not torpedo the critics' concern with the unequal treatment of black and white drug offenders; their concern about discrimination remains a legitimate one. But that fact does focus the analysis.[346]

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[343] *See* CASABLANCA (Warner Bros. 1942), https://www.youtube.com/watch?v=vtSmfws0_To (prefect of Police Captain Louis Renault: "Round up the usual suspects.").

[344] LATZER, *supra* note 193, at viii; *see* Loury, *supra* note 52, at 194 (noting that, "overt discriminatory treatment" is an explanation "only in small part" for the large number of African-American prisoners and that "[i]t is in main part a reflection of huge disparities in the behavior of individuals in terms of criminal offending").

[345] TWELVE YEARS A SLAVE (Plan B Entertainment 2012).

[346] Stephanos Bibas, *The Truth about Mass Incarceration*, NAT'L REV. (Sept. 16, 2015, 8:00 AM), https://www.nationalreview.com/2015/09/mass-incarceration-prison-reform/ ("*The New Jim Crow* wrongly absolves criminals of responsibility for their 'poor choices.' Alexander opens her book by analogizing the disenfranchisement of Jarvious Cotton, a felon on parole, to that of his great-great-grandfather (for being a slave), his great-grandfather (beaten to death by the Ku Klux Klan for trying to vote), his grandfather (intimidated by the Klan into not voting), and his father (by poll taxes and literacy tests). But Cotton's ancestors were disenfranchised through violence and coercion solely because of their race. Cotton is being judged not by the color of his skin, but by the content of his choices. He chose to commit a felony, and Alexander omits that his felony was not a nonviolent drug crime, but murdering 17-year-old Robert Irby during an armed robbery. All adults of sound mind know the difference between right and wrong. Poverty and racism are no excuses for choosing to break the law; most people, regardless of their poverty or race, resist the temptation to commit crimes. Cotton is *not* a helpless victim just like his ancestors, and it demeans the free will of poor black men to suggest otherwise.").

The reason is that "[a] selective-prosecution claim is not a defense on the merits to the criminal charge itself, but an independent assertion that the prosecutor has brought the charge for reasons forbidden by the Constitution."[347] To establish a claim of unconstitutionally selective prosecution, an offender must show either that the prosecutor in his case was motivated by racism or that someone else similarly situated was not prosecuted only because of his or her race. The Supreme Court twice made that clear.

In *Ah Sin v. Wittman*, the defendant was convicted of illegal gambling and claimed that the city enforced local anti-gambling only against the Chinese. [348] The Court rejected his argument on the grounds that he had not alleged that "the conditions and practices to which the ordinance was directed did not exist exclusively among the Chinese, or that there were other offenders against the ordinance than the Chinese as to whom it was not enforced."[349] The Court rejected a similar claim in *United States v. Armstrong.*[350] That defendant argued that he was entitled to pursue discovery to learn why the government had prosecuted only blacks for crack trafficking. The Court turned aside his request because he had not shown that "similarly situated individuals of a different race were not prosecuted."[351] The Court also refused to adopt a presumption that the incidence of crack trafficking should be the same across all races by pointing to evidence that individuals of different races committed some crimes more often than members of other racial or ethnic groups.[352] The Court wrote that it was always open to a particular defendant to prove that the prosecutor *in his or her case* was motivated by an intent to discriminate.[353]

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347 United States v. Armstrong, 517 U.S. 456, 463 (1996).

348 Ah Sin v. Wittman, 198 U.S. 500, 504 (1905).

349 *Id.* at 507–08.

350 *Armstrong*, 517 U.S. at 463–71.

351 *Id.* at 465–71.

352 *Id.* at 469–70.

353 *Id.* at 468.

The most commonly voiced argument that the Anti-Drug Abuse Act of 1986 has been applied with "an evil eye and an unequal hand"[354] rests on the claim that more blacks than whites are imprisoned on drug charges even though both are comparable drug users.[355] Yet, the relevant comparison is between black and white *drug traffickers*, not between the broader categories of black and white *drug users*. The latter is like comparing the number of people who play a sport against the number who do so professionally. That is not all. "To the extent that the enhanced punishment for crack offenses falls upon blacks," Professor Kennedy has explained, "it falls not upon blacks as a class but only upon a distinct subset of the black population—those in violation of the crack law."[356] African-Americans are not sent to prison for the same reason that black schoolchildren were sent to segregated schools before *Brown v. Board of Education*. Their commission of a drug crime distinguishes the former from the latter. And that is true even without considering the fact that "if dealers in crack cocaine have their liberty significantly restricted, this will afford greater liberties to the majority of citizens who are the potential victims of drug dealing and associated violent behaviors."[357]

In addition, it was not racist for the government to have feared that trafficking in crack cocaine might send African-American communities even further over the edge.[358] Crack increased the availability of cocaine to a

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354 Yick Wo v. Hopkins, 118 U.S. 356, 373–74 (1886).

355 *See, e.g.*, ALEXANDER, *supra* note 1, at 185, 241.

356 KENNEDY, *supra* note 1, at 376.

357 Stith, *supra* note 185, at 153.

358 *See, e.g.*, Chitwood et al. eds., *supra* note 302, at ix–x ("[T]he story of crack is fairly well-known, having been reported (and perhaps over-reported) in the media since early in 1986—the 'highs,' binges, and 'crashes' that induce addicts to sell their belongings and their bodies in pursuit of more crack; the high addiction liability of the drug that instigates users to commit any manner and variety of crimes to support their habits; the rivalries in crack distribution networks that have turned some inner-city communities into urban 'dead zones' where homicide rates are so high that police have written them off as anarchic badlands; the involvement of inner-city youths in the crack business, including the 'peewees' and 'wannabees' (want-to-be's), those street-gang acolytes in grade school and junior-high who patrol the streets with two-way radios and cellular phones in the vicinity of crack houses, serving in networks of look-outs, spotters, and steerers, and aspiring to be 'rollers' (short for

broader range of users and thereby also made it attractive for a new group of sellers.[359] Because the relevant comparison is between blacks and whites who sell or use the same drug, it is critical that, in the 1980s, more blacks than whites sold and used crack cocaine.[360] As Professor Kennedy noted, "[e]veryone concedes that there exists a striking and racially identifiable pattern in the demographics of the drug trade" because "blacks are more likely than whites to traffic in crack," and did so in communities suffering its fallout.[361]

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high-rollers) in the drug distribution business; the child abuse, child neglect, and child abandonment by crack-addicted mothers; and finally, the growing cohort of crack-exposed infants that are troubled not only physically, but emotionally and behaviorally as well."); JACOBS, *supra* note 297, at 66–67 ("The crack crime wave was arguably the worst of any drug epidemic. At the zenith of its popularity, significantly more persons used and sold the drug than ever used or sold heroin or cocaine powder (at the height of these respective drug eras). Large numbers of crack market participants were heavy daily consumers, using the substance in unparalleled amounts and frequencies.").

[359] *See, e.g.*, Reinarman & Levine, *supra* note 304, at 2 ("Crack appeared in late 1984 and 1985 primarily in impoverished African-American and Latino inner-city neighborhoods in New York, Los Angeles, and Miami. . . . Crack was a marketing innovation. It was a way of packaging a relatively expensive and upscale commodity (powder cocaine) in small, inexpensive units. So packaged, this form of smokable cocaine (crack) was then sold, usually on the street by young African-Americans and Latinos to a whole new class of customers: residents of impoverished inner-city neighborhoods. The marketing innovation was successful for at least two reasons. First, there was a huge workforce of unemployed young people ready to take jobs in the new, neighborhood-based business of crack preparation and sales. . . . Second, the marketing innovation succeeded because turning powder cocaine into smokable 'crack' changed the way cocaine was consumed and thereby dramatically strengthened the character of cocaine intoxication. Smoking crack offered a very brief but very intense intoxication. This inexpensive and dramatic 'high' was much better suited to the finances and interest in immediate escape of the inner-city poor than the more subtle and expensive effects of powder cocaine.").

[360] *See id.* at 4 ("[I]n 1989, after being a crucial source for the news that in the suburbs crack use was 'epidemic' and 'all over the place,' the *New York Times* quietly noted that just the opposite was true. The *Times* reported that except for a few 'urban pockets' in suburban counties, 'educators, law enforcement officials, and young people say crack and most other narcotics are rarely seen in the suburbs, whether modest or wealthy.' Crack, the *Times* now said, 'is confined mainly to poor urban neighborhoods.'").

[361] KENNEDY, *supra* note 1, at 365; *see also* FORMAN, *supra* note 119, at 164 (noting that "African Americans were more likely to be involved in the crack trade" than white

Another factor is that, during the crack era, African-American dealers typically sold in "open air" or "streetcorner" markets, rather than more discretely inside buildings and homes, which made police surveillance, undercover purchases, and "jump out" arrests far easier.[362] The police focused on that practice in part because it offered "easy targets" for an arrest of the seller or other dealers seeking to rip off a competitor.[363] Police departments rate and reward officers based on the number of cases they "clear"—viz., the number of arrests they make—so officers will naturally

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Americans); *id.* at 173 (footnotes omitted) ("Arrest, conviction, a possible jail or prison sentence, forfeiture of property, and a lifetime of collateral consequences—today many would conclude that this cumulative set of punishments was disproportionate to the offense of PCP possession. It appears all the more unjust—even cruel—given how few drug treatment slots were available for addicts seeking help. But that's not how it looked to many black citizens facing the horrors of the crack epidemic. 'Thanks to [the D.C. Metropolitan Police Department's] Operation Clean Sweep we are now getting control of our streets and community,' said Calvin Rolark, chairman of the MPD's Citizens Advisory Committee. The [*Washington*] *Afro* [*-American* newspaper] supported Clean Sweep, saying that the drug industry was 'a threat to our race.'"); MICHAEL TONRY, PUNISHING RACE: A CONTINUING AMERICAN DILEMMA 49–54, 63–70, 98 (2011). By contrast, "[t]rafficking and use of methamphetamine is dominated by whites." KENNEDY, *supra* note 1, at 385. There is no reason to presume that the rate that each crime is committed will match the racial breakdown in American society.

[362] *See, e.g.*, BOURGOIS, *supra* note 202, at xvii; Inciardi et al., *in* THE AMERICAN PIPE DREAM, *supra* note 302, at 2; FORMAN, *supra* note 119, at 125, 141, 168; JACOBS, *supra* note 297, at 3–6, 13, 47, 49–56, 58, 64–67, 71 ("[d]rive-through service"), 73–76, 85, 90; Robert Lindsey, *Oakland Fighting Back to End Drug Violence*, N.Y. TIMES, Oct. 7, 1984, https://www.nytimes.com/1984/10/07/us/oakland-fighting-back-to-end-drug-violence.html ("Lieut. Michael F. Wilson, commander of the Oakland Police Department's Vice Control Division, estimated there were still '30 to 35' street corners in the city where drugs are sold openly. Many of the dealers dispense their merchandise as casually as children selling lemonade from a sidewalk stand. At the corner of 14th street and Peralta avenues, for example, three young men appeared to consummate four drug deals, two of them with drive-up customers in expensive cars, within 20 minutes one afternoon this week. . . . [I]n neighborhoods not many blocks from this resurgent city center, police officials concede, is one of America's most public marketplaces for illegal drugs and the site of often bloody battles between rival dealers.").

[363] *See, e.g.*, FORMAN, *supra* note 119, at 168.

pursue easy cases.[364] Like it or not, that is not a racist practice and does not reflect an invidious intent.

In sum, those facially neutral factors are ample to rebut an inference of intentional discrimination based on a numerical disparity in arrests for the sale or possession of crack cocaine. It was for reasons like those that the federal courts of appeals uniformly rejected the claim that the Anti-Drug Abuse Act's 100:1 ratio offends equal protection principles.[365] Yes, the ratio was created by a legislative process motivated more by tough-on-crime rhetoric than realism, and Congress was right to change it. That being said, the evidence does not support the conclusion that racial animus motivated the ratio.

2. Racism as Indifference

Perhaps that is why some critics argue that the problem is *not* that individual criminal justice system actors act out of a racist intent, but that, as Professor Alexander put it, America suffers from "blindness and indifference" to the plight of African-Americans as a category,[366] or, as Professor Michael Tonry has described it, America is guilty of "malign neglect."[367] That is, America knows that few poor, inner-city African-Americans have escaped ghettoes and is unwilling to do anything but watch those residents suffer as their neighborhoods fester.

It is difficult to believe that today's elected officials are indifferent to the plight of African-Americans. Congress is not "chock full" of legislators who could be deemed racist.[368] Indeed, Congress has been receptive to the

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[364] Larkin, *supra* note 194, at 251.

[365] *See, e.g.*, United States v. Thompson, 27 F.3d 671, 678 (D.C. Cir. 1994) (collecting cases); United States v. Frazier, 981 F.2d 92, 95 (3d Cir. 1992); United States v. Simmons, 964 F.2d 763, 767 (8th Cir. 1992); United States v. Haynes, 985 F.2d 65, 70 (2d Cir. 1993); Larkin, *supra* note 194, at 242 ("The circuits have ruled that the disparity is not attributable to racial bias and that the 100:1 ratio is rational because Congress reasonably could have believed that crack is more addictive than powdered cocaine and that crack is easier and less expensive to conceal and distribute, making it available and attractive to a new range of users.").

[366] ALEXANDER, *supra* note 1, at 241.

[367] TONRY, *supra* note 361, at 100.

[368] Larkin, *supra* note 194, at 272. In fact, that risk is less likely in Congress than elsewhere. *See id.* at 273 ("The national media focuses their attention on Capitol Hill, making

criticisms of the Anti-Drug Abuse Act of 1986. The crack epidemic went into remission beginning in 1990 as the number of new users dipped below the number of old ones who quit.[369] Perhaps in response, Congress has twice amended the law, first to reduce the 100:1 ratio to 18:1 on a prospective basis and later to make that revision retroactive.[370] Additional reforms have been brought before Congress, and they too could become law.[371]

There is "a striking contrast between the makeup of the federal, state, and local governing bodies" today and the ones that existed fifty years ago.[372] In the words of the late Professor Bill Stuntz: "Our generation has seen massive gains in black political power over big-city governments, and (not coincidentally) in black representation on urban police forces."[373] The public has elected numerous African-Americans to the highest positions in the federal, state, and local government. There are scores of African-American chiefs of police and sheriffs, as well as thousands of black police officers and deputy sheriffs. Moreover, "white police officers (and white legislators, prosecutors, and judges) are surely less racist as a class than they were twenty or thirty years ago."[374] Taken together, "[a] rise in systemic

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it highly unlikely that the actions of a bigoted Congress could go unnoticed. If a Senator or Representative were shown to have intended to discriminate against African-Americans, the media would pillory him, and the electorate would exact retribution at the next election.").

369 JACOBS, *supra* note 297, at 5.

370 *See* Fair Sentencing Act of 2010, Pub. L. No. 111-220, 124 Stat. 2372 (2010) (codified as amended in scattered sections of 21 and 28 U.S.C.) (prospectively reducing the ratio from 100:1 to 18:1); First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194 (2018) (retroactively reducing the ratio).

371 In 2021, parallel legislation was proposed in each house of Congress to equalize the penalty for trafficking in crack and powdered cocaine. *See, e.g.*, Eliminating a Quantifiably Unjust Application of the Law (EQUAL) Act, S. 79, 117th Cong. (2021); Eliminating a Quantifiably Unjust Application of the Law (EQUAL) Act, H.R. 1693, 117th Cong. (2021).

372 Paul J. Larkin, *The Reasonableness of the "Reasonableness" Standard of Habeas Corpus Review Under the Antiterrorism and Effective Death Penalty Act of 1996*, 72 CASE W. RES. L. REV. 669, 709 (2022); *see also* MEARES & KAHAN, *supra* note 270, at 11–12; Tracey L. Meares, Terry *and the Relevance of Politics*, 72 ST. JOHN'S L. REV. 1343, 1346–47 (1998).

373 William J. Stuntz, *Race, Class, and Drugs*, 98 COLUM. L. REV. 1795, 1798 (1998).

374 *Id.*

racism coincident with a decline in the level of racism of those who populate the system seems strange, even preposterous."[375]

Keep in mind that Congress passed the Anti-Drug Abuse Act of 1986 with "near unanimity."[376] Numerous black leaders, including a majority of the Congressional Black Caucus, supported its passage and voted for it.[377] They offered (at least) two reasons for their support.[378] One was the fear that "crack was fueling crime against residents in inner cities, who were predominantly black"; the other was a concern "that prosecutors were not taking these kinds of crimes seriously enough because the victims were disproportionately black."[379] Floor statements by members of that caucus illustrate their motives. Congressman Charles Rangel said that "[w]hat is most frightening about crack is that it has made cocaine widely available and affordable for abuse among our youth."[380] During Congress's debate over the bill that became the 1986 law, Representative Major Owens twice noted crack's dangers to the black community. On August 1, 1986, he said, "We must make it perfectly clear that we view this drug as highly dangerous and that we will not tolerate its importation, possession, or sale."[381] Ten days later, he offered the following remarks:

> [T]here is a groundswell in the neighborhoods . . . all across America . . . which demands that effective steps be taken to end the drug trafficking and the drug abuse epidemic . . . .
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> . . . .
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> . . . None of the press accounts really have exaggerated what is actually going on. It is as bad as any articles have stated. It is as bad as anything you have read about. It is as

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375 *Id.*

376 Terry v. United States, 141 S. Ct. 1858, 1860 (2021).

377 *Id.* at 1860 n.2; KENNEDY, *supra* note 1, at 301, 370–72; Randall Kennedy, *Is Everything Race?*, NEW REPUBLIC, Jan. 1, 1996, at 20; Larkin, *supra* note 194, at 251.

378 *Terry*, 141 S. Ct. at 1860, 1860 n.2.

379 *Id.*

380 132 CONG. REC. 5983 (1986).

381 *Id.* at 18844 (1986).

> bad as anything you have seen on television or heard on radio.
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> . . . .
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> . . . Current law does not take cocaine seriously. It is not surprising that we have an epidemic now which is heightened by the appearance of a purified form of cocaine which is called crack . . . . Whereas the law requires stiff penalties for other narcotics, the law does not require very stiff penalties in the case of the possession of a considerable amount of cocaine.[382]

Representative Alton Waldon urged his colleagues "to crack down on crack" because "[t]he madness which is crack has no respect for social, professional, or economic status."[383] He added that "[c]rack usage is the evidence that our society may in fact be losing control of itself. For those of us who are black this self-inflicted pain is the worst oppression we have known since slavery."[384] Significantly, none of the members of the Congressional Black Caucus raised the complaint that the bill was motivated by anti-black bias.[385]

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[382] *Id.* at 20738 (1986).

[383] *Id.* at 20739 (1986).

[384] *Id.* Members of Congress were not the only well-known black figures decrying the evil of crack cocaine; *See, e.g.*, FORMAN, *supra* note 119, at 158 (footnote omitted) ("Rev. Jesse Jackson equated drug dealers with Klansmen. 'No one has the right to kill our children,' he declared. 'I won't take it from the Klan with a rope; I won't take it from a neighbor with dope.").

[385] KENNEDY, *supra* note 1, at 301, 370–72, 375–76; *see* Terry v. United States, 141 S. Ct. 1858, 1860 n.2 (2021). As Professor Kennedy has explained:

> Reading between the lines, it seems that Professor Cole applauds those judges and commentators who conclude that courts should invalidate on equal protection grounds the crack/powder sentencing differential. One of the most noteworthy, though ignored, aspects of the substantial literature produced by these critics is that it is virtually devoid of any reference to what black members of Congress representing predominantly black jurisdictions had to say in 1986 when the federal crack/powder differential was instituted. This is not to say that their

The Anti-Drug Abuse Act of 1986 was not the first legislation backed by the African-American community that sought to use the deterrent and incapacitative effect of lengthy terms of imprisonment to forestall the violence that accompanies drug trafficking by removing its participants. Crack was responsible for the spread of a highly addictive drug throughout poor black inner-city communities in the 1980s, as well as the violent crime that accompanies illicit drug trafficking.[386] The same phenomenon had occurred in the late 1960s and early 1970s in response to a resurging supply of heroin in ghetto communities. In the 1970s there was considerable support among African-Americans for the severe penalties authorized by

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> arguments should be dispositive one way or another. Persons of any hue can be wrong, opportunistic, or racially prejudiced with respect to people of their own racial background. Still, it would be useful to some extent to know where the black members of Congress stood on the matter. The claim that the crack/powder distinction created a racial wrong would surely be strengthened if the black members of Congress had overwhelmingly objected to it on racial grounds. But the published critics who have condemned as racist the crack/powder distinction have failed to take into account the black members of Congress.
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> . . . . [quoting Reps. Rangel and Owens quoted *supra* at text accompanying notes 378–82]
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> Each of these Congressmen represented black urban areas afflicted by crack trafficking. Each must have or certainly should have understood that a "crack-down on crack" would necessarily mean sending more black men to jail for longer periods inasmuch as, in percentage terms, blacks tended to be involved in crack trafficking much more than whites. Each favored the crack/powder distinction despite this obvious and unpleasant prospect because other alternatives appeared to present even worse prospects.

Randall Kennedy, *A Response to Professor Cole's "Paradox of Race and Crime*," 83 GEO. L.J. 2573, 2574–75 (1995) (footnotes omitted).

[386] *See, e.g.*, People v. Broadie, 332 N.E.2d 338, 477 (N.Y. 1975) ("Defendants would minimize drug trafficking by arguing that it is not a crime of violence. Because of their illegal occupation, however, drug traffickers do often commit crimes of violence against law enforcement officers and, because of the high stakes, engage in crimes of violence among themselves (*see, e.g.*, People v. Medina, 47 A.D.2d 717 (two drug pushers, upon learning of a dealer's plot to have one kill the other, kill the dealer)"); JACOBS, *supra* note 297, at 76–81.

the so-called Rockefeller Drug Laws passed by the New York legislature.[387] Named after Nelson Rockefeller, the New York governor at the time of their enactment, the Rockefeller Drug Laws imposed a minimum sentence of fifteen years and authorized life imprisonment for the sale of one ounce, and possession of two ounces, of heroin.[388] The Rockefeller Drug Laws were the predecessor and model for the Anti-Drug Abuse Act of 1986, and the working- and middle-class black community in New York City strongly supported passage and enforcement of those laws.

In his 2015 book *Black Silent Majority*, Professor Michael Javen Fortner describes in detail the provenance of, and rationale for, the Rockefeller Drug Laws.[389] In so doing, he also tells the story of the African-Americans

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[387] *See infra* text accompanying notes 389–411, 435–458.

[388] *See* N.Y. PENAL LAW § 70.00(2)(a), (3)(a) (Consol. 2023); Carmona v. Ward, 439 U.S. 1091, 1091 (1979) (Marshall, J., dissenting from the denial of certiorari) (describing the New York law); BARKER, *supra* note 293, at 125–28. There was considerable black working- and middle-class support for the Rockefeller drug law. *See, e.g.*, ALEXANDER, *supra* note 1, at 42; *infra* text accompanying notes 389–414.

[389] MICHAEL JAVEN FORTNER, BLACK SILENT MAJORITY: THE ROCKEFELLER DRUG LAWS AND THE POLITICS OF PUNISHMENT (2015). For other accounts of that period, see, for example, WILLIAM JULIUS WILSON, THE TRULY DISADVANTAGED: THE INNER CITY, THE UNDERCLASS, AND PUBLIC POLICY (1990); Chester R. Hardt & Ruth Brooks, *Social Policy on Dangerous Drugs: A Study of Changing Attitudes in New York and Overseas*, 48 ST. JOHN'S L. REV. 48 (1973); Orde Coombs, *The Three Faces of Harlem*, N.Y. TIMES, Nov. 3, 1974; Charles V. Hamilton, *The Silent Black Majority*, N.Y. TIMES, May 10, 1970; FORTNER, *supra*, at 48–49 (quoting Marjorie Hunter, *Senators Hear of Life in the Ghetto*, N.Y. TIMES, Aug. 30, 1966) ("Interpreting the testimony, a *New York Times* reporter described the Harlem ghetto as 'the world of the child watching his father slit another man's throat. Of mothers who go to bed with the butcher to get pork chops for their children. Of a boy who turned dope pusher at age 13. The world of the wino and the backyard crapshooter, of the 12-year-old mother and the cop hater, the world of Southern Negroes who went north looking for streets paved with gold and found them paved with garbage.'") (describing a 1966 congressional hearing on the "federal role in urban affairs"); *King Heroin*, EBONY, June 1971, at 56–57 ("Harlem play vividly dramatizes the destructive effects of dope addiction on all levels in the black community."); *Dope in the Church*, JET, Dec. 20, 1951, at 62–63 ("A new ominous note is creeping into the sermons of Negro ministers who for years have been proclaiming the eternal agony of spending the hereafter in hell. Today they are campaigning against the forces of a new hell right here on earth: the cancer of dope. Alarmed at the influence of this new Satan on the members of [the congregation in their churches], many ministers have joined hands to save straying members of their flocks from the fire and brimstone of

in New York City, particularly Harlem, who, like blacks in other large cities,[390] were "captives" and "broken-hearted" by drug-caused violent crime in the late 1960s and early 1970s.[391]

Some Harlemites distinguished between "junkies" and "pushers" in the 1940s and 1950s, saving their condemnation only for the latter, who were deemed criminals.[392] By the 1960s, however, the worm had turned; junkies now were a threat to commit burglary, robbery, or murder to feed their habit.[393] As a result, according to Javen, "working- and middle-class

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narcotics. Noting [that] maladjusted, thrill-seeking youngsters turning to dope in increasing numbers and even turning up occasionally in pews under the influence of marijuana, pastors are determined to make 'Thou shalt not take dope' a new commandment.").

[390] The heroin-crime scenario in New York City also could be seen elsewhere. *See* FORMAN, *supra* note 119, at 25–33; *Dope in the Church*, *supra* note 389 (describing anti-drug efforts by black ministers in New York City, Chicago, Philadelphia, and Los Angeles).

[391] FORTNER, *supra* note 389, at xii. Fortner is not the only commentator to note the importance to African-Americans of personal safety. As Professor Forman noted: "African Americans have *always* viewed the protection of black lives as a civil rights issue, whether the threat comes from police officers or street criminals. Far from ignoring the issue of crime by blacks against other blacks, African American officials and their constituents have been consumed by it." FORMAN, *supra* note 119, at 11 (footnote omitted); *id.* at 11–12 (noting that blacks were concerned about both white racism and black crime).

[392] FORTNER, *supra* note 389, at 44 ("As *Dope* [a 1951 Harlem play about the harms of drug use]makes clear, working- and middle class Harlemites believed junkies were victims of their own character flaws. Still, at this point, drug addicts did not represent a threat to the community. . . . Drug dealers, however, were an entirely different matter. Not only did they create the nuisance of the 'Zombie-eyed junkie,' but community members associated them with gangsters and violence."); *id.* at 45 ("[Adam Clayton Powell, Jr., the U.S. Representative for Harlem] did not consider the pusher a victim of broader structural forces. According to him, the pusher chose his lifestyle: he decided to be a menace, so he deserved extreme punishment.").

[393] *See, e.g.*, *id.* at 47 ("Most of the addicts in the United States resided in New York City [in 1960], and most of them lived in Harlem. Most drug-related deaths in New York City took place in Harlem, and most of the victims were black."); *id.* at 53 ("By the 1960s, working-class, middle-class, and urban poor African Americans had become enmeshed within a calamitous and deepening social morass produced by residential segregation, the loss of labor-intensive work, and unscrupulous landlords; but instead of blaming social and economic forces, working- and middle-class Africans, motivated by fear and advised by indigenous values, inveighed against the poor. They blamed the community's downfall on individual behavior, the self-indulgent, irresponsible actions of the disadvantaged, rather

African-Americans began to invite police and aggressive policing into Harlem to regulate the behavior of a larger group of individuals."[394] Individuals were not the only ones affected. "All in all, drug addiction and related crimes posed an existential threat to churches, businesses, and civic organizations."[395] "Junkies" were seen as "sources of insecurity rather than risks to good race relations," and Harlemites "began to advocate for their punishment and removal."[396]

> Caught in the throes of urban decline and social disorganization, working- and middle-class African Americans were under siege and overwrought. Their "respectable" lives, which they had worked so hard to create, were now being jeopardized by ne'er-do-wells stealing their property and accosting their person. These offenses and frequent affronts on houses of worship and businesses nurtured the punitive impulses of working- and middle-class Harlemites. Given the threats that drug addiction and crime posed to working- and middle-class African Americans, many in Harlem and other black neighborhoods in New York City felt they constituted a "silent majority" of decent, law-abiding citizens victimized by the recklessness and immorality of a dangerous

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than racial or economic inequality."); *id.* at 138–39 (noting that by the early 1970s, "New York City's black community rated drugs and crime as its top concerns"); *id.* at 139 ("Churches and their parishioners felt trapped."); *id.* at 141–42, 146 (noting that local businesses found themselves in similar dire circumstances).

394 *Id.* at 62; *see also, e.g.*, *id.* at 153–55, 157–58; *see also* FORMAN, *supra* note 119, at 35 ("[A] central paradox of the African American experience: the simultaneous over- and *under*-policing of crime.").

395 FORTNER, *supra* note 389, at 141; *id.* ("Because of racial segregation, these firms and organizations had developed a niche in black communities, but crime had threatened their viability. Not only were they victims of drug addicts, but their members and customers were so afraid of being mugged by junkies that they no longer attended meetings or patronized businesses.").

396 *Id.* at 62; *see also* FORMAN, *supra* note 119, at 61 (noting the occurrence of the same phenomenon in Washington, D.C.).

> minority. They felt imprisoned by drug addicts. And they responded in kind. They now believed policing and prisons—the systematic removal of junkies—represented their only path to salvation.[397]

Ironically, white liberals blamed the crime problem on "the structural origins of criminal behavior," such as poverty and racism.[398] By contrast, Harlem residents, who daily saw and understood that problem "viscerally,"[399] believed that "[p]ushers and junkies were the architects of their own demise and the main source of the insecurity felt by working- and middle-class Harlemites."[400] They saw drug abuse and crime as being "inextricably connected" and "'stood in terror' of the black underclass" they held responsible.[401] "They linked drug addiction and crime and resisted structural explanations . . . ."[402] By the early 1970s, "[the] harsh demand for

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[397] FORTNER, *supra* note 389, at 143; *id.* at 146 ("Ultimately the immediacy of Harlem's crime problem caused the black silent majority to abjure their progressive sympathies and indulge their conservative instincts. Constant insecurity prompted them to seek, before all else, the removal of the threat—primarily junkies."). Junkies were not the only targets of the black silent majority's ire. "Many working- and middle-class African Americans also resented the ways black militants glamorized violence and used racial ties to validate criminal tactics," such as the assassination of two uniformed New York City police officers in retaliation for the deaths of black prisoners at Attica. *Id.* at 149.

[398] *Id.* at 66.

[399] *Id.* at 130.

[400] *Id.* at 66, 106; *see also, e.g.*, FORMAN, *supra* note 119, at 36 ("As Stokely Carmichael had once joked, 'I'm going to tell you what a white liberal is. You talking about a white college kid joining hands with a black man in the ghetto, that college kid is fighting for the right to wear a beard and smoke pot, and we fighting for our lives.'").

[401] FORTNER, *supra* note 389, at 66, 106, 169–70.

[402] *Id.* at 130; *id.* at 106 ("Unlike white reformers and liberal politicians, Harlemites considered drug addiction and trafficking public safety issues."); *see also, e.g.*, *id.* at 93 (noting that "working- and middle-class [Harlemites] 'were adamant about the need for aggressive policing'"). C*ompare, e.g.*, *id.* at 69–70 ("[W]hite reformers were advancing criminologies of the welfare state. They had been emphasizing the structural roots of addiction and urging the legislature and every governor of New York State, from the end of World War II until 1962, to establish sufficient hospital facilities for drug users."), *with, e.g.*, *id.* at 73 ("In contrast, working- and middle-class African Americans considered addiction a crime problem rather than a public health concern. They were much less focused on

the 'removal of all known drug addicts' was becoming a consensus proposal in Harlem.'"[403]

Doubly ironic was the "common cause" that working- and middle-class blacks found with their white counterparts.[404] "Drugs . . . had reconstructed class categories within black neighborhoods in New York" because working- and middle-class African-Americans felt a shared sense of insecurity with their white counterparts.[405] Harlemites, for example, "no longer understood their community in strictly racial terms."[406] Instead, the "dystopic state of many urban neighborhoods"[407] riven with drug abuse and

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environmental conditions than on an environment inhabited by pushers, prostitutes, and pimps."); *compare, e.g.*, *id.* at 97 ("Driven by their values and informed by social statistics, a dense network of predominantly white local civic leaders, medical professionals, and public officials spent the 1950s fighting to rescue addicts in Harlem. Early on, they fashioned a causal story that stressed the structural origins of addiction, and, encouraged by moral certainty and scientific skepticism, they maintained with abiding vehemence that 'criminal prosecution neither spares the community nor cures the addict.'"), *with, e.g.*, *id.* ("Working- and middle-class African Americans were not afforded such luxuries"—viz., "study[ing] and confront[ing] these social tragedies from a distance, sheltered by the privileges of their social and professional positions"—because "[t]he racial order did not allow them to witness such tragedies at a remove.").

[403] *Id.* at 108; *id.* at 113 ("While many working- and middle-class African Americans were not willing to criminalize addiction in the early 1960s, the risks junkies posed to person and property forced many blacks to promote their expulsion from the community."); *id.* at 115 ("In the 1940s, African American activists, in response to the white gaze, stressed the structural origins of crime in public, but in private they bewailed the behaviors of the urban black poor for threatening their safety and endangering their claims of racial equality. As they experienced greater liberty in politics and the market economy, working- and middle-class African Americans began to publicly denounce junkies, muggers, and 'hoodlums' for endangering their security and assaulting their consumers' republic. Ensconced within the safety of their racial position, middle-class white officials and experts did not suffer the same indignities, and, as a result, their values remained geared toward reform rather than removal."); *id.* at 130.

[404] *Id.* at 130.

[405] *Id.*

[406] *Id.* at 170.

[407] FORTNER, *supra* note 389, at 170; *see also, e.g.*, *id.* at 189–90 ("In an op-ed piece published in the *New York Law Journal*, Harlem's U.S. representative Charles Rangel complained that 'king heroin reigns supreme' in his community and pressed the Nixon Administration to wage an all-out war on the international drug trade . . . . 'The effect of this

crime "prompted them to view themselves as members of a broader class-based community of 'decent citizens,' 'hard-working people,' and Bible-believing churchgoers."[408] The result was the "precipitat[ion] of a new class-based status group," with African-Americans treating "dealers" and "junkies" as outside "their community."[409] No longer did working- and middle class African-Americans see the black underclass as "brothers"; they were "hoods" and "monsters."[410] "The notion of the drug dealer as race traitor, established in the 1970s by black nationalists . . . ," as Professor Forman put it, "was an especially visceral one, particularly for poor and working-class blacks who bore daily witness to the devastation of addiction."[411]

Given that black leaders and working class blacks strongly supported the passage of anti-drug laws, it is strange to label them systemically racist

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epidemic is truly horrifying. An atmosphere of fear and hate abounds as a derelict army of addicts prey upon neighbors and friends.' He depicted Harlem as a wasteland ravaged by addicts: 'Whole neighborhoods have declined; others have become abandoned. Addicts have taken up scarce space in the community's hospitals, destroyed the functioning of our school system and forced desperately needed stores . . . to relocate outside Harlem. Those who dare to drive or walk through Harlem streets must experience the agonizing sight of . . . our children, the hope of the black nation, staring vacantly from door-ways and street corners, oblivious to reality around them.'").

[408] *Id.* at 170.

[409] *Id.* at 130, 170.

[410] *Id.* at 170; *see* FORMAN, *supra* note 119, at 63 (footnote omitted) ("[Atlanta Mayor Maynard] Jackson's rhetoric, however, obscured one significant fact about gun crime: it wasn't equally distributed throughout black America. Rather, it was concentrated among the poorest blacks, who were forced into living conditions that generated violence."). That class-based difference appears to have carried forward since the 1970s. *See id.* at 13 ("Understanding African American attitudes on matters of crime and punishment requires that we pay careful attention to another topic that is often overlooked in criminal justice scholarship: class divisions within the black community. Although mass incarceration harms black America as a whole, its most direct victims are the poorest, least educated blacks. While the lifetime risk of incarceration skyrocketed for African American male high school dropouts with the advent of mass incarceration, it actually decreased slightly for black men with some college education. As a result, by the year 2000, the lifetime risk of incarceration for black high school dropouts was *ten times higher* than it was for African Americans who had attended college.").

[411] FORMAN, *supra* note 119, at 142.

today.[412] Doubly so, given that they had every reason to know that these laws' deterrent and incapacitative effects would apply to the detriment of black offenders and the benefit of black victims.[413] It is stranger still to continue calling them systemically racist while black political power is the greatest it has ever been and overt racist animus the least.[414] Today, there are more black legislators, mayors, police officers, police chiefs, judges, and other state and local officials than when these laws were first passed.[415] At the same time, the American people have continued to reject the use of racial animus both in and out of the criminal justice system.[416] Something has changed for the worse since the passage of the Anti-Drug Abuse Act in 1986, but it is not the American people's attitudes towards race; it is intellectuals' attitudes towards criminal laws, emphasizing their incapacitative effects on those who violate them and deemphasizing their protective effects on those who would be victimized.[417]

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[412] *See* Jason L. Riley, *Biden's Marijuana Pardon Won't Release a Single Inmate*, WALL ST. J. (Oct. 11, 2022), https://www.wsj.com/articles/biden-marijuana-pardon-prison-midterms-crime-drug-offenders-racial-disparities-systemic-racism-war-on-drugs-pot-legalization-11665520780 ("Whatever you think of the wisdom of this approach in hindsight, the claim that the initial war on drugs and subsequent escalations were motivated by racial animus toward blacks is nonsense.").

[413] *See supra* notes 374–83.

[414] Stuntz, *supra* note 373 at 1798; *see also* Larkin, *supra* note 372 at 709–13 (describing, in the context of the Antiterrorism and Effective Death Penalty Act of 1996, how attitudes have shifted over time to reject racism and how, at the same time, black people occupy more and greater positions of power than ever before).

[415] Larkin, *supra* note 372 at 709–12.

[416] *Id.* at 712–13 (citing MCWHORTER, *supra* note 6, at 13–15) (noting the change brought over time by fear of being labeled "racist").

[417] As Professor Loury has written:

> Where is the self-respecting black intellectual to take his stand? Must he simply act as a mouthpiece for movement propaganda aiming to counteract "white supremacy"? Has he anything to say to his own people about how some of us are living? Is there space in American discourse for nuanced, subtle, sophisticated moral engagement with these tendentious, cynical, and overtly political partisan arguments on behalf of something called "racial equity"? And what about those so-called

This undermines the claim made by some critics[418] that law enforcement officers have created a system of "mass incarceration" by fixating on penny-ante, nonviolent drug offenders, particularly by African-American offenders.[419] In his recent book *The Myth of Overpunishment*, Professor Barry Latzer (like Professor John Pfaff before him)[420] found that "[t]he drug offenders who see more than nominal time are incarcerated for drug

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> "white intellectuals"? Do they have to remain mute? Alternatively, must they limit themselves to incanting antiracist slogans?
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> I don't know all the answers here, but I know that those victims in Chicago [63 shot, six killed, one weekend in May 2016] had names. I know that they had families. I know that they did not deserve their fate. I know that black intellectuals must bear witness to what is actually taking place in our midst; must wrestle with complex historical and contemporary causes both within and outside the black community that bear on these tragedies; must tell truths about what is happening instead of hiding from the truth with platitudes, euphemisms, and lies.
>
> I know that, despite whatever causal factors may be at play, we black intellectuals must insist that each youngster is capable of choosing a moral way of life. I know that, for the same of the dignity and self-respect of my people as well as for the future of my country, we American intellectuals of all colors must never lose sight of what a moral way of life consists of. And yet I fear we are in imminent danger of doing precisely that.

Loury, *supra* note 52, at 176–77.

[418] *See* Bibas, *supra* note 346 ("Liberals blame racism and the 'War on Drugs,' in particular long sentences for nonviolent drug crimes. This past July, in a speech to the NAACP, President Obama insisted that 'the real reason our prison population is so high' is that 'over the last few decades, we've also locked up more and more nonviolent drug offenders than ever before, for longer than ever before.' The War on Drugs, he suggested, is just a continuation of America's 'long history of inequity in the criminal-justice system,' which has disproportionately harmed minorities.").

[419] *See, e.g.*, ALEXANDER, *supra* note 1, at 209 (emphasis omitted) ("[T]he drug war has not been aimed at rooting out the most violent drug traffickers, or so-called kingpins. The vast majority of those arrested for drug trafficking are not charged with serious offenses, and most of the people in state prison on drug charges have no history of violence or significant selling activity.").

[420] *See* PFAFF, *supra* note 1.

trafficking offenses, not 'low-level' simple possession offenses."[421] Besides, drug trafficking convictions, he adds, "do not drive our overall incarceration rates."[422] He found that "the vast majority of offenders with lengthy prison terms are behind bars for violent offenses, especially murder, aggravated assault, and rape."[423] When you look closely at the data, he concluded, "[w]hat we will see is that violent crimes and not drug offenses were accountable, are still are responsible, for black imprisonment."[424] "If we combine all black drug offenders, state and federal, drug sentences account for only 5.5 percent of the African Americans in prison," he concluded.[425] In other words, contrary to Professor Alexander's claim, more than ninety-four percent of African-American federal and state prisoners are doing time for non-drug offenses.[426] In 1991, at the height of the crack

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[421] LATZER, *supra* note 193, at viii–ix.

[422] *Id.* at ix.

[423] *Id.* To the claim that our nation has too many people in jail or prison, Professor Latzer responded as follows:

> [T]here are millions of crimes in the United States each year, many more than the number of offenders in jails and prisons. So lots of criminals are not being punished at all, or they've been given wrist-slap sentences, such as probation, which means no imprisonment whatsoever. In fact, 31 percent of all convicted felons and 23 percent of violent offenders are released without spending a single day in prison!

Id. at xii. The data supports that conclusion. In 2019, according to law enforcement and victims-reported data, there were 5.8 million violent crimes (such as murder) and 12.8 property crimes (such as burglary), for a total of 18.6 million offenses. *Id.* Yet, there were only 1.43 million jail admissions in 2018-2019, and only 577,000 were imprisoned in 2019. *Id.* The bottom line is that only 2.2 million people were incarcerated for the 18.6 million crimes committed. *Id.* Atop that, from 1800 to 1850 the mean length of incarceration was more than four years, while today the mean is 2 years and eight months. *Id.* at 17. In 2018 two-thirds of the prisoners released from state prison, where the vast majority of prisoners are confined, *see id.* at 91, served less than two years. *Id.* at xiii.

[424] *Id.* at 90.

[425] *Id.* at 91.

[426] *Id.* ("Even more damning: drug crimes have been responsible for only one-quarter of black state imprisonments for at least the last twenty-five years. That is why analysts like law professor John Pfaff called Alexander's claim that drug crimes were responsible for the growth in imprisonment, that is, for so-called mass incarceration, 'blatantly false.'").

cocaine problem, "violent crime, not the drug war, was the main reason so many African Americans were behind bars[.] . . . [T]hat is still true today."[427]

Drug trafficking and violence have always gone together like peanut butter and jelly[428] and still do now.[429] That is critical to note because the

> In 1980, for instance, when cocaine was a relatively minor menace, only 6 percent of state prisoners were in for drug crimes. By 1990, when the War on Drugs was in high gear, this figure jumped to 22 percent. Unquestionably a big increase, but note that even at the height of the drug war, 78 percent of all state prisoners were behind bars for non-drug crimes.
>
> And what impact on African Americans? In 1991, the first year with prison statistics broken out by race and crime, 25 percent of black state prisoners were sentenced for drug offenses. Even at the apogee of crack prosecutions, three-quarters of all black state inmates were imprisoned for something other than drug crimes. This percentage held steadily throughout the 1990s, and then started declining until the present 13 percent rate.
>
> Why, then, were more blacks than ever imprisoned in the 1990s? The answer is violent crime, not drugs. Half the growth in black state prisoners from 1990 to 1999 was due to violent crime, 27 percent to drug offenses. During this same period, 46–48 percent of all black inmates in state prisons had been sentenced for a crime of violence.

Id. at 91–92 (footnotes omitted).

427 LATZER, *supra* note 193, at 92.

428 *See, e.g.*, Terry v. United States, 141 S. Ct. 1858, 1860 & n.2 (2021); BOURGOIS, *supra* note 202, at 24 ("Regular displays of violence are essential for preventing rip-offs by colleagues, customers, and professional holdup artists. Indeed, upward mobility in the underground economy of the street-dealing world requires a systematic and effective use of violence against one's colleagues, one's neighbors, and, to a certain extent, against oneself. Behavior that appears irrationally violent, 'barbaric,' and ultimately self-destructive to the outsider, can be reinterpreted according to the logic of the underground economy as judicious public relations and long-term investment in one's 'human capital development.'"); *id.* at 34; JACOBS, *supra* note 297, at 126 (noting the relationship between drug use and crime, particularly crack cocaine) ("The most serious crime occurs among the heaviest crack users and includes offenses that extend beyond drug-related, income-generating activity and into the realm of revenge, racial antagonism, and the protection of image and honor."); MANGUAL, *supra* note 28, at 161–62.

[429] *See, e.g.,* Press Release, U.S. Att'ys Off., Dist. of Mass., Dep't of Just., Former Enforcer of New Bedford Latin Kings Chapter Sentenced for Drug Trafficking and Manufacturing (June 17, 2021), https://www.justice.gov/usao-ma/pr/former-enforcer-new-bedford-latin-kings-chapter-sentenced-drug-trafficking-and; Matt Trammell, *Violent Drug Gang Members Busted by Federal Agents in Shady Apartment Complex*, SANANGELOLIVE.COM (June 17, 2021),https://sanangelolive.com/news/crime/2021-06-17/violent-drug-gang-members-busted-federal-agents-shady-apartment-complex; Press Release, U.S. Att'ys Off., So. Dist. of Iowa, Dep't of Just., Six Defendants Charged in a 15-Count Racketeering Indictment against OTB Criminal Street Gang (June 16, 2021), https://www.justice.gov/usao-sdia/pr/six-defendants-charged-15-count-racketeering-indictment-against-otb-criminal-street; Press Release, U.S. Att'ys Off., E. Dist. of N.Y., Dep't of Just., Bloods Gang Leader Convicted of Attempted Murder-in-Aid of Racketeering and Other Violent Crimes (June 14, 2021), https://www.justice.gov/usao-edny/pr/bloods-gang-leader-convicted-attempted-murder-aid-racketeering-and-other-violent-crimes; Gregory Yee, *As National Gangs Expand into South Carolina, Authorities Have a Plan to Fight Back*, POST & COURIER (June 13, 2021), https://www.postandcourier.com/news/as-national-gangs-expand-into-south-carolina-authorities-have-a-plan-to-fight-back/article_e30b6e54-9189-11eb-901c-dbcbd1b95142.html; Ava-joye Burnett, *Baltimore Gang, 'Triple-C', Allegedly Responsible For More Than 18 Murders, 15 Members Arrested In The City*, CBS BALT. (June 3, 2021), https://baltimore.cbslocal.com/2021/06/03/triple-c-gang-members-charged-with-murder/; Spencer Joseph, *Utah Gang Member Indicted for Drug Trafficking Along the Wasatch Front*, FOX 13 SALT LAKE CITY (June 2, 2021, 12:36 AM), https://www.fox13now.com/news/local-news/utah-gang-members-indicted-for-drug-trafficking-along-the-wasatch-front; Press Release, U.S. Att'ys Off., E. Dist. of Ark., Dep't of Just., Gang Activity in White County Results in Dozens of Federal Arrests (Mar. 11, 2021), https://www.justice.gov/usao-edar/pr/gang-activity-white-county-results-dozens-federal-arrests; Rebecca Davis O'Brien, *Alleged MS-13 Gang Leaders Charged in DOJ Indictment*, WALL ST. J. (Jan. 14, 2021), https://www.wsj.com/articles/fourteen-ms-13-gang-leaders-charged-in-doj-indictment-11610663337?mod=searchresults_pos15&page=3; Derick Hutchinson, *19 Detroit Men Face Drug Charges; Feds Reveal 'Climate of Fear' Created by Gang's Violence, Control*, CLICK ON DETROIT (May 18, 2022, 11:50 AM) https://www.clickondetroit.com/news/local/2020/10/26/19-detroit-men-face-drug-charges-feds-reveal-climate-of-fear-created-by-gangs-violence-control/; Press Release, U.S. Att'ys Off., E. Dist. of N.Y., Dep't of Just., 36 Members, Associates. and Co-Conspirators of the Bully Gang Charged with Narcotics Conspiracy, Firearms Offenses and Money Laundering (Oct. 21, 2020), https://www.justice.gov/usao-edny/pr/36-members-associates-and-co-conspirators-bully-gang-charged-narcotics-conspiracy; Press Release, U.S. Att'ys Off., E. Dist. of N.Y., Dep't of Just., MS-13 Gang Member Arrested in El Salvador for Murder on Long Island (Aug. 17, 2020), https://www.justice.gov/usao-edny/pr/ms-13-gang-member-arrested-el-salvador-murder-long-island; Graham C. Ousey & Matthew R. Lee, *Investigating the Connections Between*

prevalence of violent crimes is the primary cause of our current level of imprisonment. As Professors Latzer and John Pfaff have shown,[430] state prisons are filled with violent offenders, not simple drug users caught with a joint or two. Other commentators have reached the same conclusion.[431] "The crime tsunami," as Professor Latzer put it, has not been either a "media-generated moral panic," or a "by-product of fake statistics," or a "Republican plot to undo civil rights or the war on poverty."[432]

> More Americans were murdered in the crime boom than perished in World War II, the Korean War, the Vietnam War, and the conflicts in Iraq and Afghanistan *combined*. Between 1970 and 1995, a staggering 540,019 Americans slain. War fatalities totaled 507,340. And if we compare the war-wounded to those injured in criminal assaults, the toll of the crime tsunami is even more shocking. Fewer than one million service personnel suffered nonfatal injuries in the foreign conflicts named, whereas *2.2 million Americans*

Race, Illicit Drug Markets, and Lethal Violence, 1984-1997, 41 J. RES. CRIME & DELINQUENCY 352 (2004).

[430] LATZER, *supra* note 193, at viii–xiii, 73–75; PFAFF, *supra* note 1, at viii ("[A] majority of people in prison have been convicted of violent crimes, and an even greater number have engaged in violent behavior."); *id.* at 5–6, 13 (noting that, while half of federal prisoners are imprisoned for drug crimes, 87 percent of prisoners are in state custody, only 16 percent of state prisoners are incarcerated for drug crimes, and only 5-6 percent of that group are low-level and non-violent); *id.* at 11 ("[T]he incarceration of people who have been convicted of violent offenses explains almost two-thirds of the growth in prison populations since 1990. Similarly, almost all the people who actually serve long sentences have been convicted of serious violent crimes.").

[431] *See, e.g.*, FORMAN, *supra* note 119, at 220 ("[A]s a percentage of our nation's incarcerated population, those possessing small amounts of marijuana barely register. For every ten thousand people behind bars in America, only six are there because of marijuana possession."); *id.* at 228–29; SERED, *supra* note 194, at 5–6 ("As consensus and momentum to end mass incarceration has grown, the current reform narrative, though compelling, has been based on a false narrative: that the United States can achieve large-scale transformative change (that is, reductions of 50 percent or more) by changing responses to non-violent offenses. That is impossible in a nation where 54 percent of people incarcerated in state prisons were convicted of violent crimes."); *supra* note 194.

[432] LATZER, *supra* note 193, at 74.

> *per year* were injured by violent crime. Over 6 million of the assault injuries, 1973 to 1991, were considered serious, as they involved gunshot or knife wounds, broken bones, loss of consciousness, dislodged teeth, and internal damage. Many crime victims required hospitalizations lasting two days or more. And these losses do not address the financial costs, which ran into the billions, and which usually had to be borne by the victims. The crime tsunami was a war on the American civilian population.[433]

Drug-trafficking-inspired violence might even be worse in poor African-American communities than it is elsewhere. The reason is that those communities already suffer from economic and psychological despair.[434] To

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[433] *Id.* at 74–75.

[434] *See, e.g.*, ALEXANDER, *supra* note 1, at 51(quoting DAVID M. KENNEDY, DON'T SHOOT: ONE MAN, A STREET FELLOWSHIP, AND THE END OF VIOLENCE IN INNER-CITY AMERICA 10 (2011)) ("No one should ever attempt to minimize the harm caused by crack cocaine and the related violence. As David Kennedy correctly observes, '[c]rack blew through America's poor black neighborhoods like the Four Horsemen of the Apocalypse,' leaving behind unspeakable devastation and suffering."); MURRAY, *supra* note 39, at 89–91; Stuntz, *supra* note 189, at 1220–21 ("The centrality of drugs makes this problem still worse. Drug markets are not the same everywhere; one tends to find street markets in poor urban neighborhoods, and more discreet means of distribution in more upscale areas. In late twentieth-century America, poor urban neighborhoods are both disproportionately black and heavily segregated. It is much easier for the police to catch buyers and sellers in street markets than in the kind of drug markets that function more discreetly in more middle-class, and whiter, neighborhoods. Street markets also seem to cause more collateral social injury. Put these points together, and you have a recipe for racially disparate enforcement of the drug laws. Yet the racial disparity arises naturally, without any racial animus, and it is very hard to see how the legal system can combat it by the way it regulates street policing."); Larkin, *supra* note 194, at 282–83 (footnotes omitted) ("Crack dealers largely sell their wares in urban communities. Given contemporary housing patterns, the residents in those communities, like the dealers themselves, are predominantly black. Residents who are victims of crime will far outnumber those who are perpetrators. Those victims suffer the effects of violence brought on by drug trafficking, and they endure the fear consequent upon living in a community haunted by outlaws. Punishments, even severe ones, may be necessary to protect innocent third parties in the communities where crack trafficking flourishes. By deterring crime and imprisoning offenders, the system reduces the harms that innocent residents

also suffer from the daily fact and risk of physical violence is a trifecta no one wants to hit.[435]

For his part, Fortner has disparaged the contemporary literature criticizing the "mass incarceration" of drug offenders on similar lines, saying that it "has unnecessarily discounted the hurt and terror of those who clutch their billfolds as they sleep, of those who exit their apartments and leave their buildings with trepidation," and, most poignantly, "of those who have had to bury a son or daughter because of gang activity, the drug trade, or random violence."[436] It is a mistake, in Fortner's view, to attribute to race the turn by whites and blacks toward a punitive approach to drug-related crime.[437] In fact, it was class, not race, that was at the root of the punitive responses.[438] In Fortner's words, "The evidence makes two things very clear: racial issues were not high priorities for either blacks or whites, and African-Americans and Puerto Ricans were far more concerned than whites about drugs and crime."[439] What Fortner labels as the "black silent majority" chose the enforcement of the law and punishment of offenders as

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suffer and, over time, makes the community a less frightening place. The benefits for residents, particularly those who have nowhere else to go, are immeasurable.").

[435] *See* MANGUAL, *supra* note 28, at 5 ("To the extent that there are costs associated with the push to drastically cut back on policing and incarceration (and, as this book will forcefully argue, there are), they're borne disproportionately by the relative handful of communities—often with largely low-income, minority populations—already struggling with elevated levels of crime, disorder, and other social problems. In other words, the same people those pushing for decarceration and depolicing say they're fighting for.").

[436] FORTNER, *supra* note 389, at xii.

[437] *See id.* at 270 ("The evidence does not indicate that working- and middle-class African Americans' shift from 'liberal sentiments to conservative acts' was the result of their succumbing to the hegemony of the white ruling class. To the contrary, a rich array of sources shows that, especially during the late 1960s and early 1970s, the black silent majority offered an alternative to the criminologies of the welfare state espoused by the white middle-class reformers who had monopolized the debate over drug addiction and crime during the 1950s and the early 1960s.").

[438] *Id.* at 255–56.

[439] *Id.* at 229; *see id.* at 252 ("There is very little evidence that whites in [New York City] turned to the new penology in order to guard their position within the racial order.").

its means of defense and gave drug dealers and users a choice: stop your misconduct or go to prison.[440]

Fortner takes issue with the arguments of those who trace "mass incarceration" to efforts to re-establish white racial hegemony. In his account, international narcotics trafficking resumed after the end of World War II, and it "wreaked havoc upon African American communities in New York City."[441] Trapped in a "'junkyard by the sea'" because of "persistent residential segregation," residents of Harlem were confronted with "people they believed were determined to steal their hard-fought security and destroy their consumers' republic."[442] There was a massive increase in the rates of heroin addiction[443] and crime, particularly murder.[444] Drug-related

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[440] *Id.* at 273 ("Shorn of any commitment to rehabilitation for adult drug users and other criminal offenders, the black silent majority turned exclusively to the police and prisons for their salvation. They foisted a hard bargain on drug users, 'hoods,' and other social outcasts: submit to the norms of traditional black civil society without the guarantee of structural reforms of face prison time.").

[441] *Id.* at 260.

[442] FORTNER, *supra* note 389, at 97.

[443]

> The confluence of the malignant and robust heroin trade and the depressed and racialized market for low-skilled labor caused many poverty-stricken African Americans . . . to seek "junk" in order to feel "great" and "free" and caused some entrepreneurial and sinister individuals . . . to sell the drug in order to make a living. For these reasons, the dual scourges of heroin addiction and crime befell African American neighborhoods much more so that white neighborhoods. Drug-related arrests, surveys of self-reported drug use, and statistics on individuals receiving treatment in state-sponsored or affiliated programs indicate that higher proportions of African Americans than whites were heroin users from the end of the war until the 1970s [viz., the period Fortner discusses in his book]. While each individual measure carries its own descriptive limitations, vital statistics, the most reliable data, confirm these trends, revealing that higher proportions of African Americans than whites died from drug-related causes over the same period. The data also show that drug-related deaths were concentrated in minority neighborhoods, especially Harlem.

Id. at 260.

violent street crime and burglary left New York City residents with a deep sense of physical danger whether they were outside or at home. In response, a "grassroots movement" of residents developed and embraced aggressive use of the criminal law as its hope for an end to their fears.[445] New York residents, community leaders, and politicians were vocal in their demand that drug dealers and violent criminals should be confined, not the law-abiding members of black communities.[446] And it was the residents of black

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[444]

> Similarly, crime rates shot up in black neighborhoods during the 1960s and 1970s. Crimes rates climbed throughout the city, but the highest rates of increase occurred within minority communities, like Harlem and Bedford-Stuyvesant. African Americans constituted a minority of the city's population but represented about half of all homicides. Neighborhood context defined individuals' exposure to certain illegal acts; their expressed concerns were not abstract but born of the unique nature of crime in their communities. The black silent majority was much more alarmed about drug addiction and violent crime than its white analogue. While working- and middle-class whites worried about vandalism and property crime, working- and middle-class African Americans sought an end to the "reign of criminal terror" in their neighborhoods.

Id. at 261.

[445] *Id.* at 5–6, 100; *see also, e.g.*, *id.* at 106; Jessica Neptune, *Harshest in the Nation: The Rockefeller Drug Laws and the Widening Embrace of Punitive Politics*, 26 SOC. HIST. ALCOHOL & DRUGS 170, 173 (2012) ("New Yorkers' sense of insecurity—specifically as it related to the street crime that many people associated with heroin addiction—had grown to such an extent by 1973 that a significant portion of the population began to embrace tougher crime policy.").

[446] *See*, *e.g.*, FORTNER, *supra* note 389, at 6 (quoting Vincent Baker, Chair, Anti-Crime Committee of the New York City Chapter of the NAACP) ("[I]t is not police brutality that makes people afraid to walk the streets at night," but "criminal brutality."); Neptune, *supra* note 445, at 173 ("In a February, 1973 speech at a legislative dinner with the Empire State Chamber of Commerce in Albany, an impassioned [Governor] Rockefeller shouted into the microphone: 'We the citizens are imprisoned by pushers. I want to put the pushers in prison so we can come out."); *id.* at 174 ("At least some black activists had been advocating this revisionist notion of law and order for several years. In late 1970, Civil Rights leader Bayard Rustin also called for a redefinition of law and order. Rustin claimed that 'law-and-order' was too often a 'euphemism for anti-black attitudes,' but insisted that law-and-order need

communities who were the most at risk from heroin addicts. "In New York City, seventy percent of the victims of homicides, muggings, and narcotics pushers were African Americans and Puerto Ricans."[447] Or, "[p]ut simply, black and Puerto Rican neighborhoods were much more dangerous than white neighborhoods."[448] Working and middle-class blacks were fearful of the murderers, rapists, and muggers—"hoodlums," "gangsters," and "monsters"—within their own neighborhoods.[449]

New York adopted the Rockefeller Drug Laws in response to the pleas of working and middle-class Harlemites and other African-Americans that drug trafficking and its attendant violence were corroding the quality of life in their communities; killing their sons, daughters, and neighbors; and robbing them (sometimes quite literally) of whatever material success they had achieved from the civil rights revolution of the 1950s and 1960s. The immediate response from the African-American community toward drug enforcement was favorable.[450]

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not be a conservative and racist proposal. 'Certainly conservatives and racists have made use of this slogan to further their own deplorable ends, but it should not follow, therefore, that liberals and blacks should be against the content of the slogan,' Rustin contended."); *id.* ("[S]everal black community leaders and politicians had begun to frame the push for increased policing as a way to end discriminatory law enforcement practices. According to these leaders, the city had failed to ensure the security and safety of all its citizens equally, and they demanded more and better policing in black neighborhoods as the fulfillment of civic entitlements.").

[447] Neptune, *supra* note 445, at 175; *see also* FORTNER, *supra* note 389, at 260–61 ("[H]igher proportions of African Americans than whites died from drug-related causes over the [period from 1945 until the 1970s]. The data also show that black drug-related deaths were concentrated in minority neighborhoods, especially Harlem. Similarly, crime rates shot up in black neighborhoods during the 1960s and 1970s. Crime rates climbed throughout the city, but the highest rates of increase occurred within minority communities, like Harlem and Bedford-Stuyvesant.").

[448] FORTNER, *supra* note 389, at 223.

[449] *See id.* at 5, 44, 279.

[450] *Id.* at 194 ("Les Matthews, columnist for the *Amsterdam News*, reacted by saying, 'I'm in favor of burning them alive.'"); *id.* at 198 ("Only a few weeks after the passage of the law, the *Amsterdam News* called it 'a powerful weapon against the wholesale use of drugs.' The paper supported mandatory life sentences for nonaddict pushers because it considered drug dealing 'an act of cold, calculated, pre-meditated, indiscriminate murder in our community.'

New York State was not alone in its turn toward aggressive prosecution of drug trafficking and related crimes. Other communities, from Washington, D.C. to Los Angeles, saw the same need for reliance on the criminal justice system to police their communities.[451] Forty-eight states and the District of Columbia followed by enacting their own anti-drug laws, some of which included mandatory minimum terms of imprisonment.[452] Resorting to the criminal law and lengthy terms of imprisonment was deemed necessary to stop the harms.

In short, as Fortner documents in detail, the passage of the Rockefeller Drug Laws—not the Anti-Drug Abuse Act of 1986—was the first step in a reaffirmed commitment to use the criminal law to halt drug trafficking. The latter also became law with black support, but it was the former that led the

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This was not just an elite opinion; this punitive sentiment was popular."); *id.* at 213 ("[A]ll available survey evidence indicates widespread black support for the Rockefeller drug laws."); *see also, e.g.*, *id.* at 191, 194–96, 213–14; BARKER, *supra* note 293, at 147–51.

[451] *See*, *e.g.*, FORMAN, *supra* note 119, at 60–61, 114–15, 124–33 (describing the African-American demand for more aggressive drug enforcement in the 1970s and 1980s); *id.* at 134 (noting that Los Angeles was blighted by phencyclidine (or PCP)); *id.* at 136 ("[Columnist Ed] Davis' argument—that drug dealers were directly responsible for the collateral damage in their communities—was a familiar and resonant one in black neighborhoods across the country, and it goes a long way toward explaining why so many blacks were in favor of harsher drug punishments."); *id.* at 137 ("For [Johnnie] Cochran, the PCP epidemic was part of a broader crisis in black communities: crime, and the tendency he saw among blacks to excuse it. That so much of this crime was perpetrated by blacks upon other blacks only made matters worse."); *id.* at 137–39 (describing the reporting of black-on-black crime by Houston newspapers and *Ebony* magazine); FORTNER, *supra* note 389, at 7–8 ("Baker and the five Harlem civic leaders who stood with Rockefeller were not alone. They were leaders within a broader, grassroots, anticrime social movement bubbling up from the streets of Harlem and black communities throughout the United States."); *id.* at 8–9 ("Working- and middle-class African Americans in cities like Chicago, Los Angeles, Detroit, Philadelphia, Memphis, New Orleans, Washington, D.C., and Atlanta activated the black institutions that had been tested in the struggle for racial equality and also formed new groups to affirm 'traditional black values' and end 'the reign of criminal terror' in their communities."); *id.* at 9 ("After tilting the discursive terrain in the direction of racial equality during the struggles of the civil rights movement, working- and middle-class African Americans tilted it in favor of punitive crime policies and against economic justice for the urban black poor.").

[452] *See* FORMAN, *supra* note 119, at 33–59; FORTNER, *supra* note 389, at 11.

way.[453] New York adopted the Rockefeller Drug Laws out of concern for the physical safety and personal interests of working and middle-class blacks caused by "'the reign of criminal terror in Harlem,'"[454] not to establish a new form of black-community control, as Professor Alexander argues.[455] Black crime victims are "invisible" to critics like Alexander, Fortner notes.[456] "African Americans are more likely than whites to be victims of crime," he argues, but these critics' theories for the rise of imprisonment "highlight white resentment while ignoring black agony."[457] Their "theories denude black politics of purpose and power," while depicting "African Americans either as victims of an unyielding racial order, . . . or as useful casualties of the inescapable resolution of economic crises"—which is even worse.[458] As Fortner concludes, "mass incarceration had less to do with white resistance to racial equality and more to do with the black silent majority's confrontation with the 'reign of criminal terror' in their neighborhoods."[459]

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[453] *See* Bibas, *supra* note 207 ("Black Democrats, responding to their constituents' understandable fears, have played leading roles in toughening the nation's drug laws. In New York, black activists in Harlem, the NAACP Citizens' Mobilization Against Crime, and New York's leading black newspaper, the *Amsterdam News*, advocated what in the 1970s became the Rockefeller drug laws, with their stiff mandatory minimum sentences. At the federal level, liberal black Democrats representing black New York City neighborhoods supported tough crack-cocaine penalties. Representative Charles Rangel, from Harlem, chaired the House Select Committee on Narcotics Abuse and Control when Congress enacted crack-cocaine sentences that were much higher than those for powder cocaine. Though many have come to regret it, the War on Drugs was bipartisan and cross-racial.").

[454] FORTNER, *supra* note 389, at 12.

[455] *Id.* at 12–13.

[456] *See id.* at 13–14.

[457] *Id.* at 13.

[458] *Id.* at 13–14.

[459] FORTNER, *supra* note 389, at 23. Fortner does not say that broad socioeconomic factors played no role in the rise of crime in places like Harlem. "Lingering residential segregation, exploitative and absentee landlords, and the increasing disappearance of work, generated a variety of ills that undermined this historic community's vibrancy, abraded its civil infrastructure, and frayed its social bonds." *Id.* at 24. But it was heroin that lit the match that torched such neighborhoods:

> As the 1940s came to a close, middle-class leaders and residents faced a new crime problem: heroin. The postwar recrudescence of the heroin

Those problems did not disappear in 1973 or 1986. In 2022, the U.S. Sentencing Commission issued a report finding that drug trafficking is a problem with more lives than a cat.[460] The Commission analyzed the recidivism of federal drug offenders released from incarceration or placed on probation in 2010—a total of 13,783 people.[461] The report also compared those results to the ones that the Commission found in a similar report on offenders released in 2005.[462] Among the Commission's conclusions were the following:

- The rearrest rate for drug trafficking offenders did not materially change from 2005 to 2010 despite intervening changes to the federal criminal justice system;[463]
- The rearrest rate for drug trafficking offenders (47.9%) was not materially different from that of all other offenders (50.4%), although the median time between release and rearrest was longer for the former than the latter (23 months versus 16 months);[464]

> trade hit Harlem particularly hard. Because of entrepreneurial white and black gangsters, heroin flowed through Harlem's streets and coursed through the veins of some of its celebrities and many of its residents.

Id. at 37; *see also id.* at 269 ("Working- and middle-class Harlemites had forged a new fate [by the early 1970s], one not linked to the fate of the urban black poor. They had become less invested in civil rights and more concerned about public safety. Beliefs about black-on-black crime once shielded in the subaltern counterpublic were now being expressed publicly, in everyday talk as well as opinion polls, editorials, cartoons, songs, and plays. Instead of parroting the sociological and epidemiological consensus among members of the state's predominantly white narcotics control network, working- and middle class Harlemites spoke their own truth.").

460 *See generally* U.S. SENT'G COMM'N, RECIDIVISM OF FEDERAL DRUG TRAFFICKING OFFENDERS RELEASED IN 2010 (2022).

461 *Id.* at 2–4.

462 *Id.* at 2–5, 51–53.

463 *Id.*

464 *Id.* at 5.

- Crack cocaine trafficking offenders had the highest rate of rearrest (57.8%, with rearrest rates for other drug offenses varying from 41.8% to 46.7%);[465]
- The overwhelming majority of federal crack cocaine trafficking offenders released in 2010 were male (89.8% male versus 10.2% female) and black (82.7% were black, while the percentages for white, Hispanic, and other were 9.7%, 6.7%, and 1%, respectively);[466] and
- 47.9% of drug trafficking offenders released in 2010 were rearrested, which was only marginally lower than the 50% figure describing the 2005 release cohort.[467]

The point is that the problem discussed by Forman, Fortner, and others is, unfortunately, an enduring one. Whatever the causes might be for the prevalence of drug trafficking, the activity persists—which means that the harms to communities and individuals recur. If, as we believe, an overwhelming majority of residents in the communities where drug trafficking (including the distribution of crack cocaine) is widely practiced do not want to live amidst such criminality, do not want to live in fear of the violent crime that drug trafficking spawns, and certainly do not want to be the victims of such crime—if all that is true, society should aggressively enforce the laws against those offenses because the overwhelming majority of the victims are law-abiding residents who want only to live the same crime-free life enjoyed by residents of less violent neighborhoods.

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Where are we? Whether viewed from the perspective of 1973, 1986, or 2023, it is not racism, systemic or otherwise, for the political and criminal justice systems to respond to the legitimate demands of community residents, black or otherwise, for an end to the violence that accompanies drug trafficking. It is not racism, systemic or otherwise, for the government to help communities—black or white—eliminate the corrosion of

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465 *Id.*

466 U.S. SENT'G COMM'N, *supra* note 460 at 64.

467 *Id.* at 6.

neighborhood life displayed by the sleeping bodies of zoned-out, drug-addicted zombies littering the streets. It certainly is not systemic racism to respond to the repeated pleas of black residents for a return to (or, for some residents, the birth of) some state of normalcy in their neighborhoods.[468]

We should empathize with the plight of the African-Americans who feel doomed from birth to live in ghettos that no one would voluntarily choose. But empathy and guilt are two quite different reactions, and that difference matters. It is not racism, systemic or otherwise, to hold accountable whoever harms the residents, black or white, who suffer at the hands of outlaws, black or white. As Professor John DiIulio writes:

> Yes, let's listen to the black community. Let's listen to black men who are well into long prison terms. As I have learned from such conversations, many black prisoners are abused or neglected as children, bounce between dysfunctional homes and mindless social welfare bureaucracies, and end up behind bars. Listen to these men talk about what it's like to be in prison without visits from "loved ones" who never were there for them in the first place; the only real loved ones many of these guys have are their friends on the inside.
>
> Let's listen even harder to the overwhelming majority of black citizens who are decent, law-abiding, religious, children-loving people. [Professor Glenn] Loury hears them say they are "deeply ambivalent" about whether to imprison "our youngsters," and he terms their supposed "sympathy for and empathy with the perpetrators" a "fact of deep political significance."
>
> That's not what I hear. I hear the anguished voices of innocent black crime victims in courts where I've listened

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[468] *See* MURRAY, *supra* note 39, at 48 ("The best way to avoid becoming a victim of violent crime is to stay away from the parts of town where the violent crime is concentrated at the times of day when the most crime is committed—if you're affluent enough not to live in those parts of town. If you do live in those parts of town, there's no escape.").

> to case after case involving black-on-black crime. I hear the frustrated black police sergeant tell me, as we cruise in a patrol car, that he can't get from one call to the next fast enough in the neighborhood where he grew up and where some of his elderly relatives live as virtual prisoners in their own homes. I hear the self-righteous black lifer who I'm interviewing in prison say that "the only reason I'm here is that I'm black and poor," and the black prison counselor snap back in reply, "The only reason you're here is because you killed a boy who was black and poor."[469]

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[469] John J. DiIulio, Jr., *White Lies About Black Crime*, 118 PUB. INT. 30, 32–33 (1995). As he added:

> [W]hat Loury calls "a fact of deep political significance" is better recognized as a polarizing but persistent myth, a myth that has been exploited politically by members of the Congressional Black Caucus and other regressively liberal politicians, black and white, some of whom, no doubt sincerely but wrongly, believe it themselves.
>
> Finally, I do not find any such ambivalence about punishing predatory criminals to be easily defensible either morally or in civic terms. Let me personalize the point. Not too many decades ago, members of that part of my Italian-American family who hail from West Virginia were segregated from "whites" in public schools. Other parts of the family from the East Coast to the Midwest also suffered various forms of discrimination. Some overcame; most worked hard; a few lived the American dream.
>
> Yet, no matter what they achieved, they labored under the disgraceful reality of the Mafia. Italians killing Italians. Italians murdering, extorting, corrupting, and thereby creating a self-defaming cultural image which, even to this day, no Italian in any walk of life can ever fully escape. Should I, then, as an Italian-American, feel the least bit "ambivalent" when a big-city Italian prosecutor puts away a bunch of Italian-American criminals for life? Does the society need any special Italian-American "authorization" to lock these people up or put them on death row? No way.

Id. at 34–35.

D. Problems with the Critics' Remedy

Critics of the Anti-Drug Abuse Act of 1986 argue that ending the "war on drugs" is indispensable to remedy the systemic racism that the drug war has caused. As Professor Alexander puts it, "If we become serious about dismantling the system of mass incarceration, we must end the War on Drugs. There is no way around it."[470] Yet, it is not clear exactly what ending

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[470] ALEXANDER, *supra* note 1, at 232. Professor Alexander identifies other remedial steps too:

> Equally important, there must be a change within the culture of law enforcement. Black and brown people in ghetto communities must no longer be viewed as the designated enemy, and ghetto communities must no longer be treated like occupied zones. Law enforcement must also adopt a compassionate, humane approach to the problems of the urban poor—an approach that goes beyond the rhetoric of "community policing" to a method of engagement that promotes trust, healing, and genuine partnership. Data collection for police and prosecutors should be maintained nationwide to ensure that selective enforcement is no longer taking place. Racial impact statements that assess the racial and ethnic impact of criminal justice legislation must be adopted. Public defender offices should be funded at the same level as prosecutor's offices to eliminate the unfair advantage afforded the incarceration machine. The list goes on: Mandatory drug sentencing laws must be rescinded. Marijuana ought to be legalized (and perhaps other drugs as well). Meaningful re-entry programs must be adopted—programs that provide a pathway not just to dead-end, minimum-wage jobs, but also training and education so that those labeled criminals can realistically reach for high-paying jobs and viable, rewarding career paths. Prison workers should be retrained for jobs and careers that do not involve caging human beings. Drug treatment on demand must be provided for all Americans, a far better investment of taxpayer money than prison cells for drug offenders. Barriers to re-entry, specifically the myriad laws that operate to discriminate against drug offenders for the rest of their lives in every aspect of their social, economic, and political life, must be eliminated.

Id. at 233; *see also* KENNEDY, *supra* note 1, at 387–90; MURRAY, *supra* note 39, at 95 (describing the problems in the criminal justice system that should be reformed). Some of Professor Alexander's remedies are reasonable ones and should be debated. Her basic proposal should also be debated, but it is not a reasonable option.

a metaphorical war would require us to do. Critics spend far more time arguing that the criminal justice system is racist than explaining the practical steps that we should take to end that problem. There are remedies that should be pursued. While none of them are a home run and none require repealing the Controlled Substances Act, each one puts someone on base, and each one is a realistic option.

1. Option 1: Repeal the CSA

The first remedy would be to legalize the manufacture, importation, distribution, possession, and use of the drugs that are currently illegal under federal and state law. That would require Congress to repeal the provisions in Title 21 that define, prohibit, and regulate controlled substances and bar the states from outlawing those drugs under their own statutes. That option, however, is a complete nonstarter.

The principal federal law governing illegal drugs is the CSA.[471] Congress has revisited that statute on numerous occasions since it was enacted in 1970, and at no time has Congress eliminated the ban on the illegal distribution of drugs like heroin, methamphetamine, and cocaine.[472] On the

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[471] *See supra* note 286 and accompanying text.

[472] *See, e.g.*, First Step Act of 2018, Pub. L. No. 115-391, tit. IV, § 401, 132 Stat. 5194, 5220-21 (codified at various sections of 18 U.S.C.); Agriculture Improvement Act of 2018, Pub. L. No. 115-334, tit. XII, § 12619(a), 132 Stat. 4490, 5018; Substance Use-Disorder Prevention that Promotes Opioid Recovery and Treatment for Patients and Communities Act, Pub. L. No. 115-271, 132 Stat. 3894 (2018) (codified at various sections of 21 & 42 U.S.C.); Comprehensive Addiction and Recovery Act of 2016, Pub. L. No. 114-198, 130 Stat. 695 (codified at various sections of 21 & 42 U.S.C.); Designer Anabolic Steroid Control Act of 2014, Pub. L. No. 113-260, 128 Stat. 2929 (codified at various sections of 18 & 21 U.S.C.); Ryan Haight Online Pharmacy Consumer Protection Act of 2008, Pub. L. No. 110-425, 122 Stat. 4820 (codified at 21 U.S.C. § 801 note (2018)); USA PATRIOT Improvement and Reauthorization Act of 2005, Pub. L. No. 109-177, 120 Stat. 192 (2006); Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub. L. No. 109-162, 119 Stat. 2960; Anabolic Steroid Control Act of 2004, Pub. L. No. 108-358, 118 Stat. 1661; Children's Health Act of 2000, Pub. L. No. 106-310, div. B, tit. XXXVI, § 3622(a), 114 Stat. 1101, 1231; Hillory J. Farias and Samantha Reid Date-Rape Drug Prohibition Act of 2000, Pub. L. No. 106-172, 114 Stat. 7; Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796 (codified at various sections of 12, 18 & 42 U.S.C.); Crime Control Act of 1990, Pub. L. No. 101-647, 104 Stat. 4789 (codified at various sections

contrary, since 1970, Congress has passed a variety of statutes—such as the Comprehensive Methamphetamine Control Act of 1996[473] and the Foreign Kingpin Designation Act (enacted in 1999)[474]—that leverage the criminal law to halt distribution of dangerous controlled substances and prevent the diversion of regulated drugs doses for illegal use. Finally, for more than fifty years, Congress implicitly reaffirmed the need for those acts every time that it appropriated funds for the Drug Enforcement Administration and Justice Department for their drug-law enforcement missions.[475]

In fact, now would be one of the worst possible times for Congress to repeal Title 21. The severity of the COVID-19 epidemic that rocked the nation from 2020 to early 2022 might be gradually disappearing, but the opioid overdose epidemic that began a decade or so ago has not. It just dipped below the radar because of the pandemic. Fentanyl has triggered the third—and deadliest—stage of the still ongoing opioid overdose epidemic

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of 18 U.S.C.); Chemical Diversion and Trafficking Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181 (codified at various sections of 21 U.S.C.); Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181 (codified at various sections of 21 U.S.C.); Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207 (codified at 21 U.S.C. § 813); Dangerous Drug Diversion Control Act of 1984, Pub. L. No. 98-473, ch. V, pt. B, §§ 506-25, 98 Stat. 1837; Controlled Substances Penalties Amendments Act of 1984, Pub. L. No. 98-473, ch. V, pt. A, §§ 501-03, 98 Stat. 1837; Sentencing Reform Act of 1984, Pub. L. No. 98-473, ch. 2, §§ 211-19, 306-09, 98 Stat. 1837; Psychotropic Substances Act of 1978, Pub. L. No. 95-633, 92 Stat. 3768; Narcotic Addict Treatment Act of 1974, Pub. L. No. 93-281, 88 Stat. 124, 124-25.

[473] Comprehensive Methamphetamine Control Act of 1996, Pub. L. No. 104-237, 110 Stat. 3099 (codified at scattered sections of 21 U.S.C.).

[474] Foreign Narcotics Kingpin Designation Act, Pub. L. No. 106-120, tit. VIII, 113 Stat. 1606 (1999) (codified at 21 U.S.C. § 1901 and other sections).

[475] *E.g.*, 21st Century Department of Justice Appropriations Authorization Act, Pub. L. No. 107-273, div. B, tit. IV, § 4002(c)(1), 116 Stat. 1758, 1808 (2002); *see* Tenn. Valley Auth. v. Hill, 437 U.S. 153, 189–91 (1978) (noting that, when passing an appropriations bill, Congress ordinarily assumes that the underlying substantive law will remain unchanged). To be sure, Congress has enacted a series of appropriations riders that seek to prevent the Justice Department from using the criminal law to shut down state-authorized medical cannabis programs. *See* Larkin, *supra* note 150, at 530–31, 530 n.29 (collecting appropriations laws). *None* of those riders, however, would have removed heroin or similar drugs from the CSA. No President, no senior Executive Branch official, and no member of Congress has stepped forward to champion the legalization of heroin. It never makes sense to say never, but the possibility that Congress would repeal the CSA in its entirety is nil.

that has beset the nation.[476] Unlike heroin, which is the product of the opium poppy grown in places such as Mexico, Afghanistan, and Southeast Asia, fentanyl, like other Novel Psychoactive Substances (NPSs), is created entirely in a lab.[477] It is 50-100 times more powerful than morphine (for perspective, heroin is five times more powerful than morphine), the baseline drug for measuring analgesic effectiveness.[478] A small amount of fentanyl can be fatal. What is worse is that some analogues of fentanyl, such as carfentanil, an elephant tranquilizer, are more powerful still.[479]

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[476] *See, e.g.*, DRUG ENF'T ADMIN., U.S. DEP'T OF JUST., 2020 NATIONAL DRUG THREAT ASSESSMENT 4 (2021) [hereinafter DEA NAT'L DRUG ASSESSMENT] ("Illicit fentanyl—produced in foreign clandestine laboratories and trafficked into the United States in powder and pill form—is primarily responsible for fueling the ongoing opioid crisis. Fentanyl-laced counterfeit pills continue to be trafficked across the country and remain significant contributors to the rates of overdose deaths observed across the country. As inexpensive, potent fentanyl continues to push into established heroin markets, fentanyl will augment, and in some cases supplant, white powder heroin in various domestic markets."); Paul J. Larkin, Jr. & Bertha K. Madras, *Opioids, Overdoses, and Cannabis: Is Marijuana an Effective Therapeutic Response to the Opioid Abuse Epidemic?*, 17 GEO. J. L. & PUB. POL'Y 555, 588 (2019) (footnote omitted) ("The current epidemic of fatal opioid overdoses is the third of three different 'waves' that have broken on America's shores, and each wave is characterized by a more powerful opioid than its predecessors. Wave 1 was the overuse of prescription opioids. In Wave 2, pharmaceutical firms developed abuse-deterrent formulations of opioids, and the federal and state governments made it more difficult for physicians to prescribe opioids for chronic pain sufferers. That wave saw people turn to heroin use, as heroin was easier to obtain and less expensive than prescription opioids. Wave 3, the current stage, is beset with use of fentanyl and its derivatives (e.g., carfentanil, a tranquilizer used on elephants) as a cutting agent added to heroin because fentanyl is less expensive to create.").

[477] *See, e.g.*, BRYCE PARDO ET AL., THE FUTURE OF FENTANYL AND OTHER SYNTHETIC OPIOIDS (2019); BRODIE RAMIN, THE AGE OF FENTANYL: ENDING THE OPIOID EPIDEMIC (2020); SAM QUINONES, THE LEAST OF US: TRUE TALES OF AMERICA AND HOPE IN THE TIME OF FENTANYL AND METH (2021); BEN WESTHOFF, FENTANYL, INC.: HOW ROGUE CHEMISTS ARE CREATING THE DEADLIEST WAVE OF THE OPIOID EPIDEMIC (First Grove Atl. hardcover ed. 2019).

[478] CTRS. FOR DISEASE CONTROL & PREVENTION, *Opioids: Fentanyl*, https://www.cdc.gov/opioids/basics/fentanyl.html (last visited Sept. 9, 2023) [hereinafter CDC, FENTANYL]; PARDO, *supra* note 477, at 2.

[479] *See, e.g.*, PARDO, *supra* note 477, at 2.; WESTHOFF, *supra* note 477, at 31–32.

The upshot of all that is this: maybe Congress should re-evaluate the penalty structure imposed by laws like the Anti-Drug Abuse Act of 1986. Maybe we have relied on imprisonment rather than treatment too heavily and for too long. Maybe we would and should consider ending the so-called "War on Drugs" if it were irredeemably racist. But there is a difference between a law or policy that is mistaken or overaggressive and one that is racist. The CSA might be the former, but it is not the latter.[480] Moreover, completely abandoning any use of the criminal law to prevent drug abuse would go too far too fast in the other direction. Stopping the "War on Drugs" would lead to thousands more overdose deaths for blacks and whites than the ones that we have already seen.[481] Congress will not, and should not, repeal the CSA.

2. Option 2: Exempt African-Americans from the CSA

A second option would be to expressly exempt black offenders from the CSA.[482] An exemption from an otherwise generally applicable criminal statute that is expressly limited to parties of only one race would be subject to the same scrutiny as a crime that is explicitly defined in racial terms. Accordingly, a race-based exemption would be constitutional only if the government could prove both that limiting the defense to only African-Americans serves a compelling state interest and is narrowly tailored to

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[480] *See* KENNEDY, *supra* note 1, at 386 (footnote omitted) ("There is force to the argument that policing prohibition with draconian laws is inefficient, the cause of avoidable misery, and inferior to alternative models of regulation. Maybe the crack-powder distinction and, indeed, the entire war on drugs is mistaken. But even if these policies are misguided, being mistaken is different from being racist, and the difference is one that greatly matters.").

[481] *See, e.g.*, WESTHOFF, *supra* note 477, at 31–32, 158.

[482] No one—yet—has expressly made this argument, but see *supra* note 29 and *infra* note 483, but it would follow from the stated desire to end the "war" on African-Americans. Plus, the exemption might soon be appearing in a courtroom in your neighborhood. *See* Andrew Mark Miller, *Biden Nominee Dodges Sen. Kennedy 9 Times When Asked If Social Justice-Inspired Crimes Should Be Forgiven*, FOX NEWS (Dec. 17, 2021, 5:29 PM), https://www.foxnews.com/politics/biden-nominee-dodges-sen-kennedy-9-times-asked-social-justice-inspired-crimes-forgiven.

serve only that interest.[483] It is impossible to see how a defense available only to black drug offenders could pass that test.

The traditional defense for a race-based remedy is the need to relieve victims of the harm they have suffered from discrimination and to prevent that harm from recurring.[484] That is why the classic remedy in the educational context is to eliminate desegregated schools and to assign students on a race-neutral basis.[485] But the drug laws are entirely race neutral, and a racial imbalance in the number of prisoners by itself is insufficient to establish a constitutional violation.[486] In addition, a

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[483] *See, e.g.*, Students for Fair Admissions, Inc. v. Harv. Coll., 143 S. Ct. 2141, 2166–76 (2023) (applying strict scrutiny to race-based school admission decisions); Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 720–25 (2007) [hereinafter *Parents Involved*] (applying strict scrutiny to race-based school assignments); Johnson v. California, 543 U.S. 499, 505–15 (2005) (applying strict scrutiny to state policy of celling new prisoners with only members of the same race); *id.* at 505 (emphasis added) (citations omitted) ("We have held that '*all* racial classifications imposed by government . . . must be analyzed by a reviewing court under strict scrutiny. . . . Under strict scrutiny, the government has the burden of proving that racial classifications 'are narrowly tailored measures that further compelling governmental interests.' We have insisted on strict scrutiny in every context, even for so-called 'benign' racial classifications, such as race-conscious university admissions policies, . . . race-based preferences in government contracts, . . . and race-based districting intended to improve minority representation."). Some people have essentially proffered such a race-based defense. *See* Chamberlain, *supra* note 29.

[484] *See* City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989) (holding that the government has a compelling interest in remedying past discrimination only when three criteria are met: the government is targeting a specific instance of discrimination, the discrimination was intentional, and the government had a hand in it).

[485] *See, e.g.*, *Parents Involved*, 551 U.S. at 720–21; *cf.* Vitolo v. Guzman, 999 F.3d 353, 362 (6th Cir. 2021) ("An observation that prior, race-neutral relief efforts failed to reach minorities is no evidence at all that the government enacted or administered those policies in a discriminatory way.").

[486] *See, e.g.*, *Parents Involved*, 551 U.S. at 721 (quoting Milliken v. Bradley, 433 U.S. 267, 280 n.14 (1977)) ("We have emphasized that the harm being remedied by mandatory desegregation plans is the harm that is traceable to segregation, and that 'the Constitution is not violated by racial imbalance in the schools, without more.'"); *see also, e.g.*, Rollerson v. Brazos River Harbor Navigation Dist., 6 F.4th 633, 649 (5th Cir. 2021) (Ho, J., concurring in part and concurring in the judgment) (quoting Tex. Dep't of Hous. & Cmty. Affs. v. Inclusive Cmtys. Project, Inc., 576 U.S. 519, 554 (2015) (Thomas, J., dissenting)) ("[A] presumption of discrimination runs into a bedrock principle of our legal system. We

defendant can already argue that he or she has been the victim of racism because of the discriminatory acts of the police or prosecutor in his or her case. A general race-based exemption would therefore have the anomalous effect of freeing people who are *not* the victims of racism. Plus, it would be impossible to defend any such race-based defense as a remedial measure designed to make up for the harms African-Americans suffered under slavery and Jim Crow. Aside from the fact that no one is alive today who could be held responsible for practicing slavery, creating a race-based remedy to exculpate present-day offenders as a symbolic way of honoring deceased victims of racism is not only unreasonable on its face, but it also cannot be reconciled with the principles of free will and individual responsibility that underlie the entirety of the criminal law.

The defense also makes little sense as a racial policy proposal. Ironically, the defense would have the effect of adopting the mirror image of the old Black Codes that American society has rejected and that no one would defend today. It also would have the bizarre effect of encouraging interest groups representing different races and ethnic backgrounds to lobby and argue for the exemption to be extended to their own favored class, a scenario that can only corrode race relations. And a "Get Out of Jail Free" card for black drug traffickers would certainly *worsen* the harms that drug trafficking and violent crime already wreak on black users, their families, their neighborhoods, and society.[487] Sadly, "[r]ace matters when it comes to urban violence," and African-American men are "disproportionately impacted" by it.[488] We shouldn't make an already bad situation worse.

In fact, the federal government's "War on Drugs" might be the best hope for black communities to fend off drug-related violence. Aggressive

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ordinarily assume innocence, not bigotry. Plaintiffs must typically prove, not presume, discrimination. 'We should not automatically presume that any institution with a neutral practice that happens to produce a racial disparity is guilty of discrimination until proved innocent.'").

[487] *See* Larkin, *supra* note 194, at 282–83.

[488] ABT, *supra* note 272, at 5; *see id.* ("[I]n 2017, homicide victimization rates for black men were 3.9 times higher than the national average and black people accounted for 52 percent of all known homicide victims, despite representing only 13 percent of the US population.").

enforcement of the CSA sometimes is the only vehicle that the federal government can use to assist the states with investigating and prosecuting violent street crimes, such as murder.[489] Congress has the Article I Commerce Clause authority to outlaw interstate or intrastate trafficking or possession of controlled substances.[490] Yet, even though people are essential to commerce, Congress cannot generally outlaw murder.[491] Unless there is a direct and clear nexus with an express federal power—such as the victim is a federal or foreign official, or the crime occurs within federal territorial jurisdiction (on federal property)—only the states can prosecute murder.[492] Accordingly, members of Congress and executive branch officials might

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[489] *See* Larkin, *supra* note 194, at 285–86.

[490] *See* Gonzales v. Raich, 545 U.S. 1 (2005) (upholding the application of the CSA against a challenge that Congress lacked the authority to outlaw the intrastate possession of cannabis).

[491] *See* United States v. Lopez, 514 U.S. 549, 566 (1995) ("The Constitution . . . withhold[s] from Congress a plenary police power that would authorize enactment of every type of legislation."); *see also, e.g.*, United States v. Morrison, 529 U.S. 598, 627 (2000) (holding unconstitutional a generally applicable civil remedy for rape).

[492] *See, e.g.*, 18 U.S.C. § 1111(b) (limiting the penalty for murder to the commission of the crime "[w]ithin the special maritime and territorial jurisdiction of the United States"); *id.* § 1112(b) (same limitation for manslaughter); *id.* § 1113 (same limitation for attempted murder and manslaughter); *id.* § 1114 (applying the statutes governing murder, manslaughter, and the attempt to commit those crimes to "any officer or employee of the United States or of any agency in any branch of the United States Government (including any member of the uniformed services) while such officer or employee is engaged in or on account of the performance of official duties, or any person assisting such an officer or employee in the performance of such duties or on account of that assistance"); *id.* § 1116 (applying the statutes governing murder, manslaughter, and the attempt to commit those crimes to "a foreign official, official guest, or internationally protected person"); *id.* § 351 (applying the same to any person who kills (inter alia) a member or member-elect of Congress, a cabinet official, a "major Presidential or Vice-Presidential candidate," and a Supreme Court Justice or a person nominated to that position). There are some other possibilities that could lead to a federal prosecution, but they are few and far between. *See, e.g.*, *id.* § 1121 (applying the same to any person who intentionally kills "a State or local official, law enforcement officer, or other officer or employee while working with Federal law enforcement officials in furtherance of a Federal criminal investigation").

reasonably believe that strict enforcement of the federal drug laws may be the only available federal recourse.[493]

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Critics have not made a persuasive legal case that the drug war is racist under long-settled constitutional law. They also have devalued the interests of the African-Americans who are damaged by illicit drug use and drug-related violent crime. Finally, they have not offered a remedy that, practically speaking, would do anything other than perpetuate the same injuries blacks now suffer from drug trafficking.

Where does that leave us? Perhaps the laws, strategies, and tactics we have used to prevent the undeniable harms of illicit drug use are mistaken. They might even be counterproductive in some cases. Maybe we should make greater and better use of drug education and treatment and less use of imprisonment. Families, neighbors, churches, and other civic institutions should be our primary means of educating juveniles about law-abiding and norm-abiding conduct and deterring them from stepping off that path. The criminal law should be the last resort to ensure a civil society. At some point, overuse of the criminal law increases the crime rate by removing so many actual and potential fathers, uncles, and older brothers from communities along with the informal social controls that they could use to channel juvenile and young adult males—the primary contributors to and victims of violent crime—that the law defeats its intended purpose. All that is true.

But that does not mean our past approaches have been unlawful or immoral. As Professor Kennedy reminded us, "There is an important difference between saying that a policy is wrong, or misguided, or mistaken, or imprudent, or even silly and saying that a policy is 'racist.'"[494] Critics have forgotten or ignored that distinction in their rush to condemn an admittedly imperfect system that struggles to protect communities from harm.

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[493] Larkin, *supra* note 194, at 285–86. Thomas Constantine, DEA Administrator from 1994 to 1999, once told one of us that sometimes the best way to investigate a local, possibly drug-related homicide is to treat it as a drug crime.

[494] KENNEDY, *supra* note 1, at 352.

IV. GOING FORWARD

We should not curse the darkness; we should find a light. There are steps that can be taken within the criminal justice system, to say nothing of options that we could pursue outside that system, to address the concerns of critics without placing black Americans at risk of violent crime. We identify a few below.

A. Increase the Availability of Drug Treatment

The first option is to ratchet down our almost exclusive reliance on the arrest-and-imprison model that we have used for the last fifty years for people whose drug use leads them to commit non-violent crimes, while ratcheting up our resort to drug treatment for people dependent on drugs like heroin and cocaine. For quite some time, the argument goes, we have used the criminal justice system as a hammer for every crime that has occurred, regardless of whether the problem is a nail or something else. There are programs—such as the now ubiquitous drug courts—that might better serve society than unflinching resort to imprisonment.[495] There are also two novel approaches—the 24/7 Sobriety and Hawaii Opportunity Probation with Enforcement, or HOPE—that might also be worth considering.[496] These programs place offenders with a drug problem on probation; require probationers to undergo frequent, random drug and alcohol testing to determine whether they have remained "clean"; and use immediate but brief terms in jail (say, 48 or 72 hours) for offenders whose urine is "hot," with increasingly longer terms for repeat positive drug tests.[497] The programs give effect to the belief that punishment is not always necessary to change behavior. At the same time, the programs communicate

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[495] *See, e.g.*, U.S. DEP'T OF JUST., OFFICE OF JUST. PROGRAMS, DRUG TREATMENT COURTS (June 2023), https://www.ojp.gov/pdffiles1/nij/238527.pdf; JENNIFER MURPHY, ILLNESS OR DEVIANCE? DRUG COURTS, DRUG TREATMENT, AND THE AMBIGUITY OF ADDICTION (2015); REBECCA TIGER, JUDGING ADDICTS: DRUG COURTS AND COERCION IN THE CRIMINAL JUSTICE SYSTEM (2012); SHELLI B. ROSSMAN ET AL., URBAN INST. JUST. POL'Y CNTR., THE MULTI-SITE ADULT DRUG COURT EVALUATION: THE IMPACT OF DRUG COURTS (2011), https://www.ojp.gov/pdffiles1/nij/grants/237112.pdf.

[496] *See, e.g.*, Larkin, *supra* note 294 (describing those programs).

[497] *See generally id.*

that punishment must be available and, even when punishment is called for, imposing a swift, certain, and fair punishment is more effective at changing behavior than letting the hammer fall at some uncertain point for a longer period of time.

That argument is a reasonable one. There are a variety of options we should consider. Some of the funds now spent on prison cells (such as new construction monies) could be repurposed for treatment-facility beds. Police officers could refer some drug users to treatment, rather than arrest them. Prosecutors could offer non-violent drug addicts the option for mandatory drug treatment, with the threat of prison remaining available for anyone who leaves a program early. The safety valve that now allows judges to depart below a mandatory minimum sentence for minor players could be expanded to include non-violent offenders whom a judge finds would be better served in a drug rehabilitation facility than in a prison.[498] Those options, and others like them, might reduce the number of small-scale dealers who need drug treatment and who wind up getting imprisoned for crimes such as larceny or shoplifting, rather than armed robbery.[499] That option is worth serious consideration by everyone concerned about drug use and crime.

There are, however, two hurdles we would need to overcome. The first one is the combination of (1) our strong reliance on the symbolic value of punishment, regardless of its efficacy, and (2) politicians' willingness to exploit that reliance by increasing sentences whenever the public is riled up about some antisocial conduct.[500] But those problems are minor compared to this one: Drug rehabilitation can be expensive, and most first-time efforts at rehab do not work.[501] For example, more than 50 percent of the people who enter alcohol or drug treatment relapse within six months of its

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[498] *See* 18 U.S.C. § 3553(f) (authorizing a district court to depart below a mandatory minimum sentence for low-level, nonviolent drug offenders).

[499] *See, e.g.*, FORMAN, *supra* note 119, at 147.

[500] *See, e.g.*, *id.* at 148 ("The choice of which agency to call on [to remedy a social ill] might seem inconsequential, but the policy consensus it reflected and reinforced was of great import. When an urgent problem required a short-term solution, law enforcement was regarded as the only answer.").

[501] *See, e.g.*, *id.* at 123.

cessation.[502] Few members of Congress would be willing to stand in the well of the House or Senate and urge the public to spend millions, perhaps billions, of dollars on a program that fails more often than it succeeds and that a large segment of the public believes is due, not to a disease-ridden brain, but to personal character failings by the offenders involved. Maybe science or medicine will improve on those odds. It is worth trying.

B. Increase the Investigation and Prosecution of White-Collar Crime

Explicit or implicit in the criticisms voiced of our contemporary American criminal justice system is that we grossly underemphasize the prevalence, importance, and harms of white-collar crime. There is considerable merit to that criticism. While we have been critical of the phenomenon of "Overcriminalization"—viz., the overuse, misuse, and abuse of the criminal law to police conduct better addressed via civil or administrative remedies[503]—it is also the case that the federal government does not adequately address crime in the "suites."

States possess a police power that the federal government does not,[504] and therefore, the states can reach a far wider range of antisocial conduct than

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[502] *See* INST. OF MED., NAT'L ACAD. SCIS., ENG'G & MED., IMPROVING THE QUALITY OF HEALTH CARE FOR MENTAL AND SUBSTANCE-USE CONDITIONS 143 (2006) (citations omitted) ("[M]ost alcohol- and drug-dependent patients relapse following cessation of treatment. In general, about 50–60 percent of patients begin reusing within 6 months of treatment cessation, regardless of the type of discharge, patient characteristics, or the particular substance(s) used."); *see also How Many People Relapse After Completing Treatment?*, AM. ADDICTION CTRS. (July 12, 2023), https://americanaddictioncenters.org/rehab-guide/success-rates-and-statistics (footnote omitted) ("Relapse rates for drug and alcohol use resemble those of other chronic diseases, including hypertension and diabetes with an estimated 40–60% of individuals relapsing while in recovery. National surveys suggest that of those with alcohol use disorder (AUD), a medical condition defined by the uncontrollable use of alcohol despite negative consequences, only about one-third attempt to quit drinking each year. Of those, only about 25% are successful at reducing their alcohol intake for more than a year.").

[503] *See, e.g.*, GIANCARLO CANAPARO ET AL., HERITAGE FOUND., COUNT THE CODE: QUANTIFYING FEDERALIZATION OF CRIMINAL STATUTES (2022); Larkin, *supra* note 27.

[504] *See, e.g.*, Hamilton v. Ky. Distilleries & Warehouse Co., 251 U.S. 146, 156 (1919) ("That the United States lacks the police power, and that this was reserved to the States by

Congress can.[505] Every state makes it a crime to commit the offenses known at common law—such as murder, mayhem, rape, and robbery[506]—which are colloquially known as street crimes. Drug offenses were not crimes at common law, but every state outlaws the distribution of some controlled substances.[507] Yet, not every state is capable of investigating and prosecuting certain types of crime.[508] State or local public corruption; transnational or interstate offenses; complex financial wrongdoing; environmental crimes; and civil rights violations—those are some of the offenses, often labelled "white-collar" crimes, that no one locality or state is capable of adequately handling because they cross state lines, they involve public officials with control over or influence upon the state criminal justice system, or they threaten to shut down important local businesses.[509] Only the federal government can effectively investigate and prosecute those offenses.

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the Tenth Amendment, is true."); McCulloch v. Maryland, 17 U.S. 316, 405 (1819) ("This [federal] government is acknowledged by all to be one of enumerated powers.").

[505] *See, e.g.*, United States v. Morrison, 529 U.S. 598 (2000) (holding unconstitutional, as exceeding Congress's commerce power, a federal statute making rape an actionable civil claim); United States v. Lopez, 514 U.S. 549 (1995) (same, a federal law that made it a crime to possess a firearm in the vicinity of a school); *see also* Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519 (2012) (five Justices concluded in separate opinions that Congress could not justify a critical component of the Patient Protection and Affordable Care Act, known as the "individual mandate," as a regulation of interstate commerce).

[506] *See, e.g.*, Edwin R. Keedy, *Criminal Attempts at Common Law*, 102 U. PA. L. REV. 464, 465 (1954).

[507] That is a rationale for the argument that Congress should delegate to the states exclusive authority to decide whether to make cannabis distribution, possession, and use a crime. *See, e.g.*, MARIJUANA FEDERALISM: UNCLE SAM AND MARY JANE (Jonathan H. Adler ed., 2020).

[508] *See* Paul J. Larkin, Jr., Essay, *A New Law Enforcement Agenda for a New Attorney General*, 17 GEO. J.L. & PUB. POL'Y 231, 236–38 (2019).

[509] *Id.* at 237–38 (footnotes omitted) ("The Federal Bureau of Investigation (FBI), for example, is far better situated to conduct cross-border investigations, whether they are ones in which a foreign government's assistance is necessary or ones in which foreign citizens or officials might be involved in criminal activity. To further such investigations, the FBI has more than eighty overseas offices to help in global investigations. Local sheriff's departments do not."); *see also id.* at 237 n.32.

But that does not mean the federal government is responsibly doing so. Put aside for a moment the fact that the federal government does an impressively inadequate job of determining whether it is wisely using the *inputs* Congress gives the various law enforcement agencies (viz., the funds necessary to recruit, hire, train, outfit, and supervise federal agents) and also does a remarkably magical job of disguising whether it has achieved satisfactory *outcomes* from those efforts (viz., a decrease in the number of federal offenses committed and the harm those crimes produce, as well as "an improvement in the deterrent, incapacitative, educative, and rehabilitative purposes of the criminal law"[510]) by focusing, instead, on the *outputs* of their work (viz., the number of cases opened, arrests made, charges filed, convictions obtained, prison-years imposed, and fines or forfeitures secured).[511] What we need to know is the outcome of the dollars we spend and the hours it takes to spend them, an answer that the federal government avoids even making a stab at obtaining.

For present purposes, we can assume that the federal government might be doing an excellent job of tamping down the number and seriousness of white-collar crimes. What it certainly is failing at doing is persuading the public that it is making a difference in that regard. The government needs to respond to the critics' argument that federal law enforcement is concerned only with the drug crimes committed by black offenders. It can do so by upping its commitment to investigate and prosecute white-collar crimes, financial, environmental, or otherwise. Doing so would help persuade the average person that the critics' premise is wrong because the Justice Department *is* aggressively pursuing offenders whose collars and complexion are predominantly white. If the Justice Department cannot make that case, it should increase the resources devoted to investigating and prosecuting white-collar crime.[512]

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[510] *Id.* at 243.

[511] *Id.* at 242–45.

[512] *See* Blumstein, *Racial Disproportionality*, *supra* note 227, at 1279 (relying on 1980s data) ("More vigorous pursuit of the kinds of crimes more often associated with whites (e.g., fraud, corporate crime, white collar crime, etc.) might serve to redress the disproportionality to some degree. Such crimes, of course, are much more difficult to detect and to solve, but some additional resources could undoubtedly be applied to them. These crimes, however,

C. Calm the Tone of the Debate

The claims that the criminal justice system is systemically racist and that whites have racism built into their DNA ultimately reduce themselves to the use of what George Orwell once described as an ignoble form of political speech.[513] Its purpose is not to honestly describe today's criminal justice system and debate how it can be improved. No, it is designed to knock non-acolytes back on their heels and fend off any critical examination of what "systemic racism" means.[514] As Orwell noted, "[o]rthodoxy, of whatever colour, demands a lifeless, imitative style," in which a speaker "mechanically repeat[s]" terms to indoctrinate the listener.[515] Just as a Parris Island drill

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represent a small fraction of prison populations. For example, fraud, embezzlement, and forgery comprise only 4% of the 1974 prison population and have a black arrest fraction of 31.3%. Thus, even if the number of whites imprisoned for these offenses were *trebled,* their proportion of the white prison population would go from about 2.75% to about 8%, certainly well short of enough white prisoners to revise in any meaningful way the racial composition of prison populations. Furthermore, it is reasonable to anticipate that intensive pursuit of those offenses would serve to deter their commission, since these offenses tend to be more carefully planned and premeditated, and so be more vulnerable to deterrence signals. Any such deterrent response is thus likely to mitigate any intended effect on the prison-population mix.").

[513] *See, e.g.*, George Orwell, *Politics and the English Language*, HORIZON (1946), *republished by* THE ORWELL FOUND., https://www.orwellfoundation.com/the-orwell-foundation/orwell/essays-and-other-works/politics-and-the-english-language/ (last visited Sept. 8, 2023) (noting "the special connection between politics and the debasement of language").

[514] *See* Rich Lowry, *When the Truth becomes a Dog Whistle*, NAT'L REV. (May 8, 2023, 6:30 AM), https://www.nationalreview.com/2023/05/when-the-truth-becomes-a-dog-whistle/.

[515] Orwell, *supra* note 513 ("In our time it is broadly true that political writing is bad writing. Where it is not true, it will generally be found that the writer is some kind of rebel, expressing his private opinions, and not a 'party line'. Orthodoxy, of whatever colour, seems to demand a lifeless, imitative style. The political dialects to be found in pamphlets, leading articles, manifestos, White Papers and the speeches of Under-Secretaries do, of course, vary from party to party, but they are all alike in that one almost never finds in them a fresh, vivid, home-made turn of speech. When one watches some tired hack on the platform mechanically repeating the familiar phrases—*bestial atrocities*, *iron heel*, *blood-stained tyranny*, *free peoples of the world*, *stand shoulder to shoulder*—one often has a curious feeling that one is not watching a live human being but some kind of dummy: a feeling which

instructor repeatedly lectures recruits about Marine Corps battlefield virtues to indoctrinate them into the Marine Corps value system,[516] some politicians incessantly reiterate the message that America is systemically racist, regardless of its merit, to instill that belief in the minds of the electorate through repetition of terms, memes, and "talking points."[517]

That repetition can lend an authenticity even to "the defence of the indefensible," as Orwell phrased it.[518] Sustained autonomic recital of assumption-begging terms "anaesthetizes a portion of one's brain."[519] It therefore eases the way for a politician to gaslight the public because he or

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suddenly becomes stronger at moments when the light catches the speaker's spectacles and turns them into blank discs which seem to have no eyes behind them. And this is not altogether fanciful. A speaker who uses that kind of phraseology has gone some distance toward turning himself into a machine. The appropriate noises are coming out of his larynx, but his brain is not involved as it would be if he were choosing his words for himself. If the speech he is making is one that he is accustomed to make over and over again, he may be almost unconscious of what he is saying, as one is when one utters the responses in church. And this reduced state of consciousness, if not indispensable, is at any rate favourable to political conformity.").

[516] *Cf.* John McWhorter, *We Cannot Allow "1619" to Dumb Down America in the Name of a Crusade*, *in* RED, WHITE, AND BLACK: RESCUING AMERICAN HISTORY FROM REVISIONISTS AND RACE HUSTLERS, *supra* note 43, at 28 (characterizing the New York Times' *1619 Project*) ("This is a way of looking at the past familiar from Marxist ideology, training adherents Zen-style to carefully stanch reasonable disbelief in favor of slogans, to tamp down a desire to explore, discover, and reason with a commitment to broad-stroked evangelism.").

[517] That practice, unfortunately, is having a pernicious effect where we can least afford it. *See, e.g.*, Jeff Groom, *No One Wants to Join the Military Anymore*, SPECTATOR (July 12, 2022, 10:09 PM), https://spectatorworld.com/topic/no-one-wants-to-join-the-military/ ("Our elites' culture war has targeted the very Americans who traditionally enlist . . . . Imagine you are an eighteen-year-old, white, Christian male in Georgia with a family history of military service. As you progressed through your teen years, you watched Confederate statues being torn down and military bases being renamed, endless media and elitist demonization of your culture as racist and deplorable and backwards, and military and civilian leadership that thinks diversity and inclusion (i.e. fewer white men) is best thing since sliced bread. Would you volunteer? Identity politics works both ways. Trash my tribe and I won't associate with you, let alone risk my life. It shouldn't be a shock, then, that those expressing a 'great deal of trust and confidence in the military' dropped from 70 percent in 2018 to 45 percent today.").

[518] Orwell, *supra* note 513.

[519] *Id.*

she can bend terminology to fit whatever facts or audience is at hand.[520] After all, no one can prove you wrong if no one knows what is right.[521] A classic example of a term so used is "fascist," which is often voiced in criticisms of conservative proposals or philosophy. Another example is the term "violence," which is often used hyperbolically, where no actual or threatened physical contact is remotely involved, to make something seem far worse than it is.[522] Systemic racism is just the new kid on the block.[523] As

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[520] *Id.* ("Thus political language has to consist largely of euphemism, question-begging and sheer cloudy vagueness . . . . Consider for instance some comfortable English professor defending Russian totalitarianism. He cannot say outright, 'I believe in killing off your opponents when you can get good results by doing so'. Probably, therefore, he will say something like this: 'While freely conceding that the Soviet régime exhibits certain features which the humanitarian may be inclined to deplore, we must, I think, agree that a certain curtailment of the right to political opposition is an unavoidable concomitant of transitional periods, and that the rigours which the Russian people have been called upon to undergo have been amply justified in the sphere of concrete achievement.'").

[521] *Id.* ("Stuart Chase and others have come near to claiming that all abstract words are meaningless, and have used this as a pretext for advocating a kind of political quietism. Since you don't know what Fascism is, how can you struggle against Fascism? One need not swallow such absurdities as this, but one ought to recognize that the present political chaos is connected with the decay of language, and that one can probably bring about some improvement by starting at the verbal end. If you simplify your English, you are freed from the worst follies of orthodoxy. You cannot speak any of the necessary dialects, and when you make a stupid remark its stupidity will be obvious, even to yourself. Political language—and with variations this is true of all political parties, from Conservatives to Anarchists—is designed to make lies sound truthful and murder respectable, and to give an appearance of solidity to pure wind. One cannot change this all in a moment, but one can at least change one's own habits, and from time to time one can even, if one jeers loudly enough, send some worn-out and useless phrase—some *jackboot*, *Achilles' heel*, *hotbed*, *melting pot*, *acid test*, *veritable inferno* or other lump of verbal refuse—into the dustbin where it belongs.").

[522] *See* Lindsay Kornick, *Boston University Professor Calls Layoffs at Ibram X. Kendi's Antiracism Center 'Employment Violence'*, FOX NEWS (Sept. 20, 2023, 8:30 AM), https://www.foxnews.com/media/boston-univ-professor-calls-layoffs-ibram-x-kendis-antiracism-center-employment-violence.

[523] *See, e.g.*, Andrew Sullivan, *Our Politics and the English Language*, THE WEEKLY DISH (June 4, 2021), https://andrewsullivan.substack.com/p/our-politics-and-the-english-language-8be ("Part of the goal of this is political, of course. The more you repeat words like 'proper antiracist education' or 'systemic racism' or 'racial inequity' or 'lived experience' or 'heteronormativity,' the more they become part of the landscape of words, designed to dull

Andrew Sullivan noted, the point of the exercise is to control our public policy by controlling our public language through the use of terms that sound impressive but do not reflect reality and discourage critical inquiry as to their meaning.[524]

But a gauzy, manufactured, ill-defined term like "systemic racism" is an example of one of the worst types of political speech. Terms like that are useful if your goal is to minimize public understanding of your true aim by scaring away potential naysayers. That use of the term is ultimately disingenuous, even deceitful. The people are the ultimate decisionmakers in a democracy, and politicians' use of vague terms to confuse and euchre the public—the lawyer's version of the child's game of "hide the ball"—is hardly worthy of respect. Indeed, as Dean John Hart Ely taught us, lawyers often disguise a client's real intent to mask an illicit reason for their client's action, a reason that no one dares say publicly.[525] That is precisely what is

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one's curiosity about what on earth any of them can possibly mean. A mass of ideological abstractions, in Orwell's words, 'falls upon the facts like soft snow, blurring the outlines and covering up all the details.' . . . I caught a glimpse of Ibram X. Kendi's recent appearance at the Aspen Ideas Festival, the annual woke, oxygen-deprived hajj for the left-media elites. He was asked to define racism—something you'd think he'd have thought a bit about. This was his response: 'Racism is a collection of racist policies that lead to racial inequity that are substantiated by racist ideas.' He does this a lot. He repeats Yoda-stye formulae: 'There is no such thing as a nonracist or race-neutral policy . . . If discrimination is creating equity, then it is antiracist. If discrimination is creating inequity, then it is racist.' These maxims pepper his tomes like deep thoughts in a self-help book. When he proposes specific action to counter racism, for example, he suggests: 'Deploy antiracist power to compel or drive from power the unsympathetic racist policymakers in order to institute the antiracist policy.' 'Always vote for the leftist' is a bit blunter.").

[524] *Id.* ("This is a kind of bewildering, private language. But the whole point of the guide is to make it our *public* language, to force *other* people to use these invented words, to make the entire society learn and repeat the equivalent of their own post-modern sanskrit. This is our contemporary version of what Orwell went on to describe as 'newspeak' in Nineteen Eighty-Four: a vocabulary designed to make certain ideas literally unthinkable because woke language has banished them from use. Repeat the words 'structural racism' and 'white supremacy' and 'cisheteropatriarchy' often enough, and people come to believe these things exist unquestioningly. Talk about the LGBTQIA2S+ community and eventually, people will believe it exists (spoiler alert: it doesn't).").

[525] *See* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980).

happening with the endless repetition of the enigmatic term "systemic racism." Those factors make it critically important to properly define and clarify that term in an open public debate. So far, critics have made no effort to do so. That is unacceptable in a democracy.

Mistaken attributions of racism also cheapen the currency. To borrow a phrase from Justice Antonin Scalia, improvident use of "the ultimate weapon"—"the accusation of insensitivity to racial discrimination"—"will lose its intimidating effect if it continues to be fired so randomly."[526] That would be our loss, because, properly employed, the term "racist," like the term "felon," usefully conveys societal condemnation of a form of antisocial conduct. Just as the universal description of professional athletes and performers as "superstars" diminishes the value of that term, profligate use of "racism" or "racist" dilutes its positive descriptive and normative value, rendering it just a form of hate speech or little more than an epithet.

But critics' use of the term "systemic racism" is even worse than that. Claiming someone is a racist is the most incendiary and damning assertion that can be made today. At one time, unfortunately, expressions of overt racism were common; they even served as the psychological justification for chattel slavery.[527] Fortunately, those days are now gone. American society is no longer willing to tolerate racism.[528] Indeed, even the mere assertion that someone is a racist, whether or not true, can cost that person a job, a career, and a reputation built over a lifetime, because repetition of a lie can take on a life of its own. Even expressions of unwelcome opinions regarding race can have baleful consequences.[529] Leveling the charge of racism against an

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[526] Holland v. Illinois, 493 U.S. 474, 486 (1990).

[527] *See, e.g.*, SERED, *supra* note 194, at 55 ("Black people were subject to horrific acts of violence [during slavery], and their race was used as a justification not only for their enslavement, but for the violence that kept them enslaved. That racialization and all its attendant myths regarding the biological and moral inferiority of black people was necessary for white slave owners to become people who could commit that level of harm against other human beings.").

[528] *See, e.g.*, GONZALEZ, *supra* note 39.

[529] *See* Sullivan, *supra* note 523 ("I was just reading about the panic that occurred in the American Medical Association, when their journal's deputy editor argued on a podcast that socio-economic factors were more significant in poor outcomes for non-whites than structural racism.' As you might imagine, any kind of questioning of this orthodoxy required

entire race based on white skin color alone is not materially or morally different than the same character flaw that led parts of the nation for a century plus to relegate a different race to the lowest caste in American society. The only difference is that someone else's ox is gored.

Is there still racism in America today? Sadly, the answer is "Yes"—just as there still is crime, whether white-on-white, white-on-black, black-on-black, or black-on-white. Even more sadly, there always will be racism and crime until we reach the Great Beyond. What we can do is to recognize how far we have come, acknowledge that we still have far to go, and strive to end both forms of antisocial conduct. What Professor Kennedy wrote in the conclusion of his 1997 book *Race, Crime, and the Law* was true then and still is true today:

> This point is worth stressing because of the prevalence and prominence of pessimistic thinking about the race question in American life. Some commentators maintain, in all seriousness, that there has been no significant improvement in the overall fortunes of black Americans during the past half century, that advances that appear to have been made are merely cosmetic, and that the United

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the defenestration of the deputy editor and the resignation of the editor-in-chief. The episode was withdrawn from public viewing, and the top editor replaced it with a Maoist apology/confession before he accepted his own fate."); *see also, e.g.*, Jack Crowe, *UPenn Med School Leaders Turn on Former Dean over "Racist" Affirmative-Action Criticism*, NAT'L REV. (June 1, 2022, 11:00 AM), https://www.nationalreview.com/news/upenn-med-school-leaders-turn-on-former-dean-over-racist-affirmative-action-criticism/?utm_source=email&utm_medium=breaking&utm_campaign=newstrack&utm_term=27908833 ("Dr. Stanley Goldfarb had a long, distinguished career in medicine that culminated with his being appointed professor emeritus and associate dean of curriculum at Perelman. He retired from his role as associate dean in 2019 but retained his emeritus title. That honor and the career that made him worthy of it weren't enough to earn him the presumption of good faith from his former colleagues. Goldfarb's offense? Publicly questioning whether racial discrimination is as pervasive in medicine as the conventional elite narrative suggests. Responding last week to a study which suggested that systemic racism explains why minority medical residents tend to receive worse performance evaluations than their white peers, Goldfarb asked: 'Could it be they were just less good at being residents?'").

> States is doomed to remain a pigmentocracy. This pessimistic strain often turns paranoid and apocalyptic in commentary about the administration of the criminal law.
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> It is profoundly misleading, however, to focus exclusively on the ugliest aspects of the American legal order. Doing so conceals real achievements: the Reconstruction Constitutional Amendments, the Reconstruction civil rights laws, [a series of Supreme Court decisions prohibiting discrimination in the criminal justice system], the resuscitation of Reconstruction by the civil rights movement, the changing demographics of the bench, bar, and police departments—in sum the stigmatization (albeit incomplete) of invidious racial bias. Neglecting these achievements robs them of support. . . . The most salient feature of race relations in America at the end of the twentieth century is its complexity—a complexity that renders unfit as guides to action either the claim that racial bias no longer constitutes a major problem or the claim that racial bias is as dominant now as it once was. Any reliable guide to a better future must carefully take into account what has been accomplished and build upon it, using as a lodestar the uncompromisable ideal of treating all persons equally regardless of race, an aspiration best sought by responding to persons strictly on the basis of conduct not color.[530]

An aspiration that will be defeated were the nation to endorse the claim that America is beset with some undefined form of systemic racism.[531]

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[530] KENNEDY, *supra* note 1, at 389–90.

[531] "The truly grave danger of refusing to confront race differences in means is that it leads in a straight line to thinking that the only legitimate evidence of a nonracist society is equal outcomes. It appears that the Biden Administration already accepts that logic. If that's what the people in power truly believe, and if those equal outcomes continue to elude them, the logical conclusion is that the state must force equal outcomes by whatever means necessary. Once the state is granted the power to engineer equal outcomes by dispensing

CONCLUSION

Trying to take politics out of Washington, D.C., and state capitals would be like trying to take scoring out of professional sports. It can't be done without eliminating the game, it won't happen no matter how hard we might wish it would, and it doesn't make sense even to try. But, once upon a time, there were certain ground rules that governed how the game of politics was played. One of them was not playing the "race card" in a profligate manner. That rule has now gone out of fashion. Critics of the criminal justice system have thrown around the term "systemic racism" without attempting to define its meaning or justify its use. What is worse, government officials, such as President Biden and members of his Administration, have used the term without explaining what it means, without justifying why its use is correct, and without explaining to the public exactly what the Administration intends to do to make things right. Perhaps that is how politics is played today. But there is no good reason to assume that critics or government officials are right to call America racist to its core or to consign enforcement of the criminal code to the trash can. Yes, at one time the nation allowed slavery to exist, and some states fought—quite literally—to keep it that way. That day, however, disappeared in the rear-view mirror long ago, and no one remotely serious and worth listening to wants to see it again. We cannot and should not forget our past. But we do ourselves no favor by deluding ourselves into believing, or allowing ourselves to be "guilted" into believing, that it inevitably defines our present and future.

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opportunities preferentially and freedoms selectively, it will be one group versus another, 'us' against 'them.'" MURRAY, *supra* note 39, at 114.