

DISPARITIES AND MASS INCARCERATION: LAWS, POLICIES, & IMPLICIT BIAS, CONTRIBUTING TO BLACKS' MASS INCARCERATION AND ADDICTION TREATMENT FOR WHITES

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ABSTRACT

The year 2020 was a time of crisis for the United States. The opioid epidemic, COVID-19, and protests for justice each unmask disparities across racial lines in healthcare and criminal justice. This Article examines laws, policies, and implicit bias in the criminal justice system, contributing to blacks' mass incarceration and addiction treatment for whites.

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I. INTRODUCTION

Public officials, law enforcement, and the media help perpetuate two distinct drug addiction pipelines: prison and the other treatment. The path to the former or the latter differs, in many cases, for black and white Americans. In the past two decades, thousands of Americans, white and people of color, have become addicted and died from illegal and legally prescribed pain relief opioids.¹ As the number of white people overdosing on opioids grew, elected officials and law enforcements' objective shifted from largely incarceration to treatment to save addicts' lives, primarily in white communities.² Part II chronicles and explores the

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1. See *Morbidity and Mortality Weekly Report (MMWR)*, CENTERS FOR DISEASE CONTROL AND PREVENTION, <https://www.cdc.gov/mmwr/volumes/68/wr/mm6837a5.htm> (last visited April 19, 2021); see also Jasmine Drake et al., *Exploring the impact of the opioid epidemic in Black and Hispanic communities in the United States*, 0 DRUG SCI., POL'Y AND L. 1 (2020).

2. See Victoria Chau, SAMHSA Off. Behav. Health Equity, *The Opioid Crisis and the Black/African*

federal government and law enforcements' response to what elected officials have labeled an Opioid Crisis.

Unlike the government response to the Opioid Crisis, predominantly and historically, individuals in various African American communities are arrested and often imprisoned for possessing illegal drugs, even when they suffer from drug addiction.³ For several decades, police besieged neighborhoods while engaging in the government-mandated War on Drugs, leading to the mass incarceration of black men and women.⁴ Part III examines drug laws, policies, and the dominant, disproportionate police presence in communities of color, beginning in the 1970s.

If there had been a heightened emphasis on treatment rather than incarceration of drug abusers within primarily African American communities targeted over the past forty or more years, communities of color may not have endured as much hardship. Moreover, if political rhetoric and media had not contributed to blacks' criminalization through their biased portrayal, there would likely be fewer negative consequences from the War on Drugs. Elected officials should have acknowledged that the most significant crisis was not to initiate and sustain a War on Drugs directed toward incarceration for crimes that often include possession of low-level, illegal drugs. Instead, black drug users, too, like white opioid addicts, needed enhanced treatment programs rather than increased harsher penalties and more correctional facilities. Part IV considers disparities and studies implicit bias, examining police and prosecution decisions and practices.

Additionally, the examination compares the media portrayal of black drug users with white illegal opioid/drug users. Generally, the media's narrative describing whites focuses on addiction, unlike the frequent depiction of blacks as criminals allegedly creating a threat to public safety. Such disparate portrayals criminalize blacks, add to existing implicit biases, and contribute to mass incarceration; also, topics of discussion.

Despite the Opioid Crisis focus on the treatment given to people, historically outside of African American communities, who become addicted to legally prescribed or illegal opioids, there still are vestiges and current damaging drug initiatives targeting African American communities.⁵ Part V recommends strategies to reduce disparity across racial lines in criminal justice. The discussion evaluates community prosecution, its benefits, and its limitations.

II. OPIOID CRISIS: POLICIES

The number of people addicted to opioids is staggering. Public health officials estimate that nearly 400,000 people in the United States have died from complications involving opioids in the past two decades.⁶ Consider the Substance Abuse and Mental Health Services Administration (SAMHSA) statistics based on

American Population: An Urgent Issue 3 (2020); see also *Racial Double Standard in Drug Laws Persists Today*, EQUAL JUST. INITIATIVE (2019) [hereinafter *Racial Double Standard*], <https://eji.org/news/racial-double-standard-in-drug-laws-persists-today/> (last visited April 19, 2021).

3. *Racial Double Standard*, supra note 2.

4. *Racial Double Standard*, supra note 2.

5. See *Racial Double Standard*, supra note 2.

6. See CHAU, supra note 2, at 3.

various studies: "In 2018, 10.3 million people misused opioids, including prescription opioids and heroin, and two million had an opioid use disorder."⁷ The glaring numbers captured politicians' and government officials' interest; generally, the response to the Opioid Crisis has been compassionate with recommendations for treatment plans and rehabilitation for addicts, including opioid users found in illegal possession of opioids.⁸

Given the number of deaths and addicted opioid abusers, it is not surprising that the opioid epidemic is considered an urgent matter that needs focused attention.⁹ Nevertheless, the disparity across racial lines in policy decisions, laws enacted, and media coverage is notable. For the Opioid Crisis (majority whites in the early part of the twenty-first century), policies initiated and media coverage have mostly been compassionate, focusing on aiding and providing treatment for "suburban" drug abusers deemed victims.¹⁰ However, for marijuana, heroin, crack-cocaine (targeting predominantly blacks) in the earlier and continuing ruins of the War on Drugs, policies, laws, and media coverage are routinely tough-on-crime initiatives that criminalize blacks.¹¹ Many scholars, public health analysts, historians, and political scientists who study the disparity between policy responses to opioids and other drugs find that race is a decisive factor.¹² A recent *Journal of Health Politics, Policy, and Law* (JHPPL) study reviewed Center for Disease Control (CDC) and National Institute on Drug Abuse statistics to consider this vital issue:

Since death rates associated with opioid use have been higher among whites than other groups, have legislators been more likely to pursue less punitive, more public health-oriented policies in response to opioids in contrast to more punitive criminal justice policies pursued for other drug epidemics?¹³

JHPPL scholars also drew comparisons between the opioid and crack-cocaine eras, assessing specifically "whether differences in policy responses are associated with race."¹⁴ Consistent with this Article's Part III discussion, findings reveal that legislation was more punitive with less treatment in previous eras than during the current opioid period.¹⁵ The results mainly led the team of JHPPL scholars to conclude that racial inequalities are prevalent "in U.S. drug policy."¹⁶

7. CHAU, *supra* note 2, at 3.

8. CHAU, *supra* note 2, at 3.

9. CHAU, *supra* note 2, at 3.

10. See generally CHAU, *supra* note 2.

11. CHAU, *supra* note 2.

12. Susan L. Moffitt, *Introduction: The Politics of the Opioid Epidemic*, 45 J. HEALTH POL. POL'Y L. 171 (2020).

13. *Id.* at 172; see *Opioid Overdose*, CTNS. FOR DISEASE CONTROL AND PREVENTION (2020), <https://www.cdc.gov/drugoverdose/epidemic/index.html> (last visited Mar. 25, 2021).

14. Moffitt, *supra* note 12, at 172.

15. Moffitt, *supra* note 12, at 172.

16. Moffitt, *supra* note 12, at 172.

As noted, the response to the opioid epidemic is unquestionably compassionate, with the media habitually portraying opioid addicts (illegal and legal drug users) as victims.¹⁷ SAMHSA addresses the heightened attention placed on white neighborhoods, generally suburban and rural, contrasting the reduced focus on black communities where opioid addicts also need treatment.¹⁸ According to SAMHSA, though numbers are higher in white communities, black neighborhoods are also “experiencing dramatic increases in opioid misuse and overdose deaths.”¹⁹ Still, the numbers are nowhere near those of whites.²⁰

SAMHSA cites negative connotations attached to black substance abusers and the fear of arrest and prosecution as barriers to treatment in African American neighborhoods.²¹ Indeed, fewer blacks seek treatment, given the awareness of historical egregious medical practices directed at groups of black people and aggressive police targeting of black people during the War on Drugs.²² As SAMHSA notes, the African American community’s heightened distrust of medical and government criminal justice systems is relevant.²³

Many scholars and policy analysts have written about the government’s response to the Opioid Crisis.²⁴ President Barack Obama proposed a concrete plan in 2016, budgeting a billion dollars in funding to treat “prescription drug abuse and heroin use.”²⁵ Among other steps, Obama’s plan included training for providers, funding, and strategies building on the program his administration implemented in 2010.²⁶ Additionally, Obama’s initiative allocated specific funds to states to assist local community efforts to combat the epidemic of addiction and overdoses.²⁷ Yet, despite the plans, the massive opioid epidemic persisted.

President Donald J. Trump began his term in office in January 2017. Trump and the Director of the Office of National Drug Control Policy (“ONDCP”) “declared the opioid crisis a [national] ‘public health emergency’” on October 26, 2017.²⁸ Afterward, as National Public Radio Correspondent Brian Mann stated, “Significant accomplishments followed. Trump signed legislation in 2018 that boosted federal

17. See generally Moffitt, *supra* note 12, at 172.

18. See CHAU, *supra* note 2, at 3.

19. CHAU, *supra* note 2, at 3.

20. CHAU, *supra* note 2, at 5 tbl. 1.

21. CHAU, *supra* note 2, at 5.

22. See generally CHAU, *supra* note 2, at 5–7.

23. CHAU, *supra* note 2, at 6.

24. See generally Keturah James & Ayana Jordan, *The Opioid Crisis in Black Communities*, 46 J. L., MED. & ETHICS 404 (2018).

25. *Fact Sheet: President Obama Proposes \$1.1 Billion in New Funding to Address the Prescription Opioid Abuse and Heroin Use Epidemic*, WHITE HOUSE OFF. OF THE PRESS SEC’Y (Feb. 2, 2016), <https://obamawhitehouse.archives.gov/the-press-office/2016/02/02/president-obama-proposes-11-billion-new-funding-address-prescription> (last visited April 19, 2021).

26. *Id.*

27. *Id.*

28. *Ongoing Emergencies & Disasters*, CTRS. FOR MEDICARE & MEDICAID SERVS.: CMS.GOV (2020), <https://www.cms.gov/About-CMS/Agency-Information/Emergency/EPRO/Current-Emergencies/Ongoing-emergencies> (last visited Apr. 19, 2021).

funding for drug treatment.”²⁹ But critics observe, leadership gaps derailed positive steps toward treatment, and many inexperienced leaders who had not worked with complex drug treatment legislation received appointments; most were Trump supporters.³⁰

Consequently, Mann’s report features a CDC chart reflecting a slight decrease in opioid deaths in 2018, then a notable rise again in 2019.³¹ In addition, states and local governments employed steps against the growing national crisis.³² Still, critics credibly complained of no national plan administered by the ONDCP, the federal agency responsible for overseeing drug policy funds and addressing the Opioid Crisis.³³ As a result, the Office of Government Accountability (“OGA”) audited the ONDCP issuing a comprehensive audit report in late 2020. Auditors reached the following conclusions:

ONDCP is responsible for leading the nation’s fight against a persistent drug epidemic that continues to devastate Americans’ lives. However, the 2019 National Drug Control Strategy does not fully comply with the law, and the agency has not developed key planning elements to help ensure it will meet its significant additional responsibilities under the SUPPORT Act.³⁴

Trump’s term ended with the ONDCP still addressing the OGA audit report list of compliance recommendations.³⁵ The opioid epidemic was a significant part of President Joseph Biden’s campaign platform; he drafted an ambitious proposal

29. Brian Mann, *Opioid Crisis: Critics Say Trump Fumbled Response to Another Deadly Epidemic*, NAT’L PUB. RADIO, (Oct. 29, 2020, 5:01 AM), <https://www.npr.org/2020/10/29/927859091/opioid-crisis-critics-say-trump-fumbled-response-to-another-deadly-epidemic>.

30. *Id.*

31. *Id.* (citing Ahmad FB, Rossen LM & Sutton P., *Provisional Drug Overdose Death Counts*, National CTR. FOR HEALTH STAT., <https://www.cdc.gov/nchs/nvss/vsrr/drug-overdose-data.htm> (last updated Apr. 14, 2021)).

32. See *Opioid-Related Data in New York State*, NEW YORK STATE DEP’T OF HEALTH, <https://www.health.ny.gov/statistics/opioid/> (last visited Apr. 19, 2021); see also, *Opioid Overdose Prevention*, MINN. DEP’T OF HEALTH, <https://www.health.state.mn.us/communities/opioids/> (last visited Apr. 19, 2021).

33. See *Opioid-Related Data in New York State*, *supra* note 32; *Opioid Overdose Prevention*, *supra* note 32; see generally, *Baltimore City’s Response to the Opioid Epidemic*, BALT. CITY HEALTH DEP’T, <https://health.baltimorecity.gov/opioid-overdose/baltimore-city-overdose-prevention-and-response-information> (last visited Apr. 19, 2021); *The Opioid Crisis in Illinois: Data and the State’s Response*, STATE OF ILL.: DEP’T OF HUM. SERVS. (2017), https://www.dhs.state.il.us/OneNetLibrary/27896/documents/OpioidCrisisInIllinois_051617.pdf; *Opioid Crisis Response*, MO. DEP’T OF MENTAL HEALTH, <https://dmh.mo.gov/opioid-crisis-response> (last visited Apr. 19, 2021).

34. U.S. GOV’T ACCOUNTABILITY OFF., GAO-20-124, DRUG CONTROL: THE OFFICE OF NATIONAL DRUG CONTROL POLICY SHOULD DEVELOP KEY PLANNING ELEMENTS TO MEET STATUTORY REQUIREMENTS 29 (2019), <https://www.gao.gov/assets/710/703390.pdf>.

35. See generally, Mann, *supra* note 29.

titled: “The Biden Plan to End the Opioid Crisis.”³⁶ The vital difference between the Trump and Biden plans includes Biden’s commitment to maintaining the Affordable Care Act (“ACA”), allowing treatment and mental health coverage under the ACA, and emphasizing the need to reach each person who needs the services.³⁷

Since Biden’s inauguration, critics initially expressed concerns about his first few weeks in office without making executive appointments to key drug oversight agencies, including the ONDCP.³⁸ Additionally, the rise in opioid cases in 2020, partly due to isolation and other conditions influenced by the COVID-19 pandemic, led activists to suggest the need for the Biden administration to recommend individuals for critical positions expeditiously.³⁹ Subsequently, on February 3, 2021, the Drug Policy Alliance (“DPA”) announced its satisfaction with Biden’s appointments after the Biden administration announced the appointment of Regina LaBelle as ONDCP Deputy Director.⁴⁰ DPA Executive Director Cassandra Frederique commented on LaBelle’s appointment and proposed agenda:

We are encouraged by this announcement by the Biden Administration and to see that the Office of National Drug Control Policy, for once, has an agenda that seems to be more focused on public health and curbing the overdose crisis—which has been exacerbated by the pandemic—than failed interdiction efforts. The priorities, and Biden picking people with personal experience and public health backgrounds to lead them, reflect much of what we have been urging them to prioritize, such as racial equity, harm reduction and lifting barriers for people to access medication for opioid use disorder.⁴¹

As discussed, policy and criminal justice responses to the opioid epidemic have been overwhelmingly compassionate and treatment-oriented. The media has generally portrayed opioid addicts, primarily white (addicted to legal or illegal drugs), as victims, not criminals. And often, white opioid abusers are not described as drug addicts; the above are notable facts to ponder as we explore the War on Drugs laws and policies in Part III.⁴²

36. *The Biden Plan to End the Opioid Crisis*, BIDEN HARRIS, <https://joebiden.com/opioidcrisis/> (last visited Apr. 19, 2021).

37. *Id.*

38. Brian Mann, *Biden Administration Criticized for Delay in Tackling Opioid Crisis*, NAT’L PUB. RADIO (Jan. 26, 2021, 4:17 PM), <https://www.npr.org/2021/01/26/960860326/biden-administration-criticized-for-delay-in-tackling-opioid-crisis>.

39. *Id.*

40. Cassandra Frederique, *Statement on Biden’s ONDCP Appointees & First 100 Days Priorities*, WE ARE THE DRUG POL’Y ALL. (Feb. 3, 2021), <https://drugpolicy.org/press-release/2021/02/statement-bidens-ondcp-appointees-first-100-days-priorities>; see also *Regina LaBelle Appointed as Acting Director of Office of National Drug Control Policy*, O’NEILL INST. (Jan. 26, 2021), <https://oneill.law.georgetown.edu/news/regina-labelle-appointed-as-acting-director-of-office-of-national-drug-control-policy/>.

41. Frederique, *supra* note 40.

42. See Isha Weerasinghe, et al., *Between the Lines: Understanding Our Country’s Racialized Response to the Opioid Overdose Epidemic*, CLASP (2020),

III. WAR ON DRUGS: LAWS AND POLICIES

Historians and scholars generally attribute the beginning of mass incarceration to President Richard Nixon's call for war, initiated not against a foreign enemy but drugs. The war ultimately hurt black men and communities of color the most. But overcriminalization of black people did not begin with the Nixon administration; it started soon after the abolition of slavery in 1865. By enacting unjust State laws called Black Codes and the systemic Convict Lease System, segregationists placed nineteenth-century black men in southern states in prison at an alarming rate.⁴³

Black Codes enacted against blacks mimicked practices from the slavery era.⁴⁴ Additionally, black men were often arrested and sentenced to uncompensated, cruel, inhumane hard labor on plantations and other organizations under the Convict Lease System for conduct as minor as not carrying a pass in public areas.⁴⁵ This system was the beginning of the overcriminalization and disparate incarceration of black men.⁴⁶

Racial injustice in criminal justice proceeded into the twentieth century. Black people, men, in particular, have often been accused of crimes that they did not commit.⁴⁷ Attorney Bryan Stevenson observes the pattern of blacks' maltreatment, noting: "Nowhere was the animus toward black people more evident than in the criminal justice system."⁴⁸ Many scholars argue that President Richard M. Nixon initiated the War on Drugs as a war against black men and communities of color.⁴⁹ Scholar Michelle Alexander explains:

For more than a decade—from the mid-1950s until the late 1960s—conservatives systematically and strategically linked opposition to civil rights legislation to calls for law and order, arguing that Martin Luther

<https://www.clasp.org/sites/default/files/publications/2020/02/2020betweenthelines.pdf>; see also Brian Broome, *Amid the Opioid Epidemic, White Means Victim, Black Means Addict*, THE GUARDIAN (Apr. 28, 2018), <https://www.theguardian.com/us-news/2018/apr/28/opioid-epidemic-selects-white-victim-black-addict>.

43. See *Black Codes and Pig Laws, Slavery by Another Name*, PBS, <https://www.pbs.org/tpt/slavery-by-another-name/themes/black-codes/> (last visited Apr. 19, 2021) [hereinafter *Black Codes*]; see also *Convict Leasing, Slavery by Another Name*, PBS, <https://www.pbs.org/tpt/slavery-by-another-name/themes/convict-leasing/> (last visited Apr. 19, 2021) [hereinafter *Convict Leasing*].

44. See *Black Codes*, supra note 43; Cynthia Elaine Tompkins, *Title VII At 50: The Landmark Law Has Significantly Impacted Relationships In The Workplace And Society, But Title VII Has Not Reached Its True Potential*, 89 ST. JOHN'S L. REV. 693, 750 (2015) (showing that Black Codes deprived African Americans of basic rights).

45. See *Convict Leasing*, supra note 43.

46. See generally, Ruth Delaney, et al., *American History, Race, and Prison*, VERA: REIMAGINING PRISON WEB REPORT, <https://www.vera.org/reimagining-prison-web-report/american-history-race-and-prison> (last visited Apr. 19, 2021).

47. E.g., *Powell v. Alabama*, 287 U.S. 45 (1932).

48. Bryan Stevenson, et al. *Policing the Black Man* 13 (2018).

49. See MICHELLE ALEXANDER, *THE NEW JIM CROW*, 40–47 (2012).

King Jr.'s philosophy of civil disobedience was a leading cause of crime. . . . In the words of then-vice president Richard Nixon, the increasing crime rate "can be traced directly to the spread of the corrosive doctrine that every citizen possesses an inherent right to decide for himself which laws to obey and when to disobey them."⁵⁰

For most of the twentieth century, States and the Federal Government regulated and prohibited the use and distribution of illegal drugs.⁵¹ But extensive enforcement of drug laws did not occur until the 1970s when President Nixon aggressively targeted African American communities.⁵² Nixon was known as a law-and-order president, declaring "total war" on addiction and calling it "public enemy No. 1."⁵³ After Nixon announced the war initiative, he signed two initial drug enforcement laws.⁵⁴ Then, in 1973, he sent Congress a Reorganization Plan "which proposed the creation of a single federal agency to consolidate and coordinate the government's drug control activities."⁵⁵ As a result, the Drug Enforcement Administration ("DEA") was formed on July 1, 1973, after Nixon combined several agencies: "the Bureau of Narcotics and Dangerous Drugs, the Office for Drug Abuse Law Enforcement, the Office of National Narcotics Intelligence, elements of the U.S. Customs Service that worked in drug trafficking intelligence and investigations, and the Narcotics Advance Research Management Team."⁵⁶ In the first year of operation [1973], employees included 1,470 special agents and 1,428 support staff with a \$75,000,000 budget; "federal funding for President Nixon's treatment and rehabilitation programs reached \$420 million."⁵⁷

The Senate Committee on Government Operations noted six "benefits anticipated from the creation of the DEA." The list ranged from "coordinating federal drug enforcement efforts with those of state and local authorities" to setting the agency up as a "superagency to provide the momentum needed to coordinate all federal efforts related to drug enforcement outside the Justice Department, especially the gathering of intelligence on international narcotics

50. *Id.* at 50–51 (citing Richard Nixon, *If Mob Rule Takes Hold in U.S.*, U.S. NEWS AND WORLD REP., Aug. 15, 1966, at 64).

51. See S.B. Friedman et al., *Narcotic Addict Rehabilitation Act - Its Impact on Federal Prisons*, 11 CONTEMP. DRUG PROBS. 101 (1982). To avoid incarceration or receive a shorter sentence many drug users classified as addicts agree to participate in treatment, a procedure some consider overbearing and coercive.

52. See *Public Enemy No. 1*, N.Y. TIMES, Mar. 22, 1972, at 46.

53. *Id.*

54. Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, 84 Stat. 1236 (codified as amended in scattered sections of 21 U.S.C.); Drug Abuse Office and Treatment Act of 1972, Pub. L. 92-255, 86 Stat. 65 (codified as amended in scattered sections of 21 U.S.C.).

55. Drug Enforcement Admin. History: 1970-1975, *The DEA Years 1970-1975*, 34, <https://www.dea.gov/sites/default/files/2018-07/1970-1975%20p%2030-39.pdf>, (last visited Apr. 12, 2021). The Reorganization Plan was designated "Reorganization Plan No. 2). *Id.*

56. *Organization, Mission and Functions Manual: Drug Enforcement Administration*, THE U.S. DEP'T OF JUST.: JUST. MGMT. DIV., <https://www.justice.gov/jmd/organization-mission-and-functions-manual-drug-enforcement-administration> (last visited Apr. 12, 2021).

57. *Staffing & Budget*, DRUG ENF'T ADMIN., <https://www.dea.gov/staffing-and-budget> (last visited Apr. 12, 2021) [hereinafter *Staffing & Budget*]. See Chris Barber, *Public Enemy Number One: A Pragmatic Approach to America's Drug Problem*, RICHARD NIXON FOUND. (Jun. 29, 2016), <https://www.nixonfoundation.org/2016/06/26404/> (last visited May 4, 2021).

smuggling.”⁵⁸ Collins English Dictionary defines Superagency as “a very large agency.”⁵⁹ Nixon made sure that the agency met the definition.⁶⁰ Despite the administration’s drug treatment pursuits, the objective to pursue illegal drug sources seems to have been paramount.⁶¹ Although researching and educating the public on “drug abuse and its tragic effects” was a part of the DEAs mission, the agency is known for its foremost “work with state and local governments in their crackdown on illegal trade in drugs and narcotics.”⁶²

It is worth noting that many Republicans are generally opposed to expanding government operations, complaining about big government. Although a Republican, Nixon did not hesitate to propose and set forth the plan for the DEAs formation.⁶³ Historical records describe part of the agency’s administrative plan:

By the early 1970s, drug use had not yet reached its all-time peak, but the problem was sufficiently serious to warrant a serious response. Consequently, the Drug Enforcement Administration (DEA) was created in 1973 to deal with America’s growing drug problem.⁶⁴

In 2019, DEA employed 4,924 special agents.⁶⁵ The DEA retained 5,245 support staff; the agency had a 3.136-billion-dollar budget, 222 offices spread throughout the United States, and 91 additional “foreign offices in 70 countries.”⁶⁶ Indisputably, the agency started as a superagency. Since that time, it has experienced super growth in staff, offices, and budget.⁶⁷ In May 2020, former Attorney General William P. Barr stated that the DEA is “the premier drug enforcement organization in the world.”⁶⁸

Much of the DEA’s consistent growth over nearly five decades stems from Nixon’s early support of the agency’s drug enforcement mission.⁶⁹ About six months

58. *The DEA Years 1970-1975*, *supra* note 55, at 34.

59. *Collins English Dictionary*, collinsdictionary.com, <https://www.collinsdictionary.com/us/dictionary/english/superagency> (last visited Apr.10, 2021).

60. *See generally, The DEA Years 1970-1975*, *supra* note 55, at 34–39 (discussing Nixon’s Reorganization Plan No. 2 and the DEA’s immense mission).

61. *See generally The DEA Years 1970-1975*, *supra* note 55, at 34–39; *DEA Fact Sheet*, DRUG ENF’T ADMIN. (Mar. 2014), <https://web.archive.org/web/20141127132143/http://www.dea.gov/docs/factsheet.pdf>, (last visited May 4, 2021).

62. *The DEA Years 1970-1975*, *supra* note 55, at 31; *see also, DEA Mission Statement*, DRUG ENF’T ADMIN., <https://www.dea.gov/mission> (last visited Apr. 12, 2021).

63. *The DEA Years 1970-1975*, *supra* note 55, at 30.

64. *The DEA Years 1970-1975*, *supra* note 55, at 30.

65. *Staffing & Budget*, *supra* note 57.

66. *Staffing & Budget*, *supra* note 57; *see also, FY 2019 Budget Request at a Glance*, DRUG ENF’T ADMIN., <https://www.justice.gov/jmd/page/file/1033151/download> (last visited Apr. 12, 2021).

67. *FY 2019 Budget Request at a Glance*, *supra* note 66.

68. Press Release, Attorney General Barr Announces Timothy J. Shea as New Acting Administrator of Drug Enforcement Administration, DRUG ENF’T ADMIN., <https://www.dea.gov/press-releases/2020/05/19/attorney-general-barr-announces-timothy-j-shea-new-acting-administrator> (last visited Apr. 12, 2021).

69. *See The DEA Years 1970-1975*, *supra* note 55, at 30–35.

before he announced the War on Drugs, the International Narcotic Enforcement Officers' Association presented him a "certificate of special honor in recognition of the outstanding loyalty and contribution to support narcotic law enforcement."⁷⁰ Scholars note that despite accolades from law enforcement, Nixon's War on Drugs initiative was an appalling failure. Professor Mark J. Perry argues, Nixon "launched a failed, costly and inhumane federal war on Americans that continues to today."⁷¹

Perry and other policy analysts find Nixon's former counsel, John Ehrlichman's reflections on the War on Drugs, notable but disturbing. In a 1994 interview, reporter Dan Baum asked Ehrlichman to explain: "How did the United States entangle itself in a policy of drug prohibition that has yielded so much misery and so few good results?"⁷² Baum's interview with Ehrlichman is informative:

"You want to know what this was really all about?" he [Ehrlichman] asked with the bluntness of a man who, after public disgrace and a stretch in federal prison, had little left to protect. "The Nixon campaign in 1968, and the Nixon White House after that, had two enemies: the antiwar left and black people. You understand what I'm saying? We knew we couldn't make it illegal to be either against the war or blacks, but by getting the public to associate the hippies with marijuana and blacks with heroin, and then criminalizing both heavily, we could disrupt those communities. We could arrest their leaders, raid their homes, break up their meetings, and vilify them night after night on the evening news. Did we know we were lying about the drugs? Of course we did."⁷³

Nixon's War on Drugs is not without supporters. One reviewer, albeit from the Nixon Foundation, warns that a fair review of the War on Drugs requires a cautious evaluation.⁷⁴ In a Nixon Foundation article, Chris Barber admits that Nixon disliked the "drug culture and especially drug pushers."⁷⁵ However, according to Barber, Nixon, aware of the increase in crime and widespread national drug problem, wanted to initiate a response that would be long-lasting and tackle the pending 1970s problem of innumerable Vietnam soldiers returning addicted to heroin.⁷⁶ Barber acknowledges Nixon's efforts "to help build up the struggling Bureau of Narcotics and Dangerous Drugs."⁷⁷ Still, his article endeavors to persuade readers that Nixon's chief concern was the care and treatment of addiction, not arrests and prosecutions.

70. *The DEA Years 1970-1975*, *supra* note 55, at 30.

71. Mark J. Perry, *The Shocking Story Behind Richard Nixon's 'War on Drugs' that Targeted Blacks and Anti-war Activists*, AM. ENTER. INST.: BLOG POST (June 14, 2018), <https://www.aei.org/carpe-diem/the-shocking-and-sickening-story-behind-nixons-war-on-drugs-that-targeted-blacks-and-anti-war-activists/>.

72. Dan Baum, *Legalize It All: How to Win the War on Drugs*, HARPER'S MAG. (Apr. 2016), <https://harpers.org/archive/2016/04/legalize-it-all/>.

73. *Id.*

74. See Barber, *supra*, note 57.

75. Barber, *supra*, note 57.

76. Barber, *supra*, note 57.

77. Barber, *supra*, note 57.

Using phrases such as, "Nixon wondered aloud," Barber, without citing his source of information, claims Nixon was more focused on the issues of supply and demand than the narcotic agency's success in increasing drug seizures, arrests, and investigations.⁷⁸ Barber notes that Nixon sought advice from a leading drug treatment specialist, Dr. Jerome Jaffe, and followed his recommendation to test soldiers returning from Vietnam. Jaffe proposed: "If a GI tested positive for opiates, they would not be subject to court-martial or imprisonment, but to a mandatory stay in Vietnam for a period of two weeks or so for detox."⁷⁹ Barber maintains that this plan was "essentially decriminalizing drug use."⁸⁰ Yet, Barber's conclusion contradicts scholars who argue that forced treatment to avoid incarceration is disfavored and coercive.

Barber sought to minimize Nixon's push for arrests and incarceration, stressing that he was most concerned with reducing drug addiction in America.⁸¹ Yet, it is unmistakable, Nixon started the War on Drugs. His provocative words, often disparaging black people, and incitement of a political war gave law enforcement the green light to target people of color and their communities. Nixon's public statements, labeling black citizens as criminals, were harmful; the impact was long-lasting. Reporter Dan Baum's evaluation of the enduring consequence is noteworthy:

"Nixon's invention of the War on Drugs as a political tool was cynical, but every president since — Democrat and Republican alike — has found it equally useful for one reason or another. Meanwhile, the growing cost of the Drug War is now impossible to ignore: billions of dollars wasted, bloodshed in Latin America and on the streets of our own cities, and millions of lives destroyed by draconian punishment that doesn't end at the prison gate; one of every eight black men has been disenfranchised because of a felony conviction."⁸²

If the War on Drugs rhetoric had ceased after the Nixon administration, America might not have reached the untenable enormous number of incarcerated people in Federal and State prisons and jails.⁸³ But as Reporter Baum indicates, most of Nixon's successors did not hesitate: They followed his regrettable example, promoting and extending the War on Drugs, predominantly against black people and communities of color.⁸⁴ Consider the Ronald Reagan, George H.W. Bush, and

78. Barber, *supra*, note 57.

79. Barber, *supra*, note 57.

80. Barber, *supra*, note 57.

81. Barber, *supra*, note 57.

82. Perry, *supra* note 71; Baum, *supra* note 72.

83. See *People in Jail and Prison in 2020*, VERA INST. OF JUST. (Jan. 2021) (discussing the 1.8 million people incarcerated in United States jails and prisons in 2020 and the decrease in numbers from 2019, following COVID-19 consequences; noting, also, that the United States incarcerated population remains unprecedented and egregious).

84. See Baum, *supra* note 72.

William Jefferson Clinton presidential pronouncements and War on Drugs initiatives and consequences.

Like Nixon, President Ronald Reagan unhesitatingly advanced the War on Drugs by signing legislation with significant prohibitions for drug use and dealing.⁸⁵ The Anti-Drug Abuse Act included mandatory minimum penalties with much harsher sentences “for crack-associated with black—than powder cocaine, associated with whites.”⁸⁶ As a result, the prison population, particularly for black men, grew substantially.⁸⁷ Federal, State, and local prison populations kept growing into and throughout the one-term President George H.W. Bush administration, again with black men most impacted.⁸⁸ History Professor Matthew Pembleton ably sums up George H.W. Bush’s role in advancing the War on Drugs:

Ronald Reagan may have reoriented public attitudes about drugs when he pronounced in 1982, “Drugs are bad, and we’re going after them . . . And we’re going to win the war on drugs.” But, it was Bush — and later, Bill Clinton — who put real resources into the effort.

When Bush took office, the federal drug control budget was around \$5 billion. When he left office in 1993, it was over \$12 billion. This was the sharpest escalation in the history of the drug war and it locked the country into a strategy of punishment, deterrence and intolerance.⁸⁹

In 1994, President William Jefferson “Bill” Clinton emerged foremost in the protracted nonpartisan series of presidents’ wars against drugs.⁹⁰ Clinton promoted a robust crime bill with three-strikes mandatory life penalties and increased police presence in communities: solidifying his position as a strong law enforcement president.⁹¹ The 1994 federal crime bill is the largest in history.⁹² States followed, initiating similar mandatory and increased sentences and penalties.⁹³ Many believe that Clinton promoted the crime bill and the War on Drugs to outdo Republicans, proving that Democrats were tougher on crime.⁹⁴ After the bill passed and Clinton

85. Exec. Order No. 12368, 47 Fed. Reg. 27,843 (June 24, 1982), <https://www.archives.gov/federal-register/codification/executive-order/12368.html>; see also, *Remarks on Signing Executive Order 12368, Concerning Federal Drug Abuse Policy Functions*, RONALD REAGAN PRESIDENTIAL LIBRARY & MUSEUM, <https://www.reaganlibrary.gov/archives/speech/remarks-signing-executive-order-12368-concerning-federal-drug-abuse-policy> (Jun. 24, 1982).

86. See ALEXANDER, *supra* note 49, at 53.

87. See Monique Ositelu, *Mass Incarceration in the U.S.*, NEW AMERICA, 13–15, https://d1y8sb8igg2f8e.cloudfront.net/documents/Interior_Text_-_Life_Beyond_Bars_v3.pdf, (last visited Apr. 12, 2021).

88. Matthew Pembleton, *George H.W. Bush’s Biggest Failure? The War on Drugs*, WASH. POST (Dec. 6, 2018), <https://www.washingtonpost.com/outlook/2018/12/06/george-hw-bushs-biggest-failure-war-drugs/>.

89. *Id.*

90. Udi Ofer, *How the 1994 Crime Bill Fed the Mass Incarceration Crisis*, ACLU: THE CAMPAIGN (June 4, 2019, 2:30 PM), <https://www.aclu.org/blog/smart-justice/mass-incarceration/how-1994-crime-bill-fed-mass-incarceration-crisis>.

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.*

signed it into law, officials built many prisons, and innumerable people, primarily black men, were incarcerated.⁹⁵ Clinton's crime bill set in motion the Democratic Party's decade-long push for stringent drug laws and enforcement, a competitive weapon used against Republican opponents.⁹⁶

In 2015, Clinton acknowledged that the crime bill did more harm than good, but he covered his professed remorseful sentiments with explanations: "We had gang warfare on the streets. We had little children being shot dead on the streets who were just innocent bystanders standing in the wrong place."⁹⁷ After offering arguments for the enormous crime bill and the drug war, Clinton flipped back to ostensibly remorse, seeming to weigh the bill's harms against its benefits: "The good news is we had the biggest drop in crime in history. The bad news is we had a lot of people who were locked up, who were minor actors, for way too long."⁹⁸ Bill Clinton's contributions to the growth of mass incarceration are substantial.⁹⁹ Indeed, whether Clinton was remorseful or not, the crime bill's massive law enforcement objective was indisputable from inception: The Department of Justice fact sheet announcing details of the astonishingly broad legislation was unprecedented, containing enormous allocations for law enforcement programs, grants for prosecutors, drug courts, harsh criminal provisions, including three strikes mandatory life imprisonment, and substantial funding for the building of new correctional facilities:

It is the largest crime bill in the history of the country and will [did] provide for 100,000 new police officers, \$9.7 billion in funding for prisons and \$6.1 billion in funding for prevention programs which were designed with significant input from experienced police officers.¹⁰⁰

Clinton's war continued throughout President George W. Bush's subsequent term, as he, too, spoke of the need to remain tough on drug abuse enforcement.¹⁰¹ Then, President Barack Obama also requested huge funds for drug control

95. See *id.*; ALEXANDER, *supra* note 49, at 56. See generally, Rayshawn Ray & William A. Galston, *Did the 1994 Crime Bill Cause Mass Incarceration?*, BROOKINGS: FIXGOV (Aug. 28, 2020), <https://www.brookings.edu/blog/fixgov/2020/08/28/did-the-1994-crime-bill-cause-mass-incarceration>.

96. Ofer, *supra* note 90; ALEXANDER, *supra* note 49, at 56; Ray & Galston, *supra* note 95.

97. Dan Merica, *Bill Clinton Says He Made Mass Incarceration Issue Worse*, CNN: POL. (July 15, 2015, 5:25 PM), <https://www.cnn.com/2015/07/15/politics/bill-clinton-1994-crime-bill>.

98. *Id.*

99. Ofer, *supra* note 90. As ACLU Political Director Ubi Ofer notes, some "[d]efenders of the [crime] law deny that it created the problem of mass incarceration . . . [B]ut it certainly encouraged mass incarceration to grow even further."

100. *Violent Crime Control and Law Enforcement Act of 1994: Fact Sheet*, U.S. DEP'T OF JUST., (Oct. 24, 1994), <https://www.ncjrs.gov/txtfiles/billfs.txt>.

101. See U.S. DEP'T OF STATE, PRESIDENT BUSH ANNOUNCES DRUG CONTROL STRATEGY (Feb. 12, 2002). See also *A Brief History of the Drug War*, DRUG POL'Y ALL., <https://drugpolicy.org/issues/brief-history-drug-war> (last visited Apr. 10, 2021).

programs during his two terms.¹⁰² Obama pushed for “more than \$31.1 billion” for “public health and public safety in the second term.”¹⁰³ However, during President Obama’s two-term administration, there were notable changes to reduce disparity in drug case prosecutions. Congress passed the Fair Sentencing Act, and Obama signed the law in 2010.¹⁰⁴ Most notably, the grotesque disparities between crack-cocaine and powder-cocaine changed from 100:1 to 18:1.¹⁰⁵ As noted earlier, crack-cocaine is generally attributable to blacks and powder-cocaine to whites.¹⁰⁶ Therefore, even with the positive change of the reduced 18:1 ratio, sentences for blacks are still higher, leaving longer mandated penalties for crack-cocaine convictions, essentially the same substance as powder-cocaine.¹⁰⁷

The general assessment is that the War on Drugs continued during President Donald J. Trump’s Administration.¹⁰⁸ Despite Trump’s signing of the late 2018 First Step Act,¹⁰⁹ which includes provisions to reduce the prison population, most scholars maintain that Trump prolonged the War on Drugs, primarily through his rhetoric.¹¹⁰ Months before signing the criminal reform legislation, Trump called for stiffer penalties for drug traffickers: “‘We are really going after the traffickers; I have always said that’s the biggest thing,’ Trump said in August. ‘And, frankly, the punishment is getting stronger and stronger. Maybe, at some point, we’ll get very smart as a nation and give them the ultimate punishment.’”¹¹¹

Media accounts widely reported that Trump targeted drug dealers, mainly immigrants and those living in inner-city neighborhoods.¹¹² Drug Policy Alliance advocate Maria McFarland Sánchez-Moreno, argues: “It’s just very easy to pin the [opioid] overdose crisis on immigrants . . . and then say that you’re doing something

102. See *FACT SHEET: Administration’s Drug Control Budget Represents Balanced Approach to Public Health and Public Safety* (Feb. 9, 2016), <https://obamawhitehouse.archives.gov/the-press-office/2016/02/09/fact-sheet-administrations-drug-control-budget-represents-balanced> (last visited May 4, 2021).

103. *Id.*

104. Fair Sentencing Act of 2010, 21 U.S.C. § 801 (2012).

105. See generally *id.*; see also German Lopez, *How Obama Quietly Reshaped America’s War on Drugs*, (Jan. 19, 2017) <https://www.vox.com/identities/2016/12/19/13903532/obama-war-on-drugs-legacy>.

106. See Fair Sentencing Act; Lopez, *supra* note 105; ALEXANDER, *supra* note 49, at 48–53.

107. Fair Sentencing Act; Lopez, *supra* note 105; ALEXANDER, *supra* note 49, at 48–53; see Equal Act of 2021, H.R. 1693, 117th Cong. (2021) (Rep. Hakeem S. Jeffries introduced the Equal Act, aiming to ultimately change the disparate 18:1 ratio). See also, *Eliminating Disparities in Sentencing*, AM. BAR ASS’N (July 26, 2021), https://www.americanbar.org/advocacy/governmental_legislative_work/publications/washingtonletter/july-2021-wl/equal-act-0721wl/?q=&wt=json&start=0 (“On July 21, 2021, the House Judiciary Committee voted 36-5 to approve H.R. 1693, the Eliminating a Quantifiably Unjust Application of Law (EQUAL) Act. The Act seeks to eliminate the disparity in authorized sentences for offenses involving crack versus powder cocaine.”).

108. Ayesha Rascoe, *How Trump Went from ‘Tough On Crime’ To ‘Second Chance’ For Felons*, NPR: POLITICS (Dec. 17, 2018, 5:00 AM), <https://www.npr.org/2018/12/17/676771335/how-trump-went-from-tough-on-crime-to-second-chance-for-felons>.

109. FIRST STEP Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194 (codified as amended in scattered sections of 18 U.S.C.).

110. See Rascoe, *supra* note 108.

111. Rascoe, *supra* note 108.

112. Kristen Gwynne, *The War on Drugs Is Working*, PROGRESSIVE (June 1, 2018), <https://progressive.org/magazine/the-war-on-drugs-is-working>.

about it by going after immigrants.”¹¹³ Sánchez-Moreno draws support for her argument from Trump’s January 30, 2018, State of the Union address, where he stated: “For decades, open borders have allowed drugs and gangs to pour into our most vulnerable communities.”¹¹⁴

Critics insist that Trump was disingenuous about his push to address the opioid addiction epidemic, insisting his real objective was to advance “the policies important to him and his base[,]” policies directed toward marginalizing immigrants, and generally people of color.¹¹⁵ Sánchez-Moreno adopts that notion; thus, she essentially places Trump’s intentions in harmony with Ehrlichman’s assessment of Nixon’s 1971 scheme.¹¹⁶ Moreover, she maintains that Trump’s frequent proclamations about criminal, drug-using immigrants were his attempt to divert attention to his immigration border wall plan.¹¹⁷ Notably, during a New Hampshire speech in 2018, Trump stated that drug dealers should receive the death penalty.¹¹⁸

Despite Sánchez-Moreno’s contention that “the War on Drugs is operating exactly as it was meant to” during the Trump administration, she remained hopeful, noting: “We have an opportunity now to get things right, to move toward a more health-based approach to problematic drug use . . . It’s critically important that as we do that, we be very conscious of who is going to benefit and who is getting hurt by law enforcement response.”¹¹⁹ That was the hope, the reality: Trump signed the First Step Act, but disparities between whites and blacks, immigrants, and other people of color in the criminal justice system remain.¹²⁰ Most notably, the incongruence between crack-cocaine and powder-cocaine sentences, albeit reduced in 2010, remains.¹²¹

As long as disparities persist in arrests, prosecutions, and sentencing for possession and distribution of drugs, American jails and prisons will routinely hold more black men, especially for extended periods. Nevertheless, aspiring journalists, scholars, and current criminal justice reformers encourage future administrations to cease using damaging rhetoric that marginalizes and criminalizes black people

113. *Id.*

114. *Id.* See *State of the Union 2018: Read the Full Transcript*, CNN: Pol. (Jan. 31, 2018, 4:12 AM), <https://www.cnn.com/2018/01/30/politics/2018-state-of-the-union-transcript>.

115. Gwynne, *supra* note 112.

116. See *generally* Gwynne, *supra* note 112.

117. Gwynne, *supra* note 112.

118. Gwynne, *supra* note 112.

119. Gwynne, *supra* note 112.

120. *E.g.*, Jin Woo Kim et al., *Treatment Versus Punishment: Understanding Racial Inequalities in Drug Policy*, 45 J. HEALTH POL., POL’Y & L. 177 (2020); EZEKIEL EDWARDS ET AL., ACLU, A TALE OF TWO COUNTRIES: RACIALLY TARGETED ARRESTS IN THE ERA OF MARIJUANA REFORM (2020).

121. See *Equal Act of 2021*, *supra* note 107; see also, Gabby Birenbaum, *The Equal Act Would Finally Close the Cocaine Sentencing Disparity*, CONGRESSMAN BOBBY SCOTT, (Mar. 19, 2021), <https://bobbyscott.house.gov/media-center/in-the-news/the-equal-act-would-finally-close-the-cocaine-sentencing-disparity>.

and to condemn derogatory speech and conduct.¹²² President Joseph R. Biden's campaign promises favored removing the 18:1 crack-cocaine to powder-cocaine disparity, ending cash bail, and eliminating any remaining mandatory minimum sentences.¹²³ Biden also proposed to eliminate private prisons operating under federal oversight.¹²⁴ The Biden proposals are needed to reduce mass incarceration.

Additionally, drastic steps are required to deter drug addiction.¹²⁵ Reporter Dan Baum's radical proposal to address the problem might not be a pragmatic solution. Still, it is worth noting a diverse point of view to conclude the War on Drugs discussion:

We cannot begin to enjoy the benefits of managing drugs as a matter of health and safety, instead of as a matter of law enforcement, until the drugs are legalized at every level of American jurisprudence, just as alcohol was re-legalized when the United States repealed the Eighteenth Amendment in 1933.¹²⁶

IV. DISPARITIES AND MASS INCARCERATION

Part III set forth a conscientious study of presidents' drug policies from Nixon to Trump and addressed Biden's campaign promises, including discussing his early-term drug policy initiatives. The intention: To explain the destructive pursuits, labeled a War on Drugs, by many law-and-order or tough-on-crime Republican and Democrat presidents. Additionally, the media has played a significant role in stereotyping black people during the era. The group most impacted by stereotypical rhetoric, racial profiling, and War on Drugs tactics are black men and African American communities. The incalculable disparities and damage are topics of discussion in the examination that follows.

A. Rates of Incarceration Higher for Black People

In late 2020, the Bureau of Justice Statistics ("BJS") reported the 2019 "combined state and federal [incarceration] rate [of] 419 [sentenced prisoners] per

122. See generally Lisi Merkley, *Racial Rhetoric and the Election: Can Words Hurt a Candidate's Election Chances?*, DAILY UNIVERSE (Oct. 26, 2020), <https://universe.byu.edu/2020/10/26/race-and-the-2020-presidential-election/>; *The Biden Plan for Strengthening America's Commitment to Justice*, BIDEN HARRIS, <https://joebiden.com/justice/> (last visited Apr. 19, 2021).

123. See *The Biden Plan for Strengthening America's Commitment to Justice*, *supra* note 122.

124. *The Biden Plan for Strengthening America's Commitment to Justice*, *supra* note 122; see also, Lauren-Brooke Eisen, *Breaking Down Biden's Order to Eliminate DOJ Private Prison Contracts*, BRENNAN CTR. FOR JUST. (Aug. 27, 2021), <https://www.brennancenter.org/our-work/research-reports/breaking-down-bidens-order-eliminate-doj-private-prison-contracts> (After the inauguration in January 2021, President Biden issued an executive order "directing the attorney general not to renew Justice Department contracts with privately operated criminal detention facilities." This positive step, however, does not eliminate private prisons operating pursuant to contracts with other federal and state agencies.).

125. Baum, *supra* note 72.

126. Baum, *supra* note 72 (Dan Baum provides numerous explanations for why the benefits of legalizing all drugs outweigh the substantial harm, noting reasons such as, a significant reduction in the prison population, if current addicts are released and those in the future are not incarcerated for purchasing illegal drugs.).

100,000 U.S. residents.¹²⁷ The numbers reflect prisoners “sentenced to more than one year”¹²⁸ The agency’s press release headline: “U.S. Imprisonment Rate at Its Lowest Since 1995.”¹²⁹ BJS further boasts: “The imprisonment rate in 2019 marked a 17% decrease from 2009 and a 3% decrease from 2018, and it marked the 11th consecutive annual decrease.”¹³⁰ While criminal justice reformers recognize a slight decrease in human beings incarcerated in American prisons, it was only 3% from 2018 to 2019.¹³¹ And a 17% decrease over the past decade is minimal, given the massive numbers of imprisoned people remaining.¹³² As Policy Analyst Alexi Jones explains:

But this framing [BJAs expression of decreased numbers] misses the bigger picture: 1.4 million Americans, who are disproportionately Black, are still incarcerated in state and federal prisons – meaning that the prison population is still five times larger than it was in 1975, before the ‘war on crime’ really took hold and the number of people under correctional control exploded.¹³³

More specifically, Jones adds: “In 1975, there were 216,462 people incarcerated in state prisons, and 24,131, people incarcerated in federal prisons for a combined population of 240,593.”¹³⁴ Substantially different from the “1,430,805” incarcerated in 2019.¹³⁵ Consequently, neither the decade rate of incarceration numbers creeping down nor the slight 2019 reductions are causes for celebration. Moreover, the numbers reported by BJS do not include the thousands of people in local jails.¹³⁶ And in some states, like California, individuals are housed in jails because the prisons are too full, adding to the total mass incarceration numbers.¹³⁷ Reformers call for more substantial decreases and changes in laws, policies, and law enforcement practices.¹³⁸ Policy Analyst Jones estimates that the incarceration rate is not decreasing at a consequential pace; she calculates that it will take decades

127. E. ANN CARSON, U.S. DEP’T OF JUST., PRISONERS IN 2019 (2020).

128. *Id.*

129. Press Release, Kara McCarthy, Dep’t of Just., U.S. Imprisonment Rate at its Lowest Since 1995 (Oct. 22, 2020, 10:00 AM), https://www.bjs.gov/content/pub/press/p19_pr.pdf.

130. *Id.*

131. *Id.*

132. *Id.*

133. Alexi Jones, *New BJS Data: Prison Incarceration Rates Inch Down, but Racial Equity and Decarceration Still Decades Away*, PRISON POL’Y INITIATIVE (Oct. 30, 2020), https://www.prisonpolicy.org/blog/2020/10/30/prisoners_in_2019/.

134. *Id.* at n.1.

135. *Id.*

136. *Id.*

137. *Id.*

138. See, e.g., *id.*; Nazgol Ghandnoosh, *U.S. Prison Decline: Insufficient to Undo Mass Incarceration*, SENT’G PROJECT, (May 19, 2020), <https://www.sentencingproject.org/publications/u-s-prison-decline-insufficient-undo-mass-incarceration/>.

for the Federal and State prison population and black incarceration rate to return to pre-War on Drugs mass incarceration levels.¹³⁹

B. Policing, Prosecution: Implicit Bias

The politically motivated War on Drugs, explained in Part III, exacerbated the improper targeting of black men, added to their over-criminalization, and contributed to the negative portrayal. Indeed, the War on Drugs has disproportionately impacted black men. But if illegal drug use, addiction, and distribution affect both black and white people, why the over-emphasis and over-criminalization of black men? Part IV-B addresses this question by exploring implicit bias, how it impacts police and prosecutors' decisions and dominates accounts of black men.

Like political officials, police and prosecutors, too, have immense discretion and individual biases.¹⁴⁰ Psychologists argue:

Implicit bias, also known as unconscious bias, is 'the bias in judgment and/or behavior that results from subtle cognitive processes (e.g., implicit attitudes and implicit stereotypes) that often operate at a level below conscious awareness and without intentional control.'¹⁴¹

Various sources recognize Mahzarin Banaji and Anthony Greenwald as psychologists who developed the implicit bias concept about twenty-five years ago.¹⁴² Their research findings reveal that subtle unknown perceptions influence everyone's decisions and judgments.¹⁴³ If this is a sound empirical argument, and many psychologists and scholars believe it is, all people have implicit biases. Police perform public safety functions, and prosecutors represent "the people" arguably with various unconscious perceptions and judgments hard to control in their brains.¹⁴⁴ Consequently, scholars maintain that police officers' immense discretion to investigate crimes and make arrests and prosecutors' to issue charging decisions, offer plea bargains, and make sentencing recommendations are guided by biases.

To understand why the concept is called an implicit bias, it is worth noting the definitions of implicit and bias. Merriam-Webster Dictionary defines implicit as

139. Jones, *supra* note 133.

140. See JENNIFER L. EBERHARDT, *BIASED* 47–50 (2020); see also *Promoting Racial Equity in Prosecution*, VERA INST. OF JUST., <https://www.vera.org/securing-equal-justice/promoting-racial-equity-in-prosecution> (last visited Apr. 19, 2021); see also Rachel D. Godsil & HaoYang (Carl) Jiang, *Prosecuting Fairly: Addressing the Challenges of Implicit Bias, Racial Anxiety, and Stereotype Threat*, 40:2 CDDA PROSECUTOR'S BRIEF 142, (2018).

141. IHI Multimedia Team, *How to Reduce Implicit Bias*, INSTITUTE FOR HEALTHCARE IMPROVEMENT (Sept. 26, 2017), <http://www.ihl.org/communities/blogs/how-to-reduce-implicit-bias#:~:text=Implicit%20bias%2C%20also%20known%20as,systematic%20review%20by%20Hal%20and>.

142. Charlotte Ruhl, *Implicit or Unconscious Bias*, SIMPLY PSYCHOLOGY (July 1, 2020), <https://www.simplypsychology.org/implicit-bias.html>.

143. *Id.*

144. See EBERHARDT, *supra* note 140, at 47–50; see also *Promoting Racial Equity in Prosecution*, *supra* note 140.

“present but not consciously held or recognized.”¹⁴⁵ Psychology Today offers the following description of a bias:

A bias is a tendency, inclination, or prejudice toward or against something or someone. Some biases are positive and helpful—like choosing to only eat foods that are considered healthy or staying away from someone who has knowingly caused harm. But biases are often based on stereotypes, rather than actual knowledge of an individual or circumstance. Whether positive or negative, such cognitive shortcuts can result in prejudgments that lead to rash decisions or discriminatory practices.¹⁴⁶

Professor Jennifer Eberhardt, a psychologist, is known for her expert knowledge of implicit bias.¹⁴⁷ In her book, *Biased*, Eberhardt writes about the power of stereotypes to label groups, the universal impact of categorization, and how stereotypes are “culturally generated and culturally specific.”¹⁴⁸ Eberhardt has studied the negative portrayal of black people in America.¹⁴⁹ She explains that reading a black person’s facial expression is hindered by ingrained stereotypes that individuals have associated with black people.¹⁵⁰ So, Eberhardt notes, some who look at a black man misinterpret his expressions as threatening and aggressive.¹⁵¹ For example, she adds, “a black man who is excited might appear angry. Fear can be misread as outrage. Silence taken as belligerence.”¹⁵² Eberhardt’s findings suggest this manner of stereotyping is prevalent in America’s criminal justice system.¹⁵³

For nearly two decades, Professor Eberhardt has trained police officers on implicit bias, informing her awareness of the biases and stereotypes in the criminal justice system.¹⁵⁴ In her acclaimed book, Eberhardt presents a somber example of how implicit biases can become central in officers’ minds.¹⁵⁵ She writes:

“MALE BLACK.” “MALE BLACK.” “MALE BLACK.” This is what officers in Oakland hear, booming from their police radios, hundreds of times every day. It’s the inescapable background track to the chaos of crime-

145. *Implicit*, Merriam-Webster Dictionary (2021).

146. *Bias*, PSYCHOLOGY TODAY, <https://www.psychologytoday.com/us/basics/bias> (last visited Apr. 19, 2021).

147. Alisa Chang, *Can We Overcome Racial Bias? 'Biased' Author Says to Start By Acknowledging It*, NPR (Mar. 28, 2019), <https://www.npr.org/2019/03/28/705113639/can-we-overcome-racial-bias-biased-author-says-to-start-by-acknowledging-it>.

148. See EBERHARDT, *supra* note 140, at 35.

149. EBERHARDT, *supra* note 140, at 35.

150. EBERHARDT, *supra* note 140, at 35.

151. EBERHARDT, *supra* note 140, at 35.

152. EBERHARDT, *supra* note 140, at 35–36.

153. EBERHARDT, *supra* note 140, at 47–54.

154. EBERHARDT, *supra* note 140, at 47.

155. EBERHARDT, *supra* note 140, at 80.

saturated streets. On a typical day, an officer on patrol might hear that dispatched description three hundred times—or twelve hundred times a week, fifty thousand times each year.¹⁵⁶

Eberhardt clarifies that descriptions of other suspects, such as “*FEMALE WHITE*,” are also broadcast over the City of Oakland police radios, but none as frequent as “*MALE BLACK*.”¹⁵⁷ She includes the observation in her book to demonstrate the impact of the repetitive words “*MALE BLACK*.”¹⁵⁸ Eberhardt concludes: “It is implausible to believe that officers—or anyone else—can be immersed in an environment that repetitively exposes them to the categorical pairing of blacks with crime and not have that affect how they think, feel, or behave.”¹⁵⁹ Indeed, the number of daily, weekly, and yearly opportunities that officers in Oakland, CA, and ostensibly in other similarly situated areas may hear the words “*Male Black*” associated with criminal activity are astonishing.¹⁶⁰ Arguably in some jurisdictions, “Fifty thousand times each year,” and so, generalizations, categorizations, ultimately implicit biases form, Eberhardt, argues.¹⁶¹

Prosecutors experience similar repetitions when reviewing police reports, given the inclusion of words “*MALE BLACK*” drawn from initial calls placed over police radios. Additionally, media portrayals of black people are especially harmful, creating and reinforcing implicit biases.¹⁶² Dr. Julie Netherland and Dr. Helena Hansen questioned the media’s coverage of black and white drug users in a study to determine whether the media’s coverage of blacks and whites is different.¹⁶³ The findings expose the media’s disparate “coverage of white-non-medical opioid users with that of black and brown heroin users.”¹⁶⁴ Research outcomes also showed other expressions used to describe black and white communities and what they labeled legal codes to describe neighborhoods.¹⁶⁵ Netherland and Hansen determined that the media routinely refers to the epidemic of drug use in black neighborhoods as “urban.”¹⁶⁶ Still, the media used the legal codes “suburban” and “rural” when referencing white opioid users communities, the same disparate codes used during the War on Drugs pursuits.¹⁶⁷

Netherland and Hansen’s observations do not elaborate on the concept of implicit bias. Nevertheless, the assessment of disparate stereotypes is strikingly similar, explaining: “In our analysis, we find that media accounts of white drug use

156. EBERHARDT, *supra* note 140, at 80.

157. EBERHARDT, *supra* note 140, at 81.

158. EBERHARDT, *supra* note 140, at 80–81.

159. EBERHARDT, *supra* note 140, at 81.

160. EBERHARDT, *supra* note 140, at 80.

161. EBERHARDT, *supra* note 140, at 81.

162. Julie Netherland & Helena Hansen, *The War on Drugs That Wasn't: Wasted Whiteness, “Dirty Doctors,” and Race in Media Coverage of Prescription Opioid Misuse*, PMC US NAT’L LIBR. OF MED. NAT’L INST. OF HEALTH (Dec. 1, 2016), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5121004/>.

163. *Id.*

164. *Id.*

165. *Id.*

166. *Id.*

167. *Id.*

go out of their way to humanize the person using drugs, to explain how he or she defies the stereotype of a drug user, and then to describe the potential that the individual tragically lost.”¹⁶⁸ Recall the “*MALE BLACK*” frequent repetitions in criminal police calls of black male suspects, described by Professor Eberhardt, and compare that to the frequent portrayal of white opioid users as tragic, innocent victims.¹⁶⁹ The accounts are valuable examples of blacks identified with crime but decriminalization of whites.¹⁷⁰ Thus, words that officers speak repetitively and messages conveyed persistently, even if pertinent police radio calls, reinforce stereotypes, often resulting in implicit biases.¹⁷¹ Once individuals form implicit biases in policing and prosecution, scholars conclude: Blacks are feared, misunderstood, more susceptible to being profiled, targeted, and killed by police when encountered.¹⁷²

Professor Paul Butler has made significant contributions to this body of scholarship, arguing:

When people see black men they don't know, they have a physical response that is different from their response to other people. Their blood pressure goes up, and they sweat more. When a white person sees an unfamiliar black male face, the amygdala, the part of the brain that processes fear, activates.¹⁷³

In part, Professor Butler draws his conclusions from Rachel Godsil and Alexis Johnson's Article, “Transforming Perception: Black Men and Boys,” and studies performed by scholars at the National Center for State Courts.¹⁷⁴ It is worth pausing, repeating, and reflecting on Professor Butler's conclusion: When human beings “see black men they don't know,” blood pressures rise, “they sweat more,” and “the part of the brain that processes fear, activates” when a white person sees an unknown black man.¹⁷⁵ While it is improbable that *every* human being and *all* white people have the same experiences when one “sees an unfamiliar black male face,” Professor Butler and other notable scholars' conclusions result from considerable research worthy of scrutiny.¹⁷⁶ For example, scientists who measure brain

168. NETHERLAND & HANSEN, *supra* note 162.

169. See EBERHARDT, *supra* note 140, at 80.

170. EBERHARDT, *supra* note 140, at 80.

171. EBERHARDT, *supra* note 140, at 80.

172. EBERHARDT, *supra* note 140, at 81–82.

173. PAUL BUTLER, *CHOKEHOLD: POLICING BLACK MEN* 19 (The New Press 2017).

174. *Id.* See also, Alexis McGill Johnson & Rachel D. Godsil, *Transforming Perception: Black Men and Boys*, BLACK MALE RE-IMAGINED II, <https://equity.ucla.edu/wp-content/uploads/2016/11/Transforming-Perception.pdf>; Pamela M. Casey et al., *Helping Courts Address Implicit Bias*, *National Center for State Courts*, 2012, B-2, B-6.

175. BUTLER, *supra* note 173, at 19.

176. See Alexis McGill Johnson & Rachel D. Godsil, *supra* note 174. Professors' Godsil's and McGill

processes, neuroscience, and study implicit bias note the limitations of racial bias “self-report data,” drawing the following conclusions:

While self-report measures make it easier for people to report non-prejudiced attitudes, this does not ensure that they can respond without bias across all domains. Early work measuring implicit bias relied on skin conductance measures, which, despite poor differentiation, did show that White American participants showed increased arousal when viewing photos of or interacting with Black Americans.¹⁷⁷

Moreover, several scientists studying the brain, amygdala, and implicit bias, reached the same conclusions as Professor Butler’s noted references: “Whites display increased amygdala activation when looking at Black faces.”¹⁷⁸ One scientific study addressed amygdala and fear, finding:

People with diagnosed phobias of spiders and snakes have significantly higher levels of amygdala activation when they view pictures of those fear triggers than when they view pictures of other predatory or ferocious creatures, such as tigers.

Similarly, a pioneering fMRI [functional Magnetic Resonance Imaging]¹⁷⁹ study showed a measurable increase in the activation of the amygdala when Caucasian participants viewed African American male faces versus Caucasian male faces.¹⁸⁰

Generally, discussions of personal experiences are unwarranted in scholarship, but the following example offers valuable points to consider. As a young child, I had a frightening encounter with a large German Shephard dog that chased me a few feet up the street. Since that day, I have experienced anxiety and a slight rise in my blood pressure when I see a sizeable unfamiliar dog. However, while psychologists argue that dogs have minimal cognitive abilities, dogs do not possess and share humans’ special, significant cognitive skills and sense of

Johnson’s research findings suggest that “The widespread stereotype of Black criminality makes it more likely that a cell phone will appear to be [a] gun if the man holding it is Black rather than White,” <https://equity.ucla.edu/wp-content/uploads/2016/11/Transforming-Perception.pdf> (last visited May 5, 2021).

177. Sarah V. Vinson, *Measuring Implicit Racial Bias*, LORIO FORENSICS, <https://www.lorioforensics.com/blog/measuring-implicit-racial-bias> (Sept. 3, 2020).

178. Kimberly Papillion, EQUAL JUST. SOC’Y, *Implicit Bias Overview* 2–3 <https://srcity.org/DocumentCenter/View/3024/Implicit-Bias-Overview-PDF>.

179. *Id.* at 1.

180. *Id.* at 2–3.

morality.¹⁸¹ Dogs also lack essential verbal communication skills and other human qualities.¹⁸²

Most importantly, dogs are not made in the image of God, so moral conduct, humanity, or brotherly love is not at issue.¹⁸³ My point: my fear is of unknown animals. I do not become anxious without cause or have a rise in blood pressure when I see human beings—as noted, black men who share my human ability to reason and make moral decisions. But according to Professor Butler and other scholars' research findings, individuals, significantly white people (without conscious awareness, or empathetically considering the impact of their demeanor), look at their fellow black male human beings with anxiety.¹⁸⁴ Fear and anxiety, as illustrated, are customary if one has “phobias of spiders and snakes” or apprehensions of any unfamiliar animal, but problematic if directed toward fellow human beings based on stereotypes, implicit biases, or “activation of the amygdala.”¹⁸⁵ Scholars note an individual's fear can contribute to unnecessary killings, targeting, and disparities in charging, plea bargaining, and sentencing if police and prosecutors harbor such apprehensions.¹⁸⁶

Therefore, if Professor Butler's conclusions and other studies with similar findings are valid, implicit bias training is vital to avoid anxiety and fearing fellow human beings; as Professor Butler notes, “[p]eople can actually unlearn bias. . .”¹⁸⁷ As such, both white and people of color in corporations, businesses, government organizations (including police departments and prosecutors' offices), secondary schools, colleges, and universities should learn the meaning of implicit bias. Recognizing and overcoming bias is essential. Moreover, Professor Butler's conclusions and topics addressing bias and empathy deserve consideration as vital topics for discussion in training sessions.

Furthermore, scholars argue, fear of black men and implicit bias extends beyond personal encounters—it is prevalent in professional workplaces, including law enforcement.¹⁸⁸ As Professor Eberhardt describes: “Black people are stopped by police at disproportionate levels and are more likely to have force used upon them. I know how our sons are perceived in society generally, and that can affect

181. See 1 *Genesis* 26–27; see also, *Smarter Than You Think: Renowned Canine Researcher Puts Dogs' Intelligence on Par with 2-Year-Old Human*, AM. PSYCHOLOGICAL ASS'N, <https://www.apa.org/news/press/releases/2009/08/dogs-think> (2009) [hereinafter *Smarter Than You Think*].

182. 1 *Genesis* 26–27; *Smarter Than You Think*, *supra* note 181.

183. 1 *Genesis* 26–27; *Smarter Than You Think*, *supra* note 181.

184. BUTLER, *supra* note 173, at 19–24.

185. BUTLER, *supra* note 173, at 19–24.

186. See BUTLER, *supra* note 173, at 1–2.

187. BUTLER, *supra* note 173, at 20.

188. See BUTLER, *supra* note 173, at 17–21; EBERHARDT, *supra* note 140, at 36–38, 47–63. See also, ANGELA J. DAVIS, *POLICING THE BLACK MAN: ARREST, PROSECUTION, AND IMPRISONMENT* (Vintage Books 2017), for a discussion of the similarities between unconscious racism and implicit bias, both generated from unconscious biases pertinent to one's race and many other attributes.

how they're perceived and treated by police."¹⁸⁹ Scholars note that the fear and bias directed toward black men is bewildering and a tragic vestige of the racism they faced during slavery, Jim Crow segregation, and the War on Drugs.¹⁹⁰ They conclude, like earlier eras, many black men experience dehumanizing treatment in today's criminal justice system.¹⁹¹ Recall the May 2020 George Floyd tragedy and former police officer Derek Chauvin's conviction of murder of Mr. Floyd, prompting international protests and immense calls for criminal justice reform and police implicit bias training.¹⁹²

Criminal justice reformers and scholars maintain: fear of black men and their portrayal as violent criminals have contributed to mass incarceration.¹⁹³ In 1992, William "Bill" Barr was Attorney General under George H. W. Bush.¹⁹⁴ Barr's Department of Justice ("DOJ") Office of Policy and Communications issued a report, *The Case for More Incarceration*, that called for the building of more prisons to "plainly reduce crime and help to protect the public."¹⁹⁵ DOJ officials argued recidivism was harming communities; therefore, among other factors, they insisted, building more prisons would keep violent offenders incapacitated and reduce victims' medical expenses.¹⁹⁶ What DOJ did not directly state: Building more prisons would lead to the incarceration of a disproportionately large number of black men convicted of violent and non-violent crimes and decades of rising prison population numbers.¹⁹⁷ After the report was released, the War on Drugs and mass

189. EBERHARDT, *supra* note 140, at 51.

190. See Bryan Stevenson, *Slavery Gave America a Fear of Black People and a Taste for Violent Punishment. Both Still Define Our Criminal-Justice System.*, N.Y. TIMES MAG. (Aug. 14, 2019), <https://www.nytimes.com/interactive/2019/08/14/magazine/prison-industrial-complex-slavery-racism.html>. See generally, Graham Boyd, *The Drug War is the New Jim Crow*, ACLU (Jul./Aug. 2001), <https://www.aclu.org/other/drug-war-new-jim-crow>; ANGELA J. DAVIS, A Presumption of Guilt, in POLICING THE BLACK MAN, *supra* note 188, at 3–26.

191. ANGELA J. DAVIS, A Presumption of Guilt, in POLICING THE BLACK MAN, *supra* note 188, at 4–5.

192. See Yamiche Alcindor & Amna Nawaz, *What We Know About George Floyd's Death in Minneapolis Police Custody*, PBS NEWS HOUR (May 29, 2020), <https://www.pbs.org/newshour/nation/what-we-know-about-george-floyds-death-in-minneapolis-police-custody>. See also, *George Floyd: What Happened in the Final Moments of His Life*, BBC NEWS (Jul. 16, 2020), <https://www.bbc.com/news/world-us-canada-52861726>; Janelle Griffith & Corky Siemaszko, *Derek Chauvin Guilty of Murder in George Floyd's Death*, NBC NEWS (Apr. 20, 2021), <https://www.nbcnews.com/news/us-news/derek-chauvin-verdict-reached-trial-over-george-floyd-death-n1264565>; Janelle Griffith, *Derek Chauvin Sentenced to 22.5 Years for the Murder of George Floyd*, NBC NEWS (June 25, 2021), <https://www.nbcnews.com/news/us-news/derek-chauvin-be-sentenced-murder-death-george-floyd-n1272332>; Paula Vasani, *Calls for More Implicit Bias Training Grow with Demands for Police Reform*, WHAS11 ABC (Aug. 17, 2020), <https://www.whas11.com/article/news/investigations/focus/louisville-police-reform-implicit-bias-training/417-2b632d90-0da9-4e86-a1b4-27a2bd9dd854>.

193. See Bryan Stevenson, *supra* note 190.

194. See *The Case for More Incarceration*, U.S. DEP'T OF JUST. (1992), <https://www.ojp.gov/pdffiles1/Digitization/139583NCJRS.pdf> (last visited Apr. 21, 2021) [hereinafter *The Case for More Incarceration*].

195. *Id.* at v.

196. *Id.* at 13–18.

197. See MICHELLE ALEXANDER *supra* note 49, at 232.

incarceration experienced exponential growth.¹⁹⁸ DOJ officials audaciously concluded:

Finally, amid all the concern we hear about high incarceration rates for young black men, one critical fact has been neglected: The benefits of increased incarceration would be enjoyed disproportionately by black Americans living in inner cities, who are victims of violent crime at far higher rates than whites and persons who live outside the inner cities.¹⁹⁹

Therefore, as noted, while DOJ officials did not directly state that building more prisons would disproportionately target blacks, they referenced black communities as the disproportionate victims of high crime rates that would “benefit[] from increased incarceration.”²⁰⁰ Arguably, this position reveals the intent to incarcerate a disproportionate number of people in black communities. Recall Professor Paul Butler’s findings regarding the fear of black men.²⁰¹ Indeed, a careful review of DOJ official’s words, concluding that offenders at the time of the report (predominantly “young black men”) were not rehabilitative to “become upstanding, law-abiding citizens upon release,” suggests implicit bias and fear:

Every violent criminal who is in prison is a criminal who is not committing other violent crimes. Too many violent criminals are sentenced to probation with minimal supervision. Too many violent criminals are sentenced to prison but are released early on parole or simply to relieve the pressure of prison crowding. None of us is naive enough to think that these criminals will suddenly become upstanding, law-abiding citizens upon release. And indeed they do not. Much violent crime is directly attributable to our failure to sentence violent criminals to prison and our failure to keep them in prison beyond a fraction of their sentence.²⁰²

Angela J. Davis’s article, *Prosecution and Race: The Power and Privilege of Discretion*, examines and discusses how prosecutorial discretion contributes to “racial inequality in the criminal justice system.”²⁰³ Professor Davis argues: “Prosecutors, more than any other officials in the system, have the power,

198. Sagiv Galai, *William Barr Was an Ardent Champion of Mass Incarceration*, ACLU BLOG (Jan. 10, 2019), <https://www.aclu.org/blog/smart-justice/mass-incarceration/william-barr-was-ardent-champion-mass-incarceration>.

199. *The Case for More Incarceration*, *supra* note 194, at v–vi.

200. *See The Case for More Incarceration*, *supra* note 194, at v–vi.

201. BUTLER, *supra* note 173, at 19–24.

202. *The Case for More Incarceration*, *supra* note 194, at v.

203. Angela J. Davis, *Prosecution and Race: The Power and Privilege of Discretion*, 67 FORDHAM L. REV. 13, 17 (1998).

discretion, and responsibility to remedy the discriminatory treatment of African Americans in the criminal justice process."²⁰⁴ Davis's statement is credible.

United States v. Armstrong addresses the issues of prosecutorial discretion, racial disparities, and selective prosecution.²⁰⁵ In *Armstrong*, the Supreme Court of the United States reviewed whether defendants initiating selective prosecution claims have to show that the prosecution did not prosecute "similarly situated suspects of other races."²⁰⁶ The prosecution charged Christopher Armstrong and other respondents, in 1992, with conspiring to possess with intent to distribute more than fifty grams of crack-cocaine and, also, conspiring to distribute.²⁰⁷ The lower court allowed the respondents' "motion for discovery or for dismissal of the indictment, alleging that they were selected for federal prosecution because they are black."²⁰⁸

Respondents provided a paralegal specialist affidavit, but nothing more, alleging that in each relevant case "closed by the office during 1991, the defendant was black."²⁰⁹ The prosecution argued that they had not engaged in selective prosecution of black defendants or acted unfairly.²¹⁰ The lower court granted respondents' motion:

It ordered the Government (1) to provide a list of all cases from the last three years in which the Government charged both cocaine and firearms offenses, (2) to identify the race of the defendants in those cases, (3) to identify what levels of law enforcement were involved in the investigations of those cases, and (4) to explain its criteria for deciding to prosecute those defendants for federal cocaine offense.²¹¹

The prosecution filed a motion for reconsideration.²¹² In the final lower court appeal, issued by the Court of Appeals for the Ninth Circuit, the Appellate Court affirmed the District Court ruling: "a defendant is not required to demonstrate that the government has failed to prosecute others who are similarly situated."²¹³ However, when the case reached the Supreme Court of the United States, the justices reversed the lower court and entered an 8-1 decision in favor of the government: holding, defendants are not entitled to selective prosecution discovery under Federal Rule of Criminal Procedure 16; concluding, also, that respondents' claim of selective prosecution was not well-founded.²¹⁴ Regarding

204. *Id.* at 17–18.

205. *United States v. Armstrong*, 517 U.S. 456 (1996). *Armstrong* is addressed in Davis's article and many other scholarship papers. Davis, *supra* note 203. This Article examines key parts of the *Armstrong* decision to confirm problems associated with prosecutorial discretion and options for deterring disparity when prosecutors exercise discretion. Davis, *supra* note 203.

206. *Armstrong*, 517 U.S. at 458.

207. *Id.*

208. *Id.* at 459.

209. *Id.*

210. *Id.*

211. *Armstrong*, 517 U.S. at 459.

212. *Id.* at 460–61.

213. *Id.* at 461.

214. *Id.* at 470–71.

constitutional law, the court opined: "In order to dispel the presumption that a prosecutor has not violated equal protection, a criminal defendant must present 'clear evidence to the contrary.'"²¹⁵ Respondents' evidence and the study did not meet the court's standard to show a selective prosecution.²¹⁶ The result reached in *Armstrong* places defendants in the difficult position of presenting similarly situated defendant evidence without first receiving the prosecutor's pertinent internal documents to examine the case selection process.²¹⁷ Accordingly, selective prosecution cases are difficult to impossible to prove.

The *Armstrong* decision addresses the prosecutors' practically unrestricted discretion and illustrates the prosecutor's power to make charging decisions, generally unchallenged or without sustainable challenges. Additionally, prosecutors freely decide whether to offer favorable plea bargains or not. Professor Davis has studied the power granted to prosecutors extensively. She argues plea bargains are often unfair, mirroring many of the underlying concerns she raises about charging decisions: "Like the charging decision, the decision to offer a plea bargain is controlled entirely by the prosecutor."²¹⁸

Professor Davis provides examples of ways prosecutors can use discretion to charge or not; bring reduced charges, drop charges, enter a fair or unfair plea bargain, or proceed to trial.²¹⁹ As a former state and federal prosecutor, I cannot disagree with Professor Davis's assessment of the enormous power granted to prosecutors. Moreover, ethics complaints initiated against prosecutors confirm that some prosecutors abuse discretion.²²⁰ Although rogue employees exist in every occupation, I share Professor Davis's concern that the harm generated when prosecutors abuse their discretion is unprecedented. Indeed, as Professor Davis states, "the prosecutor's total control over the charging and plea bargaining stages of the process gives her more control over the criminal justice system than any other official."²²¹

Still, I served as a state and federal prosecutor for many years, worked with prosecution advisory boards, presented training workshops for prosecutors throughout the United States, worked for a prosecutors research institute, and I teach prosecution clinic law courses for future prosecutors. So I have considered and evaluated the concerns raised about prosecutorial discretion. My perspective might differ in part from Professor Davis's, given our diverse former roles, prosecutor and public defender, and given my professional experience working with several dedicated prosecutors who strive to seek justice with integrity and

215. *Id.* at 465, (citing *United States v. Chem. Found., Inc.*, 272 U.S. 1, 14–15 (1926)).

216. *United States v. Armstrong*, 517 U.S. 456, 470 (1996).

217. *Id.* at 69–70.

218. DAVIS, *POLICING THE BLACK MAN*, *supra* note 191, at 181.

219. DAVIS, *POLICING THE BLACK MAN*, *supra* note 191, at 181.

220. See Robert P. Mosteller, *The Duke Lacrosse Case, Innocence, and False Identification: A Fundamental Failure to "Do Justice"*, 76 *FORDHAM L. REV.* 1337 (2007) (examining ethics violations that led to the disbarment of Michal Nifong in the Duke University Lacrosse prosecution).

221. DAVIS, *POLICING THE BLACK MAN*, *supra* note 189, at 182–83.

fairness for all people. Despite our different professional roles, there are many points of agreement, and prosecutors and public defenders can and should collaborate their recommendations on improving the criminal justice system. Certainly, given the implicit biases that Professor Eberhardt and other psychologists conclude all humans possess, prosecutorial discretion generally unrestrained is an area that needs scrutiny. Therefore, more composite boards of public defenders and prosecutors should form, as prosecutors' beneficial contributions to the discourse on prosecutorial discretion and criminal justice reform are evident.²²²

Furthermore, I have read studies that Professor Davis and other scholars cite in their writings. They ponder, "would black men be treated more fairly at the prosecution stage of the criminal process—as defendants and victims of crime—if there were more black prosecutors?"²²³ In her Article on *The Prosecution of Black Men*, Professor Davis confronts that question and other essential prosecution issues.²²⁴ However, her observations and findings are primarily from news reports and articles discussing the initiatives of former attorney general Eric Holder and other high-profile prosecutions.²²⁵ Valuable scholarship, but Professor Davis is outside looking in as a former public defender.²²⁶

Unfortunately, there are no thorough studies to "demonstrate whether there are more or fewer racial disparities resulting from the decision-making in the offices of the few black elected prosecutors, so there is no statistical evidence," as Professor Davis notes.²²⁷ Lacking available empirical data on the topic, arguably the most effective method to evaluate the issue is to begin assessing and querying black prosecutors (elected or assistant prosecutors) at the State and Federal levels of government. Although there are specific questions that prosecutors currently serving may not address, there are some questions that they can and should answer.

For example, what steps do you engage to prepare for an indictment? Do you carefully evaluate the evidence to assess the probable cause and potential biases that may have influenced the investigation? Given the recognition brought to criminal justice matters in the wake of recent protests (2020-2021) for black Americans' equal justice, have you initiated changes in your office to address potential implicit biases? Do you think that you have implicit biases that impact your decisions? And the ultimate question, which I believe prosecutors currently serving, can answer: Do you believe systemic racism exists in the criminal justice system? If so, what measures will you implement to protect the integrity of your office or cases

222. Various assessments have been completed, like the Vera Institute study, but more is needed to efficiently assess and understand the role, benefit, and challenges of black prosecutors. See *Promoting Racial Equity in Prosecution*, VERA INST. OF JUST., <https://www.vera.org/securing-equal-justice/promoting-racial-equity-in-prosecution> (last visited Apr.11, 2021).

223. DAVIS, *POLICING THE BLACK MAN*, *supra* note 191, at 197.

224. DAVIS, *POLICING THE BLACK MAN*, *supra* note 191, at 178–205.

225. DAVIS, *POLICING THE BLACK MAN*, *supra* note 191, at 196–202.

226. Various scholars and organizations, such as the National Black Prosecutors Association are engaging discussions on the role of black prosecutors in the criminal justice system, reform movement prosecutors, and prosecutorial discretion. See generally, Daniel Fryer, *Race, Reform, & Progressive Prosecution*, 110 J. CRIM. L. & CRIMINOLOGY 769 (2020) <https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=7681&context=jclc>.

227. DAVIS, *POLICING THE BLACK MAN*, *supra* note 191, at 197.

from disparities across racial lines? Do you support training for yourself and assistant prosecutors on implicit bias and other race relations workshop topics to improve our criminal justice system? How do you view the role of the prosecutor? Do you see or can you acknowledge any problems with the broad prosecutorial discretion, arguably unchecked, given to prosecutors? Another significant question: As a black prosecutor, what distinct attributes do you, or should you, bring to the role of the prosecutor, particularly given the disproportionate number of black men incarcerated in United States prisons, jails, on parole, and probation?

The topics queried are pertinent to improving the field of prosecution and the criminal justice system. As such, beyond addressing questions about the impact of black prosecutors, except for the last question, the other noted questions can, and should, be posed to numerous prosecutors across racial lines. Moreover, current and future criminal justice reform boards should seek a diverse group of people and specialties, including State and Federal prosecutors and public defenders, criminologists, State and Federal law enforcement offices, and psychologists, among other vital scholars and practitioners.

In other words, a diverse group exploring ways to improve the criminal justice system and reduce mass incarceration. Indeed, more prosecutors, assistant prosecutors (current and former), and law enforcement should be serving on criminal justice reform boards; they bring invaluable insight. Given the scholarship findings, their broad inclusion will positively impact reform efforts and lead to internal changes and a greater understanding of disparities.²²⁸

According to scholarship findings addressed in this Article, stereotypes and biases that individuals form from repeatedly seeing black men charged with crimes and dominating court dockets in various jurisdictions influence the mind unconsciously.²²⁹ As the noted scholars explain, even individuals who attempt to issue fair decisions are unaware of their implicit biases.²³⁰ Such findings support the need for training and weighing the benefits of different initiatives, such as community prosecution. Part V examines the value of community-based prosecution programs, describing substantial advantages outweighing disadvantages.

V. COMMUNITY PROSECUTION

Community prosecution is arguably a bridge to combatting implicit bias and improving relationships between prosecutors and the African American community. Studies have shown that individuals can reduce stereotypes if people from diverse backgrounds come together and bridge barriers. Prosecutors began

228. See EBERHARDT *supra* note 140, at 47–50; see also, *Promoting Racial Equity in Prosecution*, *supra* note 140; Godsil & Jiang, *supra* note 140.

229. See EBERHARDT *supra* note 140, at 80–83.

230. See EBERHARDT *supra* note 140, at 47–50; Godsil & Jiang, *supra* note 140.

forming community prosecution initiatives several decades ago.²³¹ Focus groups gathered in different forums to consider ways that community-based approaches to prosecution could improve relationships between prosecutors and the communities they serve.²³² Group discussions addressed setting forth a clear definition and community prosecution mission that prosecutors and the community would understand.²³³

In its most basic form, community prosecution, like traditional prosecution, has a primary goal of public safety.²³⁴ Therefore, crime reduction is fundamental. But community prosecution aims to address the program goal distinctly by responding to crime proactively rather than reacting.²³⁵ The aim is for community prosecutors to set up offices in designated community locations and form partnerships with groups and individuals in the community.²³⁶ Collaborations include public organizations, such as parks and recreation, school personnel and school boards, politicians and city council members in the community, healthcare workers, and centers.²³⁷ Additionally, prosecutors form public partnerships with law enforcement: police, detectives, police personnel, and court personnel, including judges, probation and parole offices, and social service workers.²³⁸ Further, community prosecutors partner with private groups, such as boys' and girls' clubs, scout organizations, churches, and civic organizations.²³⁹

The initiatives bring people together in the community through a grassroots approach.²⁴⁰ Coming together, prosecutors ideally form community relationships to reduce crime. Early focus groups identified nine objectives for community prosecution:

A proactive approach; a clearly defined target area; problem solving, public safety and quality of life issues; the direct interaction between the prosecutor and the community and the incorporation of the community's input into the courtroom; partnerships among the prosecutor, law enforcement, public and private agencies and the community; long-term strategies; the commitment of policy makers; varied enforcement methods; and continuous evaluation.²⁴¹

231. *Key Principles of Community Prosecution*, NAT'L DIST. ATT'YS ASS'N http://ndaa.org/wp-content/uploads/final_key_principles_updated_jan_2009.pdf (last visited Apr. 12, 2021).

232. See generally John S. Goldkamp, et al., *Community Prosecution Strategies*, U.S. DEP'T OF JUST. BUREAU OF JUST. ASSISTANCE, 3 (Aug. 2003), <https://www.ojp.gov/pdffiles1/bja/195062.pdf>.

233. *Id.*

234. *Id.* at 1.

235. See *id.* at 6.

236. See *id.* at 6–7.

237. *Id.*

238. Goldkamp, *supra* note 232, at 6–7.

239. See generally John S. Goldkamp, et al., *Community Prosecution Strategies: Measuring Impact* (Nov. 2002), <https://www.ojp.gov/pdffiles1/bja/192826.pdf>.

240. *Id.* at 3–6.

241. *What is Community Prosecution?* CHEMUNG COUNTY NEW YORK (2019), https://www.chemungcountyny.gov/departments/a-_f_departments/district_attorney/what_is_community_prosecution.php.

Various jurisdictions that received federal government funding to initiate community prosecution programs in the late 1990s into the 2000s did not share the same mission and understanding.²⁴² Some found few, if any, distinctions from traditional prosecution.²⁴³ Others saw the main objective as “proactive problem-solving for all types of criminal offenses.”²⁴⁴ Finally, some viewed the programs as full-blown initiatives to garner community participation.²⁴⁵ Nevertheless, each view includes aspects of the true meaning of community prosecution, as traditional objectives to address public safety are not removed. Instead, prosecutors apply proactive rather than reactive responses to crime to build community partnerships to reduce crime.²⁴⁶

Over the past several decades, when prosecutors set up community prosecution programs in jurisdictions throughout the country, generally, programs attempt to address most of the nine objectives established.²⁴⁷ Still, perhaps the most overlooked benefit of community prosecution is the placement of community prosecutors’ offices directly in some communities or having community prosecutors visit community entities to participate in public meetings routinely and maintain a visible presence in the community. The prosecution profession and society benefit when prosecutors engage in the general community.

When prosecutors actively engage in the community, they get to know the citizens, communicate with them, and engage in meetings and activities together, contributing to a better understanding of cultural differences.²⁴⁸ Moreover, black communities begin to see prosecutors as integral citizens in the community rather than individuals they cannot trust if the program works as intended.²⁴⁹ Further, prosecutors get to know people that they previously saw only in a courtroom setting.²⁵⁰ Increased interaction and understanding should dismantle stereotypes, such as what scholars conclude is a fear of black men among some. Thus, the benefits of community prosecution are evident when the prosecutors implement the program correctly.

On the other hand, one of the drawbacks of community involvement, arguably, leads to what initial proponents of the initiative deemed vertical prosecution, allowing one prosecutor to handle all of the cases in one geographical location.²⁵¹ Various practitioners and scholars argue that such prosecutions increase conviction rates.²⁵² Nevertheless, consider the statement from the United

242. See Goldkamp, et al. *supra* note 232, at 9–17.

243. Goldkamp, et al. *supra* note 232, at 9–17.

244. Goldkamp, et al. *supra* note 232, at 19.

245. Goldkamp, et al. *supra* note 232, at 9–28.

246. Goldkamp, et al. *supra* note 232, at 9–28.

247. Goldkamp, et al. *supra* note 232, at 9–28.

248. See Goldkamp, et al. *supra* note 232, at 5.

249. Goldkamp, et al. *supra* note 232, at 5–10.

250. Goldkamp, et al. *supra* note 232, at 5–10.

251. Goldkamp, et al. *supra* note 232, at 34–35.

252. Goldkamp, et al. *supra* note 232, at 34–35.

States Attorney's Office in the District of Columbia, describing the aim of their community prosecution program:

Community Prosecutors and Community Outreach Specialists are dedicated to working with residents to improve the quality of life for all the residents of the District of Columbia. Through our community outreach efforts, the U.S. Attorney's Office has successfully established an ongoing dialogue with the community, enabling our office to better address the public safety concerns of those we serve while enhancing community trust.²⁵³

Notably, a pertinent objective outlined in the District of Columbia community prosecution program and generally understood in all community prosecution initiatives is the improvement of quality life "for all the residents."²⁵⁴ Offenders are residents in communities, too, when released on parole or serving probation sentences.²⁵⁵ As such, community prosecution initiatives should aim to improve life for former offenders and those on probation and parole. How can prosecutors meet that objective? Maintaining a persistent presence in the community should help prosecutors build trust with all citizens, most notably black men, to address the findings of psychologists and scholars in this Article. Seeing the same neighborhood faces may generate conversations between prosecutors and citizens in the community, break down cultural barriers, and reduce biases and stereotypes.

VI. CONCLUSION

This Article examined official drug policies across racial lines. Scholars reveal that in various instances, white drug users and distributors are treated differently in the criminal justice system. This disparity is particularly true when many whites become addicted and die from legal and illegal drugs. The Opioid Crisis unmasked the glaring inequality. The War on Drugs initiatives from the 1970s up to the twenty-first century elected presidents as tough-on-crime politicians but significantly harmed black communities, contributing to black people's mass incarceration, especially males. Government officials who have initiated compassionate approaches and notable policies to address the Opioid Crisis should also extend the plans to assist more black people addicted to various drugs beyond opioid addicts.

The examination in this Article presented scholars' findings that implicit bias contributes to inequalities, fear, criminalization, and mass incarceration of black men. Scholars widely find implicit bias training to be the primary method to open the discourse about the disparities in the criminal justice system across racial lines. Additionally, this Article evaluated concerns raised about the broad prosecutorial discretion given to prosecutors. The endeavor aims to widen the dialogue on

253. *Community Prosecution*, THE U.S. ATT'Y'S OFF.: D.C., <https://www.justice.gov/usao-dc/programs/community-prosecution> (last visited Apr. 21, 2021).

254. *Id.*

255. *Id.* See *Parole and Probation*, JUSTIA, <https://www.justia.com/criminal/parole-and-probation/> (last visited Apr. 12, 2021); *Parole, Probation, and Community Sanctions*, LUMEN, <https://courses.lumenlearning.com/atd-bmcc-criminaljustice/chapter/section-6-4-parole-probation-and-community-sanctions/> (last visited Apr. 12, 2021).

prosecutorial discretion concerns, weighing the benefits of engaging more current and former prosecutors and assistant prosecutors in the discourse. Finally, the discussion on community prosecution explained the concept. The analysis suggested an overlooked or understated asset of community prosecution initiatives; they provide the opportunity for interactions between prosecutors and communities, arguably highly advantageous in communities of color. Ideally, increased interactions through community prosecution programs, along with similar community policing initiatives, will deter stereotypes and scholars' findings of individuals' anxiety and ostensibly fear of black men.