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# THE RACIST ROOTS OF THE WAR ON DRUGS & THE MYTH OF EQUAL PROTECTION FOR PEOPLE OF COLOR

\* *andré douglas pond cummings*

*and*

+ *Steven A. Ramirez*

## INTRODUCTION

By 2021, the costs and pain arising from the propagation of the American racial hierarchy reached such heights that calls for anti-racism and criminal justice reform dramatically expanded.<sup>1</sup> The brutal murder of George Floyd by the Minneapolis police vividly proved that the social construction of race in America directly conflicted with supposed American values of equal protection under law and notions of basic justice.<sup>2</sup> The racially-driven War on Drugs (WOD) fuels much of the dissonance between American le-

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\* Associate Dean for Faculty Research & Development and Charles C. Baum Distinguished Professor of Law; Co-Director, Center for Racial Justice and Criminal Justice Reform, University of Arkansas at Little Rock William H. Bowen School of Law; J.D. Howard University School of Law. [acummings@ualr.edu](mailto:acummings@ualr.edu). This Article represents Part II of our War on Drugs trilogy appearing in the Tulane Law Review (Part I – *Roadmap for Antiracism: First Unwind the War on Drugs Now*), the UA Little Rock Law Review (Part II – *The Racist Roots of the War on Drugs & The Myth of Equal Protection for People of Color*) and the Loyola Chicago Law Review (Part III - *The Illinois Cannabis Social Equity Program: Toward a Socially Just Peace in the War on Drugs?*). Ending the War on Drugs and repairing the communities that it has destroyed must become top priority for any concerned citizen, legislator, public official and judge. I am grateful to Katherine James Clark, Bowen Law School, class of 2024, for her terrific research assistance. Thanks to Professors Yvette Lindgren and Guadalupe Luna for reading and commenting on early drafts of this paper. I am further grateful to the UA Little Rock Law Review editorial team for its excellent work, particularly to Chris Musteen and Sloane Stine for excellent feedback and editing. Of course, as usual, any errors within are the sole responsibility of the authors.

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1. Andrea Gawrylewski, *The Case for Antiracism*, SCI. AM. (July 21, 2021), <https://www.scientificamerican.com/article/the-case-for-antiracism/> (“In the year since a Minneapolis police officer knelt on George Floyd’s neck for more than nine minutes and stopped the man’s heart, a record number of protesters have taken to the streets around the world to demand change.”).

2. *Id.* (“It is an unequivocal scientific fact that race is a social construct, not a biological one. The implicit prejudices and biases we carry against those unlike us are real, but society instills them in our subconscious mind, and they are therefore malleable.”).

gal mythology—such as the non-discrimination principle and the impartial administration of the rule of law—and the reality of race in the United States.<sup>3</sup> Mass incarceration of people of color pursuant to the War on Drugs betrays any semblance of equal protection under law.<sup>4</sup> Yet, the Supreme Court stubbornly clings to notions of equal protection and animus that operate primarily to protect powerful white Americans, and to leave laws such as the Controlled Substances Act<sup>5</sup> intact and fully operational, notwithstanding the fact that under that Act people of color suffer grossly disproportionate incarceration relative to whites who are more frequent users of illicit drugs.<sup>6</sup>

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3. andré douglas pond cummings & Steven A. Ramirez, *Roadmap for Anti-Racism: First Unwind the War on Drugs Now*, 96 TULANE L. REV. 469–70 (2022) (“The War on Drugs (WOD) transmogrified into a war on communities of color early in its history and its impact devastated communities of color first and foremost. People of color disproportionately suffered incarceration in the WOD even though people of color use illegal narcotics at substantially lower rates than white Americans.”). The most recent data gathered by the U.S. government establish the racist implementation and execution of the WOD. See U.S. DEP’T OF HEALTH & HUM. SERVS., SUBSTANCE ABUSE AND MENTAL HEALTH SERVS. ADMIN., 2019 NATIONAL SURVEY OF DRUG USE AND HEALTH (NSDUH) RELEASES, TABLE 1.22B, (2019), <https://www.samhsa.gov/data/sites/default/files/reports/rpt29394/NSDUHDetailedTabs2019/NSDUHDefTabsSect1pe2019.htm> (showing that Whites use drugs at greater rates than African Americans and Latinos in virtually all age groups). See also PAUL BUTLER, CHOKEHOLD: POLICING BLACK MEN 121–22 (2017) (“Today most people know that ‘the war on drugs’ has been selectively waged against African Americans. . . . For drug crimes, African Americans are about 13 percent of people who do the crime, but about 60 percent of people who do the time.”).

4. As Doris Marie Provine writes:

[T]his review considers this paradox of persistent racial inequality in an ostensibly post–civil rights era. Even gross differences in the incarceration of African Americans and Latinos for drug activity fail to provoke an effective response. Yet overincarceration is one of the most significant barriers to racial equality in the United States. Ironically, the nation’s embrace of a color-blind ideology that conceptualizes racial discrimination in individualistic terms seems to prevent Americans from taking account of the structural barriers to racial equality created by the war on drugs.

Doris Marie Provine, *Race and Inequality in the War on Drugs*, 7 ANN. REV. L. SOC. SCI. 41, 42 (2011).

5. Controlled Substances Act, Pub. L. No. 91-513, §§ 100-709, 84 Stat. 1242–84 (1970) (codified as amended at 21 U.S.C. §§ 801-904).

6. See Dep’t of Homeland Sec. v. Regents of the Univ. of California, 140 S. Ct. 1891, 1916 (2020) (holding that racist statements of President did not support finding racial animus of administration policy against same group); Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 266–67 (1977) (denying relief under the Equal Protection Clause absent “proof that a discriminatory purpose has been a motivating factor in the decision.”) Notably, whites invoking Equal Protection claims need not show racial animus. See Fisher v. Univ. of Tex., 136 S. Ct. 2198, 2205–08 (2016) (reviewing only the process of admissions at university while requiring no showing of harm to victim nor animus based upon race). Moreover, the Court relieves white plaintiffs from the need to show harm. See Juan Perea, *Doctrines of*

This Article shows that the War on Drugs originated with animus against people of color: specifically, with the intent to demonize people of color and to propagate fear within the entire American body politic while assuring disproportionate punishment towards communities of color.<sup>7</sup> The WOD continues to this day to consume human potential and inflict disproportionate suffering on communities of color despite wide-ranging evidence of its racist origins and racist impact.<sup>8</sup> As such, the Fifth Amendment's equal protection guarantee should operate to invalidate the Controlled Substances Act<sup>9</sup> and liberate all victims of the racist WOD.<sup>10</sup> Only then will the promise of the rule of law and equal protection under law achieve vindication as uniquely American innovations for genuine social justice and human development under law.<sup>11</sup>

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*Delusion: How the History of the G.I. Bill and Other Inconvenient Truths Undermine the Supreme Court's Affirmative Action Jurisprudence*, 75 U. PITT. L. REV. 583, 641 (2014) (“[T]he Court simply assumes . . . the victimization of the plaintiffs in affirmative action cases without any basis in evidence. . . . Claims of victimization are hard to swallow when the plaintiffs in the education cases would not have been admitted in the absence of affirmative action.”).

7. Other scholars support our conclusion regarding the racist nature of the WOD. *E.g.*, Mitchell F. Crusto, *Weeding Out Injustice: Amnesty for Pot Offenders*, 47 HASTINGS CONST. L.Q. 367, 380–81 (2020) (“Despite the fact that marijuana use was not always associated with people of color, the criminalization of marijuana has been founded on racism and xenophobia. As a result, one scholar has referred to the WOD as a ‘war on people of color,’ with particular harm suffered by the Black community.”); Theresa Zhen & Vinuta Naik, *A Clean Slate Case Study of Community Lawyering*, 106 CALIF. L. REV. 557, 559 (2018) (“Our first clients taught us firsthand that the War on Drugs and its criminalization of a targeted group of individuals was really a war on people of color, poor people, people with mental illness, and homeless people—a lesson that would repeat itself in our work, time and time again.”). This Article considers whether the racist roots and impact of the WOD comport with equal protection under law.

8. Joseph E. Stiglitz, *Foreword* to TERRY-ANN CRAIGIE ET AL., BRENNAN CTR. FOR JUST. AT N.Y.U., CONVICTION, IMPRISONMENT, AND LOST EARNINGS 4–5 (2020), available at [https://www.brennancenter.org/sites/default/files/2020-09/EconomicImpactReport\\_pdf.pdf](https://www.brennancenter.org/sites/default/files/2020-09/EconomicImpactReport_pdf.pdf) (“There is much that has to be done if our society is to fully come to terms with our long history of racial injustice. Stopping mass incarceration is an easy place to begin. This report makes a compelling case for the enormous economic benefits to be derived from doing so.”).

9. Pub. L. No. 91-513, 84 Stat. 1242 (1970) (codified at 21 U.S.C. §§ 881–966).

10. The federal government currently incarcerates over 64,000 drug offenders which constitutes 45 percent of all federal prisoners. Federal Bureau of Prisons, *Statistics*, [https://www.bop.gov/about/statistics/statistics\\_inmate\\_offenses.jsp](https://www.bop.gov/about/statistics/statistics_inmate_offenses.jsp) (last updated Mar. 19, 2022). Hispanics make up about 30 percent of all federal inmates, *id.*, [https://www.bop.gov/about/statistics/statistics\\_inmate\\_ethnicity.jsp](https://www.bop.gov/about/statistics/statistics_inmate_ethnicity.jsp) (last updated Mar. 19, 2022), and African Americans make up 38 percent. *Id.*, [https://www.bop.gov/about/statistics/statistics\\_inmate\\_race.jsp](https://www.bop.gov/about/statistics/statistics_inmate_race.jsp) (last updated Mar. 19, 2022).

11. Currently, respected international authorities rate the United States as weak on the rule of law relative to other developed nations, largely due to the continuation of continued racism in the so-called justice system. *See* WORLD JUSTICE PROJECT (WJP) RULE OF LAW

Part I of this Article reviews and describes the racist roots of the War on Drugs. Part II shows the fundamental racist reality of the WOD today which continues to disproportionately impose devastating costs upon communities of color. Part III reviews the history of equal protection under law and argues that current equal protection under law should end the racist WOD. Despite this reality, the Supreme Court will likely allow the race-based oppression of the War on Drugs to continue indefinitely, based largely upon the Court's inability to see the mechanisms perpetuating America's racial hierarchy.<sup>12</sup>

The Article concludes that the Supreme Court's failure to authorize and direct the use of the equal protection guarantee to end the nightmarish and fundamentally racist War on Drugs exposes an institutionally racist branch of our government.<sup>13</sup> Indeed, the Supreme Court acts with complicity in the key role the WOD plays in replicating the American racial hierarchy every day it fails to curtail the WOD with full knowledge of the wrong-headed and backward criminal injustice system—as does every other actor in the criminal injustice system.<sup>14</sup> The racist reality of the WOD's continuing indefinitely suggests an enduring limitation on equal protection under law, a limita-

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INDEX 2021, 171 (2021) (scoring U.S. criminal injustice system as plagued by discrimination).

12. The American racial hierarchy manifests itself in the gaping disparities in social well-being among the major American racial groups. See Steven A. Ramirez & Neil G. Williams, *On the Permanence of Racial Injustice and the Possibility of Deracialization*, 69 CASE W. RES. L. REV. 299, 307–24 (2018).

13. “Nor has it been unusual in our history for the Supreme Court to stand at the forefront of racial injustice. In fact, except for a short period in our nation’s history, 1954 to 1965 . . . the United States Supreme Court has promoted or facilitated injustice against African Americans.” Lewis R. Katz, Whren at *Twenty: Systemic Racial Bias and the Criminal Justice System*, 66 CASE W. RES. L. REV. 923, 924–25 (2016) (citations omitted).

14. Court knowledge of the racist nature of the War on Drugs must reach deep into decades past. See, e.g., MICHAEL TONRY, *MALIGN NEGLECT—RACE, CRIME, AND PUNISHMENT IN AMERICA* 81–83, 208 (1996) (Predictably, “[t]he entanglement of extraordinary numbers of black American males in the justice system’s tentacles damages them, their children, and their communities.”) (reviewed in Paul Reidinger, *Separate but Unequal Lives*, ABA J. (Dec. 1995), at 86); Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 YALE L.J. 677, 679 (1995) (positing that the disparate treatment of African Americans, including the mass incarceration of African Americans pursuant to the WOD, creates a “moral responsibility of [B]lack jurors to emancipate some guilty [B]lack outlaws”); Dorothy E. Roberts, *The Social and Moral Cost of Mass Incarceration in African American Communities*, 56 STAN. L. REV. 1271, 1272–73 (2004) (“The gap between black and white incarceration rates . . . has deepened along with rising inmate numbers. . . . [T]he transformation of prison policy at the turn of the twenty-first century is most accurately characterized as the mass incarceration of African Americans.”). The point at which knowing participation (through at least tacit approval) in such historic oppression supports a finding of active complicity passed long ago. Justice Thomas, at least, appears prepared to hold the federal prohibition relating to cannabis violative of the Constitution. See *Standing Akimbo, LLC v. United States*, 141 S. Ct. 2236, 2238 (2021) (statement regarding petition for certiorari).

tion based upon race, and the need to impose far more serious accountability upon the Supreme Court to assure it remains tethered to current learning and social reality.<sup>15</sup>

## I. THE RACIST ROOTS OF THE WAR ON DRUGS

The War on Drugs, inaugurated by Richard Nixon,<sup>16</sup> militarized and nationalized by Ronald Reagan,<sup>17</sup> and exacerbated by Bill Clinton,<sup>18</sup> has proven to be an epic failure.<sup>19</sup> As early as 1996, author Dan Baum wrote that

15. The very notion that equal protection itself favors wealthy whites over people of color—notwithstanding its roots in the Civil War effort to free slaves—has gained increasing awareness in recent years. *See, e.g.*, Wendy Parker, *Recognizing Discrimination: Lessons from White Plaintiffs*, 65 FLA. L. REV. 1871, 1915 (2013) (“The Roberts Court’s commitment to color-blind jurisprudence is stronger than any previous Court’s, including the Rehnquist Court. It has defined white plaintiffs as victims of race discrimination when the process of decision making treated them differently because of their race, apart from any other attending substantive injury.”).

16. *See* Courtney Harper Turkington, *Louisiana’s Addiction to Mass Incarceration by the Numbers*, 63 LOY. L. REV. 557, 560 (2017) (quoting presidential aid John Ehrlichman for the proposition that Nixon focused on illicit drugs in order to attack blacks and the anti-war left). The first federal prohibition of narcotics occurred in 1914 with the passage of the Harrison Act. David Borden, *If Hard Drugs Were Legalized, Would More People Use Them?*, 12 CARDOZO PUB. L. POL’Y & ETHICS J. 569, 578 (2014). From the beginning, the federal government’s response to the problems of drug abuse suffered from the taint of racism. J. Matthew Gorga, *“Retribution, Not a Solution”: Drug-Induced Homicide in North Carolina*, 42 CAMPBELL L. REV. 161, 166 (2020) (“The nation’s first drug laws were less about the dangers of the drugs and more about the people associated with them.” In fact, “[t]hose advocating for the Harrison Act’s passage perpetuated false and racially fueled narratives—black men under the influence of drugs ‘murdering whites,’ ‘degenerate Mexicans smoking marijuana,’ and “Chinamen” seducing white women.”).

17. *See generally* IBRAM X. KENDI, STAMPED FROM THE BEGINNING: THE DEFINITIVE HISTORY OF RACIST IDEAS IN AMERICA 433–36 (paperback, 2017); Ibram X. Kendi, *How Ronald Reagan’s Drug War Fueled Americans’ Addiction to Racist Ideas*, RAW STORY (June 23, 2016), available at <https://www.rawstory.com/2016/06/how-ronald-reagans-drug-war-fueled-americans-addiction-to-racist-ideas/>; Erik Luna, *Drug War and Peace*, 50 U.C. DAVIS L. REV. 813 (2016).

18. *See generally* Paul Finkleman, *The Second Casualty of War: Civil Liberties and the War on Drugs*, 66 S. CAL. L. REV. 1389 (1992-1993); VICTOR THORN, HILLARY (AND BILL): THE DRUGS VOLUME: PART TWO OF THE CLINTON TRILOGY (2008); Donna Murch, *The Clintons’ War on Drugs: When Black Lives Didn’t Matter*, THE NEW REPUBLIC (Feb. 9, 2016), <https://newrepublic.com/article/129433/clintons-war-drugs-black-lives-didnt-matter>.

19. *See* George P. Shultz & Pedro Aspe, *The Failed War on Drugs*, N.Y. TIMES (Dec. 31, 2017), <https://www.nytimes.com/2017/12/31/opinion/failed-war-on-drugs.html> (“The war on drugs in the United States has been a failure that has ruined lives, filled prisons and cost a fortune.”); *see also* KOFI ANNAN ET AL., REPORT OF THE GLOBAL COMMISSION ON DRUG POLICY, WAR ON DRUGS 2 (2011), [https://www.globalcommissionondrugs.org/wp-content/uploads/2017/10/GCDP\\_WaronDrugs\\_EN.pdf](https://www.globalcommissionondrugs.org/wp-content/uploads/2017/10/GCDP_WaronDrugs_EN.pdf) (“The global war on drugs has failed, with devastating consequences for individuals and societies around the world. Fifty years after the initiation of the UN Single Convention on Narcotic Drugs, and 40 years after Presi-



after more than 25 years of federal efforts involving the expenditure of hundreds of billions of 1996 dollars, “nobody claims victory” and we remain “devoted to a policy as expensive, ineffective, delusional, and destructive as government gets.”<sup>20</sup> Baum also cataloged the racist impact of the WOD up through 1996.<sup>21</sup> Today, a broad bipartisan consensus recognizes the failure of the WOD.<sup>22</sup>

The WOD failed to stem drug abuse. This failure continues today. Drug overdose deaths in the United States more than tripled between 1999 and 2017 (when it hit a then-record high) before declining slightly in 2018.<sup>23</sup> Drug overdoses reached new record levels in 2020-21, exceeding 100,000 deaths for the first time.<sup>24</sup> Despite trillions spent to disrupt supply, Drug Enforcement Agency (DEA) data shows that drug prices have declined and quality has increased since 1986.<sup>25</sup> Further, since 2002 the use of illicit drugs in the United States has increased.<sup>26</sup> On the other hand, in Portugal—which

dent Nixon launched the US government’s war on drugs, fundamental reforms in national and global drug control policies are urgently needed.”); Jay Z et al., *The War on Drugs is an Epic Fail*, N.Y. TIMES (Sept. 15, 2016), <https://www.nytimes.com/video/opinion/10000004642370/jay-z-the-war-on-drugs-is-an-epic-fail.html?action=click&gtype=vhs&version=vhs-heading&module=vhs&region=title-area&cvview=true&t=11> (“The War on Drugs is an Epic Fail.”).

20. DAN BAUM, *SMOKE & MIRRORS: THE WAR ON DRUGS AND THE POLITICS OF FAILURE* vii (1996).

21. *Id.* at 245–46 (noting that on the New Jersey Turnpike out of state African Americans were disproportionately stopped and searched for drugs); *Id.* at 253 (“[E]ven in 1988, it was clear that blacks were being disproportionately targeted for drug arrest.”); *Id.* at 257 (recounting the origins of the harsher crack cocaine sentencing provision relative to cocaine, which is used far more widely by Whites); *Id.* at 323 (showing racial disparities in sentencing, arrests, and enforcement in numbers far exceeding involvement in illicit narcotics).

22. Gary S. Becker & Kevin M. Murphy, *Have We Lost the War on Drugs?*, WALL ST. J. (Jan. 5, 2013), [www.wsj.com/articles/sb10001424127887324374004578217682305605070](http://www.wsj.com/articles/sb10001424127887324374004578217682305605070) (“Decriminalization of all drugs by the U.S. would be a major positive step away from the war on drugs.”).

23. CTRS. FOR DISEASE CONTROL, NAT’L CTR. FOR HEALTH STAT., *DRUG OVERDOSE DEATHS IN THE UNITED STATES, 1999–2018* (Jan. 2020), <https://www.cdc.gov/nchs/products/databriefs/db356.htm>.

24. Kaitlin Sullivan & Reynolds Lewis, *‘A Staggering Increase’: Yearly Overdose Deaths Top 100,000 for First Time*, NBC NEWS (Nov. 17, 2021), <https://www.nbcnews.com/health/health-news/yearly-drug-overdose-deaths-top-100000-first-time-rcna5656>.

25. Talia Bronshtein, *Interactive: Explore How Illegal Drugs Have Become Cheaper and More Potent Over Time*, STAT (Nov. 16, 2016), <https://www.statnews.com/2016/11/16/illegal-drugs-price-potency/>.

26. U.S. Dept. of Health & Human Services, *Drug Facts* (showing increase from 2002 to 2012 in the use of illicit drugs by Americans over age 12); National Institute on Drug Abuse, *National Survey of Drug Use and Health*, <https://www.drugabuse.gov/drug-topics/trends-statistics/national-drug-early-warning-system-ndews/national-survey-drug-use-health> (showing increase in illicit drug use by those over 12 from 2016 to 2018).

decriminalized all drugs in 2001—drug use did not increase and overdoses declined when treatment instead of incarceration took hold.<sup>27</sup>

The economic and human carnage that lies in the wake of this failed “war” has been predictably and enormously costly.<sup>28</sup> Quantifying these costs has proven difficult, although in previous work we have undertaken to attempt to describe how badly the WOD has injured our nation, particularly the communities of color who have suffered the most under this misguided and racist campaign.<sup>29</sup> We concluded that the total direct and indirect costs amounted to at least \$450 billion per year.<sup>30</sup>

Upon close inspection, evidence indicates that the War on Drugs was never actually about stemming the use of drugs in the United States, nor about stanching the flow of drugs into the country.<sup>31</sup> Rather, the WOD originated with the intent to criminalize communities of color and marginalize the voting power of political enemies.<sup>32</sup> The WOD is, and always was,

27. Caitlin Elizabeth Hughes & Alex Stevens, *What Can We Learn from the Portuguese Decriminalization of Illicit Drugs?*, 50 BRITISH J. OF CRIMINOLOGY 999, 1018 (2010) (“The Portuguese evidence suggests that combining the removal of criminal penalties with the use of alternative therapeutic responses to dependent drug users offers several advantages. It can reduce the burden of drug law enforcement on the criminal justice system, while also reducing problematic drug use.”); Harvey Slade, *Drug Decriminalization in Portugal: Setting the Record Straight* (May 13, 2021), <https://transformdrugs.org/blog/drug-decriminalisation-in-portugal-setting-the-record-straight> (“Portugal has set a positive example for what can be done when drug policies prioritise health rather than criminalisation. . . . Many impacts of reform were felt immediately: new HIV infections, drug deaths and the prison population all fell sharply within the first decade.”).

28. See generally PATRISSE KHAN-CULLORS & asha bande, *WHEN THEY CALL YOU A TERRORIST: A BLACK LIVES MATTER MEMOIR* (2017); PAUL BUTLER, *CHOKEHOLD: POLICING BLACK MEN* 133–34 (2017) (detailing the devastating impact the War on Drugs has had on the black community writ large).

29. See generally cummings & Ramirez, *supra* note 3, at 487–88.

30. *Id.* at 494 (“[E]nding the WOD would save . . . [g]overnments . . . at least \$150 billion per annum (consisting of lower expenditures and enhanced revenues) from the failed WOD and associated mass incarceration into the communities most damaged by the WOD. In addition, our economy will enjoy a long-term boost from reversing the destruction of human capital and productivity implicit in the annual loss of over \$400 billion in earnings . . .”).

31. See BAUM, *supra* note 20, at 7–8 (recounting the birth of the War on Drugs as a Nixon campaign response to student and African American protesters and riots with well-known links to narcotics in those communities). “Rather than argue with critics of either racial discrimination or the Vietnam War, Nixon and the Republicans were learning to discredit them directly.” *Id.* at 11.

32. See Dan Baum, *Legalize It All*, HARPER’S (Apr. 2016), <https://harpers.org/archive/2016/04/legalize-it-all/> [hereinafter *Legalize It All*] (noting that 1 in 8 African American male voters has suffered disenfranchisement due to a felony conviction).



meant to be a war on black and brown Americans.<sup>33</sup> This explains why the WOD persists despite its failures and the ready availability of superior alternatives while simultaneously imposing deep misery upon millions of Americans.<sup>34</sup>

This is evident by quoting from the primary founders of the WOD, namely President Richard Nixon and President Ronald Reagan and their administrations. Paying close attention to their words and intentions at the founding of this “war” shows clearly that from the beginning, the WOD was meant to cripple the progress of black and brown Americans and pit portions of a nation’s citizenry against their own compatriots.<sup>35</sup> The truth about the WOD and its inception is pernicious and ugly.<sup>36</sup> First then, what follows are the ugly words and pernicious actions of Richard Nixon and his advisors.

### A. Richard Nixon’s “War” on Drugs

Richard Nixon declared “total war” on drug use, naming it “public enemy No. 1” in 1971.<sup>37</sup> Far from being the nation’s number one threat at that time, drug use hardly registered as a national threat nor was it on the collec-

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33. DORIS MARIE PROVINE, *UNEQUAL UNDER LAW: RACE IN THE WAR ON DRUGS* 4–5, 12 (2007) [hereinafter *UNEQUAL UNDER LAW*] (“Our history of embedded racism also helps to explain the public’s otherwise surprising tolerance for failed policies, even in the face of the tremendous human suffering associated with incarceration.”); *see generally* BAUM, *supra* note 20 (tracing the evolution of the War on Drugs as a war on black and brown American communities).

34. *See* *UNEQUAL UNDER LAW*, *supra* note 33, at 12.

35. DAVID MUSTO, *THE AMERICAN DISEASE: ORIGINS OF NARCOTIC CONTROL* 294 (1999) (“The most passionate support for legal prohibition of narcotics has been . . . fear of a given drug’s effect on a specific minority.”).

36. *See* Provine, *supra* note 4, at 43 (“The government’s war on recreational drugs did not really get underway until 1930 when Harry Anslinger left his post in the Bureau of Prohibition to become the first commissioner of the Federal Bureau of Narcotics. He used his post—which he held for a remarkable 32 years—to argue that drug addicts were the most serious criminals in the nation.”). Anslinger epitomized “the goal . . . to establish harsh criminal sanctions for selected drugs. The most fruitful approach has been to link the drug with a disliked racial minority. The specter of out-of-control behavior by the feared racial ‘other’ helps to make the case for strong criminal sanctions.” *Id.* at 42. *See generally* MICHELLE ALEXANDER, *THE NEW JIM CROW* (paperback ed. 2012) (tracing the subordination of African American citizens from slavery to Black Codes to Jim Crow through the New Jim Crow, which she defines as Mass Incarceration); ANGELA Y. DAVIS, *ARE PRISONS OBSOLETE?* (2003) (describing the clear track of subordination from slavery through convict leasing and lynching to massive populations of “racially oppressed communities” into America’s prisons); SHANE BAUER, *AMERICAN PRISON: A REPORTER’S UNDERCOVER JOURNEY INTO THE BUSINESS OF PUNISHMENT* (2018) (detailing the massive increase in the Black American prison population as connected with a profit incentive from convict leasing through current private-for-profit prison corporations).

37. *See* ‘Public Enemy No. 1’, *N.Y. TIMES* (Mar. 22, 1972), <https://www.nytimes.com/1972/03/22/archives/public-enemy-no-1.html>.

tive mind of U.S. citizens.<sup>38</sup> In fact, survey evidence proved that no drug epidemic existed and that few high-school-aged students used narcotics of any type.<sup>39</sup> Instead, Nixon and his allies were developing a straw man that would enable him and his political party to neutralize large and powerful voting blocks that had lined up solidly against him and his party, namely black Americans and young people, including anti-Vietnam War protesters.<sup>40</sup>

John Ehrlichman, Nixon's close advisor during the development of the WOD, infamously stated in 1994:

The Nixon campaign in 1968, and the Nixon White House after that, had two enemies: the antiwar left and black people. . . . We knew we couldn't make it illegal to be either against the war or black, 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.<sup>41</sup>

Ehrlichman essentially admitted twenty-five years after, that Nixon's "war" on drugs originated based on a racist lie and specifically targeted political enemies and African Americans.<sup>42</sup> Further, Ehrlichman's admission aligns with H.R. Haldeman's diary entry reported years ago in a book that chronicles Nixon's political journey to the WOD.<sup>43</sup> According to senior aide

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38. See BAUM, *supra* note 20, at 21 ("Despite Nixon's assertion [on the campaign trail] that drugs were 'decimating a generation of Americans,' drugs were so tiny a public health problem that they were statistically insignificant: far more Americans choked to death on food or died falling down stairs as died from illegal drugs."). Nixon also claimed during his campaign that half of all crimes committed in New York were committed by addicts and that while he supported civil rights, the first civil right is the safety of Americans from violence. *Id.* at 12.

39. *Id.* at 26–27.

40. See generally TONRY, *supra* note 14; Kenneth B. Nunn, *Race, Crime and the Pool of Surplus Criminality: Or Why the 'War on Drugs' Was a 'War on Blacks'*, 6 J. OF GENDER RACE & JUST. 381, 390–91 (2002) ("For the constituency the Reagan Administration was trying to reach, it was easy to construct African Americans, Hispanics, and other people of color as the enemy in the War on Drugs. These are the groups that the majority of white Americans have always viewed as the sources of vice and crime. Reagan's anti-drug rhetoric was skillfully designed to tap into deeply held cultural attitudes about people of color and their links to drug use and other illicit behavior.")

41. *Legalize It All*, *supra* note 32.

42. *Id.*; see also RUDOLPH J. GERBER, *LEGALIZING MARIJUANA* 20 (2004) ("By 1970, crime generally and drugs in particular were becoming code words in some conservative groups for racial hostility . . .").

43. Nixon did, in fact, lie to the nation about the drug problem. For example, in 1971 Nixon told Congress to increase funding for the WOD, in part because heroin addicts stole \$2

Haldeman, Nixon “emphasized that you have to face the fact that the whole problem is really the blacks. The key is to devise a system that recognizes this while not appearing to.”<sup>44</sup> The War on Drugs fit this bill.

The system that Nixon and his strategists devised, the WOD, proved to be lethal and politically effective. Harry S. Dent, Nixon’s political advisor, relentlessly distinguished between policies for “our” people, and policies for “their” people.<sup>45</sup> “‘Their’ people were what the White House called ‘the young, the poor, and the black.’”<sup>46</sup> That phrase reportedly ricocheted around the White House and “off the tongues” of Nixon’s key advisors like one word: “theyoungthepoorandtheblack.”<sup>47</sup> The Nixon WOD fit perfectly with Dent’s approach: The War on Drugs would invariably harm people of color (and other enemies) while exploiting among Nixon’s supporters evolving social norms of racialized criminality against black Americans.<sup>48</sup>

The Nixon Administration was tapping into a timeworn strategy—for years drug use had been the vehicle individuals in power exploited to disenfranchise people contesting that power. Associating drugs with African Americans and people of color did not begin with Nixon.<sup>49</sup> In the 1930s, the first commissioner of the Federal Bureau of Narcotics and a “founding father” of the WOD, Harry Anslinger,<sup>50</sup> consistently used racial slurs and stereotypes to encourage the public to link drugs to communities of color.<sup>51</sup> For example, Anslinger stated that cannabis caused “white women to seek [sexual] relations with Negroes . . .” and that reefer made African Americans

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billion in property, even though all property stolen that year in the US totaled only \$1.3 billion. BAUM, *supra* note 20, at 58.

44. *Id.* at 12 (citing H.R. Haldeman’s diary).

45. *See id.* at 20.

46. *Id.*

47. *Id.* at 21.

48. *Id.* at 20–21.

49. In fact, the Johnson Administration specifically found that enforcement of drug laws would fall disproportionately on the “poor and subcultural groups in the population.” BAUM, *supra* note 20, at 5.

50. Colin Moynihan, *An Exhibition Tells the Story of a Drug War Leader, but Not All of It*, N.Y. TIMES (Aug. 10, 2020), <https://www.nytimes.com/2020/08/10/arts/design/Anslinger-drug-czar-exhibition.html> (“Harry J. Anslinger’s pioneering work as head of the Federal Bureau of Narcotics has largely been unsung, though experts see him as the founding father of America’s war on drugs.”).

51. For example, Anslinger used racial slurs in his communications to the President and referred to “Oriental ruthlessness” with respect to the underworld of opiate drugs in his own book. *Id.* “Johann Hari, a writer and critic of U.S. drug policy, described Mr. Anslinger in his book ‘Chasing the Scream: The First and Last Days of the War on Drugs’ as someone who depicted drugs as dangerous by associating them with racial minorities. He said in an email message that his research indicated that Mr. Anslinger had adopted ‘a consistent framing that drugs are something nonwhite people disproportionately use.’” *Id.*

“think they’re as good as white men.”<sup>52</sup> Scholars attribute other insidious quotes to Anslinger that amply demonstrate the role racism played at the very beginning of the WOD: 1) “the primary reason to outlaw marijuana is its effect on the degenerate races;” 2) “Negros, Hispanics, Filipinos, and entertainers” constitute the main users of cannabis and “[t]heir Satanic music, jazz, and swing, result from marijuana use;” and 3) “the major criminal in the United States is the drug addict . . . .”<sup>53</sup> Ultimately, Anslinger’s Federal Bureau of Narcotics provoked almost entirely the Marihuana Tax Act of 1937,<sup>54</sup> the nation’s first federal cannabis enforcement effort, untethered to any scientific evidence or law enforcement necessity.<sup>55</sup>

Similarly, Harrison Wright, appointed first Opium Commissioner during the Theodore Roosevelt Administration, lobbied in favor of the Harrison Narcotics Act and attributed opium use to increased sexual relations between white women and Chinese users.<sup>56</sup> Indeed, the first federal intervention into narcotics markets (including opiates such as heroin) relied upon racist rhetoric to drive both its public support and its movement into law.<sup>57</sup> “Racial minorities have always been the target of the harshest drug laws.”<sup>58</sup>

Nixon understood from history that harsh narcotics laws could demonize and disempower the growing minority vote.<sup>59</sup> Thus, the very root of Nixon claiming a war on drug abuse was to criminalize black Americans and

52. Sarah Sloat, *Nixon Advisor Admitted the Obvious: War on Drugs was a War on Blacks and Hippies*, INVERSE (Mar. 16, 2020), <https://www.inverse.com/article/13153-nixon-advisor-admitted-the-obvious-war-on-drugs-was-a-war-on-blacks-and-hippies>; see Jessie Daniels, Julie C. Netherland, and Alyssa Patricia Lyons, *White Women, U.S. Popular Culture, and Narratives of Addiction*, 45 CUNY J. ACADEMIC WORKS 332 (2018).

53. Michelle H. Walton, *Book Note*, 11 ALB. GOV’T L. REV. 82, 89 (2017) (reviewing ROBERT MIKOS, *MARIJUANA LAW, POLICY, AND AUTHORITY* (2017)).

54. Marihuana Tax Act of 1937, Pub. L. No. 75-238, 50 Stat. 551, *invalidated by* Leary v. United States, 395 U.S. 6 (1969) (imposing tax on various marijuana-related transactions).

55. RICHARD J. BONNIE & CHARLES A. WHITEHEAD II, *THE MARIHUANA CONVICTION* 127 (1977).

56. Provine, *supra* note 4, at 43.

57. “The earliest U.S. drug laws were tied to racist stereotypes and to fears about the negative habits of immigrants.” Michael L. Rosino & Matthew W. Hughey, *The War on Drugs, Racial Meanings, and Structural Racism: A Holistic and Reproductive Approach*, 77 AM. J. ECON. & SOC. 849, 850 (2018). Rosino & Hughey take an innovative, holistic approach to quantifying the role of race in the propagation of the WOD. *Id.* at 849. Specifically, they review 30 years of media content (1983-2014) and find that “dominant racial meanings, manifest in both racial identity and racial ideology, work as a symbolic resource that people marshal to form a sense of self and rationalize or misconstrue structural racism” such as the WOD. *Id.* at 881.

58. UNEQUAL UNDER LAW, *supra* note 33, at 3.

59. According to H.R. Haldeman’s diary, Nixon told Haldeman: “the whole problem is really the blacks.” BAUM, *supra* note 20, at 12.

marginalize their growing political power.<sup>60</sup> He was following a racist strategy that had begun at least as early as Wright's and Anslinger's drug leadership in the early twentieth century.<sup>61</sup> Nixon's animus meant that science would not count when it came to the WOD.

More specifically, the Nixon Administration commissioned a study on marijuana in the early 1970s, seeking scientific evidence to support the WOD.<sup>62</sup> The National Commission on Marihuana and Drug Abuse ultimately issued a report entitled *Marihuana: A Signal of Misunderstanding*.<sup>63</sup> The study concluded, however, that marijuana was *not* a "danger to public safety" and that it should *not* be criminalized.<sup>64</sup> Nixon ignored the study, claimed that marijuana was a danger to the nation and spent millions of dollars closing the border between Mexico and the United States to halt the flow of marijuana.<sup>65</sup> These actions also directly support Ehrlichman's and Haldeman's claim that the Nixon Administration knowingly lied and used the WOD not to protect public health but as an instrument of racial animus and exploitation.

Thereafter, the Nixon Administration hastily pushed the enactment of the Controlled Substances Act in the wake of the Supreme Court's invalida-

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60. *Id.* When police found wealthy whites using drugs—such as during the cocaine epidemic—they could be counted on to treat violators differently from, in the words of a Chicago cop, "the dregs of society." *Id.* at 143. This also marked enforcement of the Harrison Act, which law enforcement used to control disempowered populations while "[r]espectable" addicts escaped sanction. UNEQUAL UNDER LAW, *supra* note 33, at 78–79.

61. BAUM, *supra* note 20, at 3–7, 20–21 (recounting America's exhaustion regarding civil rights and citing candidate Nixon's article in *Reader's Digest* calling for harsher treatment of criminals, which resonated with the general public as meaning the young, the black, and the poor).

62. *Id.* at 71.

63. NATIONAL COMMISSION ON MARIHUANA AND DRUG ABUSE, MARIHUANA: A SIGNAL OF MISUNDERSTANDING (Mar. 1972), [www.druglibrary.org/schaffer/library/studies/nc/nemenu.htm](http://www.druglibrary.org/schaffer/library/studies/nc/nemenu.htm).

64. *Id.* at 112 ("From what is now known about the effects of marihuana, its use at the present level does not constitute a major threat to public health."); see also Peat, Marwick, Mitchell & Co., *Marijuana: A Study of State Policies and Penalties*, NAT'L GOVERNOR'S CONF. CTR. FOR POL'Y RSCH. AND ANALYSIS 7–8 (Nov. 1977). In 1972, 55,000 Americans died in auto crashes, many attributable to drunk driving; another 33,000 died of alcohol poisoning or cirrhosis of the liver. No American ever died of cannabis ingestion. BAUM, *supra* note 20, at 72. Both the Ford Administration and the Carter Administration favored cannabis decriminalization (or at least considering it) after careful study. *Id.* at 86–87, 92–95. The Carter Administration also thought about comparing the costs of tobacco with the costs of cannabis (tobacco costs exceeded cannabis by 250%) but this comparison wound up edited-out. *Id.* at 97.

65. See Patrick Timmons, *Trump's Wall at Nixon's Border*, 49 NACLA REP. ON AMERICAS 15, 15 (2017).

tion of the Marihuana Tax Act,<sup>66</sup> and thereby projected the racist initiatives of Harry Anslinger into contemporary America, along with Nixon's animus towards people of color and youth war protestors. Anslinger continued at the top of the Bureau of Narcotics for over 30 years and continued spewing racist invective relating to narcotics into the post-war era, as shown above.<sup>67</sup> Animus indelibly marks the WOD.

In addition, the War on Drugs dovetailed with the "Southern Strategy."<sup>68</sup> Nixon's "Southern Strategy" sought to attract "white southerners away from the Democratic Party" through exploitation of "fear of black power" and hostility toward "the civil rights movement."<sup>69</sup> The Southern Strategy successfully "transformed the GOP's image" from the "country-club" set to "defender of working[-class] whites."<sup>70</sup> Nixon and his advisors developed a GOP electoral strategy that still operates today.<sup>71</sup> Three GOP Chairs ultimately admitted that their party pursued the Southern Strategy.<sup>72</sup> Fundamentally, the Southern Strategy and the WOD exploited civil rights fatigue and took aim at Nixon's enemies: African Americans and youth war protestors.<sup>73</sup> The Southern Strategy sought to pit rural white Americans against black and brown Americans politically by painting communities of

66. Marihuana Tax Act of 1937, Pub. L. No. 75-238, 50 Stat. 551, *invalidated by* Leary v. United States, 395 U.S. 6 (1969) (imposing tax on various marijuana-related transactions).

67. Provine, *supra* note 4, at 81, 84–90.

68. See BAUM, *supra* note 20, at 20–21. See also Angie Maxwell, *What We Get Wrong About the Southern Strategy*, WASH. POST (July 26, 2019), <https://www.washingtonpost.com/outlook/2019/07/26/what-we-get-wrong-about-southern-strategy/> ("Nixon's team . . . coded their racial appeals. The 'silent majority' of white Southerners that the candidate needed to attract understood that Nixon's call for the restoration of 'law and order,' for example, was a dog whistle, signaling his support for an end to protests, marches and boycotts, while his 'war on drugs' played on racialized fears about crime.").

69. BAUM, *supra* note 20, at 20.

70. *Id.*

71. See Jake Lahut, *Trump Supporters are Increasingly Isolated in Their Denial of Systematic Racism, According to New Polling Data*, BUSINESS INSIDER (Sept. 10, 2020), <https://www.businessinsider.com/pew-poll-trump-supporters-views-on-racism-2020-9> ("Trump has tried to court Black voters through the summer, but has repeatedly stated he does not believe systemic racism exists, equating police officers who kill unarmed civilians to golfers who 'choke' on the putting green."); see also Harold Myerson, *How Racist Are Republicans? Very.*, THE AMERICAN PROSPECT (Oct. 22, 2020), <https://prospect.org/blogs/tap/how-racist-are-republicans-very/> ("Among Republicans, however, 49 percent believed it made the country better when all Americans spoke up and protested unfair governmental treatment, but just 24 percent believed it when Black Americans spoke up and protested."); see Candace Smith, *Some White Trump Supporters Fear Becoming a Minority*, ABC NEWS (Nov. 2, 2016), <https://abcnews.go.com/Politics/white-trump-supporters-fear-minority/story?id=43229203> ("Of Trump's supporters, there are a vocal number who worry about a country that no longer looks like the United States they say they knew or envisioned.").

72. STEVEN A. RAMIREZ, *LAWLESS CAPITALISM* 152 (2013).

73. See BAUM, *supra* note 20, at 20–21.



color and anti-war protesters as criminals, drug-addicted, and receivers of government largesse (i.e. welfare), all at the expense and exclusion of rural whites.

While President Nixon declared his racist War on Drugs, despite scientific evidence contravening his claims, it was Ronald Reagan who took the racist torch and set fire to communities of color by federalizing, militarizing, and internationalizing the drug war.

## B. Ronald Reagan's "War" on Drugs

Ronald Reagan gave a famous 1980 campaign kickoff speech at The Neshoba County Fair in Philadelphia, Mississippi, near the site of the heinous white supremacist murders of three civil rights workers in 1964.<sup>74</sup> Reagan used the occasion to trumpet his states' rights plank—which signaled his opposition to federally enforced civil rights.<sup>75</sup> Yet, Reagan ordered all executive branch employees to submit to expanded drug testing<sup>76</sup> and ultimately expanded the federal government's reach into private lives to employees of federal contractors.<sup>77</sup> President Reagan felt no compunction in using expansive federal power in pursuit of mass incarceration and the WOD, even though he opposed the use of federal power to protect the civil rights of people of color.

Starting in 1982, Reagan accelerated Nixon's WOD legacy by massively increasing funding for the eradication of drug use and concomitantly decreasing funding for education, drug abuse prevention, and drug rehabilitation programs.<sup>78</sup> In general, Reagan cut government spending during this

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74. See Bruce Bartlett, *Reagan and Neshoba*, HISTORY NEWS NETWORK (July 29, 2008), <https://historynewsnetwork.org/article/52854>.

75. Matthew Yglesias, *Reagan's Race Record*, THE ATLANTIC (Nov. 7, 2007), <https://www.theatlantic.com/politics/archive/2007/11/reagans-race-record/46875/> (noting that Reagan opposed the Civil Rights Act of 1964, the Voting Rights Act of 1965, and the Fair Housing Act).

76. Exec. Order No. 12,564, 3 C.F.R. § 5 (1986 Comp.).

77. Drug-Free Workplace Act of 1988, Pub. L. No. 100-690, §§ 5151–60, 102 Stat. 4181, 4304–08.

78. For example, “[o]n Jan. 28, 1982, President Reagan create[d] the South Florida Task Force, a concentrated federal assault on the importation of cocaine by South American smugglers. Vice President Bush [wa]s designated to oversee the effort, which include[d] beefed-up law enforcement and the deployment of Navy destroyers and other military assets to stop drugs from entering the country.” *Drug Wars Past and Present*, WASH. POST, [https://www.washingtonpost.com/archive/politics/1989/09/05/drug-wars-past-and-present/70f4f3f2-2727-41fe-a799-b85173879cdf/?utm\\_term=.065124167a4a](https://www.washingtonpost.com/archive/politics/1989/09/05/drug-wars-past-and-present/70f4f3f2-2727-41fe-a799-b85173879cdf/?utm_term=.065124167a4a) (last visited Dec. 29, 2021); see also Statement Announcing Establishment of a Federal Anti-Crime Task Force for Southern Florida, Ronald Reagan Presidential Library & Museum (Jan. 28, 1982), <https://www.reaganlibrary.gov/archives/speech/statement-announcing-establishment-federal-anti-crime-task-force-southern-florida>.

time but funding for the WOD soared across the government, particularly at the FBI where spending went from \$8 million to \$95 million over a four-year period.<sup>79</sup>

President Reagan repeatedly signed harsh anti-narcotic legislation into law<sup>80</sup> while at the same time dramatically cutting drug treatment programs.<sup>81</sup> Reagan presided over a massive spike in incarceration for non-violent drug offenses where, between the early 1980s and the late 1990s, after Clinton became President, the number of individuals jailed for those crimes “rose from 50,000 to 400,000” Americans locked up.<sup>82</sup> The racist legacy of Reagan’s incarceration campaign clarifies when those arrests are broken down by ethnicity, where white Americans are more likely to use drugs than black Americans, yet black American youth are arrested at 10 times the rate of white American youth for drug-related offenses.<sup>83</sup> The NAACP reports that black Americans represent 5% of the country’s total drug users, but make up 33% of those incarcerated for a drug offense.<sup>84</sup>

Not only did Reagan harshly criminalize drug use, but he also sunk the racist roots of the drug war even deeper than Nixon had at inception. President Reagan’s campaign manager and future GOP Chair Lee Atwater stated in 1981:

You start out in 1954 by saying “N[\*\*\*\*]r, n[\*\*\*\*]r, n[\*\*\*\*]r.” By 1968 you can’t say “n[\*\*\*\*]r”—that hurts you. Backfires. So you say stuff like forced busing, states’ rights, and all that stuff. You’re getting so abstract now[,] you’re talking about cutting taxes, and all these things you’re talking about are totally economic things and a by-product of them is . . . blacks get hurt worse than whites.<sup>85</sup>

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79. UNEQUAL UNDER LAW, *supra* note 33, at 103.

80. *See, e.g.*, Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181; Drug-Free Workplace Act of 1988, Pub. L. No. 100-690, §§ 5151–60, 102 Stat. 4181, 4304–08; Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207; Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 1976.

81. BAUM, *supra* note 20, at 144–45, 163.

82. *See* Ignacio Diaz Pascual, *America’s War on Drugs – 50 Years Later*, LEADERSHIP CONF. ON CIV. AND HUM. RTS. (June 29, 2021), <https://civilrights.org/blog/americas-war-on-drugs-50-years-later/>.

83. *See* Maia Szalavitz, *Study: Whites More Likely to Abuse Drugs Than Blacks*, TIME (Nov. 7, 2011), <https://healthland.time.com/2011/11/07/study-whites-more-likely-to-abuse-drugs-than-blacks/>.

84. *See* *Criminal Justice Fact Sheet*, NAACP (2020), <https://naacp.org/resources/criminal-justice-fact-sheet>.

85. Leland Ware & David C. Wilson, *Jim Crow on the “Down Low”: Subtle Racial Appeals in Presidential Campaigns*, 24 ST. JOHNS J.L. COMM. 299, 311–13 (2009). The actual audio for any doubters of the veracity of the quote is available on *The Nation* website. Rick Perlstein, *Exclusive: Lee Atwater’s Infamous 1981 Interview on the Southern Strategy*, THE

While Atwater admits the racial coding and dog whistling in which Reagan was an expert,<sup>86</sup> the Reagan administration waged the drug war specifically in communities of color, turning those neighborhoods into veritable war zones.<sup>87</sup> As one commentator states: “Most disastrously, Reagan took Nixon’s nascent War on Drugs—an issue that experts agree should be treated as a public health crisis rather than a law enforcement crusade—and turned it into an actual armed conflict. Reagan militarized the American police force, which has used the War on Drugs as a pretext for terrorizing communities of color.”<sup>88</sup> Reagan’s militarization and prioritization of the WOD effectively “bastardized police departments across” the country.<sup>89</sup>

When President Reagan prioritized drug enforcement in the 1980s as a cornerstone of his domestic policy, his own advisors were astonished, as was the entire country.<sup>90</sup> At that time, just 2% of the U.S. population thought that drug use and abuse was among the nation’s “most pressing [national] problem[s].”<sup>91</sup> Not surprisingly, local law enforcement nationwide did not share Reagan’s drug prioritization aims, so Reagan adopted policies that incentivized police departments to make drug enforcement a top priority by promising federal funding, military-style weaponry and forfeiture laws as rewards for reprioritizing.<sup>92</sup> Thus, Reagan’s answer to dubious and obstinate local law enforcement agencies resisting prioritizing the WOD was “[h]uge cash grants” turned out to be “massive bribe[s] offered to state and local law

NATION (Nov. 13, 2012), <https://www.thenation.com/article/archive/exclusive-lee-atwaters-infamous-1981-interview-southern-strategy/>.

86. See andré douglas pond cummings, *Racial Coding and the Financial Market Crisis*, 2011 UTAH L. REV. 141, 217 (2011) (detailing Reagan’s use of the “welfare queen” as a racially-coded trope targeting black mothers in urban America).

87. The militarization of the WOD became a signature program for the Reagan Administration. BAUM, *supra* note 20, at 149–50.

88. Joey Grialva, *Opinion: Ronald Reagan is a Symbol of Systematic Racism. It’s Time to Rename our High School*, MILWAUKEE NEIGHBORHOOD NEWS SERV. (July 16, 2020), <https://milwaukeeenns.org/2020/07/16/opinion-ronald-reagan-is-a-symbol-of-systemic-racism-its-time-to-rename-our-high-school/>.

89. cummings & Ramirez, *supra* note 3, at 480.

90. See KENDI, *supra* note 17, at 433.

91. KENDI, *supra* note 17, at 433–34; MICHAEL K. BROWN, ET AL., *WHITEWASHING RACE: THE MYTH OF A COLOR-BLIND SOCIETY* 136–37 (2005) (describing how substance abuse professionals were shocked to hear Reagan claim that the non-existent drug abuse crisis could be tamped down by stronger police enforcement).

92. See Emily Crick, *Reagan’s Militarisation of the ‘War on Drugs’*, GLOBAL DRUG POLICY OBSERVATORY (2016), <https://gdpo.swan.ac.uk/?p=440> (“US President Richard Nixon is often credited with launching the ‘War on Drugs’, but my research suggests that in fact it was the Reagan administration, with support from Nancy Reagan, who really shaped and militarised the ‘War on Drugs’ as we know it now. The Reagan era introduced and propagated across the world a virulently prohibitionist and highly militarised form of international drug control.”); see also ALEXANDER, *supra* note 36, at 73–76; KENDI, *supra* note 17, at 435–38; Luna, *supra* note 17, at 857–64.

enforcement by the federal government” to motivate nationwide warfare against drugs.<sup>93</sup> “From this ensuing flood of federal largesse . . . paramilitary weaponry began flowing freely into local police agencies effectively setting military tanks, battering rams, flashbang grenades, helicopters, bazookas, and assault weaponry loose upon poor and minority urban communities across the country.”<sup>94</sup> Reagan effectually declared war on his own United States citizens.

In declaring war upon his own people Reagan was characteristically expressive, stating, “America’s liberty was purchased with the blood of heroes. Our release from the bondage of illegal drug use is being won at the same dear price. . . . At our founding, we were promised the pursuit of happiness, not the myth of endless ecstasy from a vial of white poison.”<sup>95</sup> Nancy Reagan, the President’s wife, continued her husband’s demonstrative language when she claimed “[i]f you’re a casual drug user, you are an accomplice to murder.”<sup>96</sup>

Indeed, once Reagan convinced Los Angeles police chief Daryl Gates to embrace his drug war and rhetoric, Gates “testified before Congress that ‘the casual [drug] user ought to be taken out and shot.’”<sup>97</sup> Gates continued “[w]e’re in a war” and that drug use “is treason.”<sup>98</sup> President Reagan did not relent in seeking to drive public attention to what had hitherto been fairly insignificant drug use across the nation. Further, in 1986 Reagan claimed that “illegal drugs were every bit as much of a threat to the United States as enemy planes and missiles.”<sup>99</sup> In September of that year, Reagan argued that “[d]rugs are menacing our society. They’re threatening our values and undercutting our institutions. They’re killing our children.”<sup>100</sup>

Given longstanding revelations of serious drug abuse in the Reagan family itself, these bombastic efforts at demonization represent more political ploy than heartfelt concern for public health and the nation.<sup>101</sup> Sadly, like

93. ALEXANDER, *supra* note 36, at 72.

94. cummings & Ramirez, *supra* note 3, at 481 (“For example, according to Nick Pastore, a former Police Chief of New Haven, Connecticut, ‘I was offered tanks, bazookas, anything I wanted.’”); *see also* ALEX S. VITALE, *THE END OF POLICING* 10–11 (2017); ALEXANDER, *supra* note 36, at 74–80; andré douglas pond cummings, *Reforming Police*, 10 DREXEL L. REV. 573, 622–26 (2018); *The War Comes Home: The Excessive Militarization of American Policing*, AM. C.L. UNION (June 2014), <https://www.aclu.org/report/war-comes-home-excessive-militarization-american-police>.

95. Luna, *supra* note 17, at 819.

96. *Id.* at 868.

97. *Id.*

98. *Id.* at 820.

99. Crick, *supra* note 92.

100. *Id.*

101. Lisa Anderson, *Meow*, CHI. TRIB. (May 6, 1992), <https://www.chicagotribune.com/news/ct-xpm-1992-05-06-9202100192-story.html> (recount-

it had most other wealthy white households, drug abuse struck the Reagans: Patti Davis admitted to serious and illegal use of controlled substances,<sup>102</sup> and she also wrote about Nancy Reagan's drug dependency,<sup>103</sup> since corroborated by recent sources.<sup>104</sup> This unfortunate tale of hypocrisy supports the core thesis of this Article: the WOD never addressed public health problems in a defensible manner (after all, drugs posed no sanction for "us"), instead it intentionally sought the demonization, disempowerment, and destruction of political enemies and people of color ("they" needed severe punishment), just as senior political advisors to both Presidents Nixon and Reagan admitted.

With such grandiloquent public provocations and astounding federal cash and military weapon incentives, local police agencies began prioritizing the drug war with its violent trappings over community engagement and policing as departments adopted "SWAT team takedowns of its own citizens in their own communities often propelled by drug addled informants and unreliable snitches."<sup>105</sup> Thus, the WOD simply further sullied the already racially-biased policing culture in the United States.<sup>106</sup> The rhetoric and bombast worked. "In 1985, the proportion of Americans polled who saw drug abuse as the nation's 'number one problem' was just 2-6 percent. The figure grew through the remainder of the 1980s until, in September 1989, it reached a remarkable 64 percent—one of the most intense fixations by the American public on any issue in polling history."<sup>107</sup> Public opinion, media attention, bluster, and misdirection led to a literal war being waged on the urban streets of United States cities against black and brown Americans.

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ing Patti Davis's admissions that she took acid, cocaine, and used marijuana as well as her allegation that Nancy Reagan was "regularly taking pills from a medicine chest stocked with a changing arsenal of prescription tranquilizers and sleeping pills, such as Miltown, Seconal, Librium, Valium, Quaaludes and Dalmane.").

102. PATTI DAVIS, *THE WAY I SEE IT* 121 (1992).

103. *Id.* at 123.

104. KAREN TUMULTY, *THE TRIUMPH OF NANCY REAGAN* 181 (2021) (stating that Patti Davis used LSD and cocaine, and grew and sold marijuana.). Tumulty reports that Nancy Reagan suffered serious drug dependency and possible drug addiction. *Id.* at 319–21. Tumulty also reports that Nancy Reagan shared her prescription drugs with the President. *Id.*

105. cummings & Ramirez, *supra* note 3, at 481; see VITALE, *supra* note 94, at 134–40; see also ALEXANDER, *supra* note 36, at 74–80.

106. cummings & Ramirez, *supra* note 3, at 481; see VITALE, *supra* note 94, at 137–40; see also ALEXANDER, *supra* note 36, at 74–76; cummings, *Reforming Policing*, *supra* note 94, at 622–24.

107. *A History of the Drug War*, DRUG POL'Y ALLIANCE, <https://drugpolicy.org/issues/brief-history-drug-war>; see also Richard L. Berke, *Poll Finds Most in U.S. Back Bush Strategy on Drugs*, N.Y. TIMES (Sept. 12, 1989), <https://www.nytimes.com/1989/09/12/us/poll-finds-most-in-us-back-bush-strategy-on-drugs.html>; see also *Just Say No*, HISTORY.COM (May 31, 2017), <https://www.history.com/topics/1980s/just-say-no>.

The subtle truth is that, while framed as a war on drugs, President Reagan and his advisors, each encumbered with deeply racist roots, were waging a war on black communities.

Reagan, the actor/President, dog whistled his way through his entire Presidency. While not explicitly naming African Americans in his many sweeping anti-welfare or anti-social programs speeches, he was keen to talk about “welfare queens” and “strapping young bucks,” both of whom were intent on cheating the American welfare system.<sup>108</sup> The racial coding Reagan employed explicitly meant to call to mind black women when he castigated “welfare queens” and black men when he excoriated “strapping young bucks.”<sup>109</sup> Reagan’s famed “welfare queen” was a Chicago woman who according to Reagan had “80 names,” “30 addresses,” and a \$150,000 annual check from the public taxpayers, thereby inflaming “the hateful stereotype of black, female welfare recipients as being either outright criminals or indolent leeches reaping legal but undeserved riches.”<sup>110</sup> Reagan’s “strapping young buck” used food stamps to “buy a T-Bone steak,” while Reagan’s devotees “were waiting in line to buy hamburger.”<sup>111</sup> Reports indicate that Reagan used the term “young buck” only when narrating about welfare cheats in southern states, “abandoning the descriptor when stumping in northern states” with fewer black citizens.<sup>112</sup> The dog-whistle employed by Reagan was clear as the “young buck” and the “welfare queen” were both meant to conjure Black Americans living in the ghetto.

The list of President Reagan’s under-reported racism is lengthy and significant. Reagan vetoed sanctions against South Africa’s apartheid regime. He opposed passage of both 1964’s Civil Rights Act and 1965’s Voting Rights Act, while openly defending housing segregation by arguing that

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108. IAN HANEY LÓPEZ, *DOG WHISTLE POLITICS* 4, 24–27, 59 (2014). Dog whistle politics transcends the WOD. *See id.* at ix (“In the last 50 years, dog whistle politics has driven broad swaths of white voters to adopt a self-defeating hostility toward government, and in the process has remade the very nature of race and racism. American politics today—and the crisis of the middle class—simply cannot be understood without recognizing racism’s evolution and the power of pernicious demagoguery.”). Even high-profile GOP leaders do not contest the reality of dog whistle politics or the Southern Strategy. President Nixon, as well as at least two of his senior aides, also essentially admitted to using racial anxiety and racial divisions as a political tool. *See supra* notes 85–86 and accompanying text.

109. Gabrielle Bruney, *How Ronald Reagan’s Racism Helped Pave the Way for Donald Trump’s*, *ESQUIRE* (Nov. 22, 2020), <https://www.esquire.com/entertainment/tv/a34733508/reagans-showtime-racism-matt-tyrnauer-ian-haney-lopez-donald-trump/>; *see also* Ann Cammett, *Deadbeat Dads and Welfare Queens: How Metaphor Shapes Poverty Law*, 34 *B.C. J.L. & SOC. JUST.* 233 (2014).

110. Bruney, *supra* note 109; *see also* HANEY LÓPEZ, *supra* note 108, at 4.

111. Bruney, *supra* note 109.

112. *Id.*; *see also* HANEY LÓPEZ, *supra* note 108, at 59.



property owners were within their rights to “discriminate against Negroes,” and originally opposed the creation of Martin Luther King Day.<sup>113</sup>

Recently, newly publicized tapes revealed Reagan’s breathtaking racism when he served as Governor of California, expressed during a phone call with then-President Nixon.<sup>114</sup> The tapes reveal that “[t]he day after the United Nations voted to recognize the People’s Republic of China, then-California Governor [ ] Reagan phoned President [ ] Nixon at the White House and vented his frustration at the [international] delegates who had sided against the United States.”<sup>115</sup> Reagan is recorded saying, “Last night, I tell you, to watch that thing on television as I did . . . To see those, those monkeys from those African countries—damn them, they’re still uncomfortable wearing shoes!”<sup>116</sup> Nixon is recorded as reacting to Reagan’s vulgar racism with an enormous laugh.<sup>117</sup>

President Reagan’s demonstrated racism, together with his deep commitment to politicize drug use, was used to drive a WOD that played out nearly singularly on the streets of black and brown Americans. According to Professor Kenneth Nunn, “[i]n addition to shaping the methods used to address the drug problem, the rhetoric of war also shaped the impact of those methods, for a war requires not only military strategies, but an enemy as well.”<sup>118</sup> For Reagan’s targeted constituency, it was easy to fashion “African Americans, Hispanics, and other people of color as the enemy in the War on Drugs.”<sup>119</sup> After all, these minority groups have always been viewed by the “majority of white Americans” as primary “sources of vice and crime” in the country.<sup>120</sup> “Reagan’s anti-drug rhetoric was skillfully designed to tap into deeply held cultural attitudes about people of color and their links to drug use and other illicit behavior.”<sup>121</sup>

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113. Matthew Yglesias, *Reagan’s Race Record*, THE ATLANTIC (Nov. 9, 2007), <https://www.theatlantic.com/politics/archive/2007/11/reagans-race-record/46875/>. See also Andrew Glass, *Reagan Establishes National Holiday for MLK, Nov. 2, 1983*, POLITICO, Nov. 2, 2017, <https://www.politico.com/story/2017/11/02/reagan-establishes-national-holiday-for-mlk-nov-2-1983-244328> (detailing Reagan’s initial opposition to establishing a holiday for Martin Luther King, Jr.).

114. See Tim Naftali, *Ronald Reagan’s Long-Hidden Racist Conversation with Richard Nixon*, THE ATLANTIC (July 30, 2019), [www.theatlantic.com/ideas/archive/2019/07/ronald-reagans-racist-conversation-richard-nixon/595102/](http://www.theatlantic.com/ideas/archive/2019/07/ronald-reagans-racist-conversation-richard-nixon/595102/).

115. *Id.*

116. *Id.*

117. *See id.*

118. Nunn, *supra* note 40, at 390.

119. *Id.* at 390.

120. *Id.*

121. *Id.* at 390–91.

Reagan's militarizing and racializing of the War on Drugs bore immediate, strange fruit.<sup>122</sup> Local law enforcement began relying on military-style methods and training to fight this "war." "According to a 2014 report, roughly eighty percent of SWAT deployments were for the purposes of executing a search warrant—most frequently in drug investigations (62% of SWAT raids)—while less than ten percent of deployments dealt with the type of situations for which SWAT teams were created (e.g., hostage scenarios)."<sup>123</sup> Further, "[i]n one-third (and possibly as much as two-thirds) of all drug raids, SWAT teams found no contraband of any kind."<sup>124</sup> Additional statistics indicate that "[i]n cases in which the presence of weapons was cited as a justification for using SWAT, two-thirds of the time no weapons were found" at all.<sup>125</sup> Additionally, in as many "as two-thirds of drug searches, SWAT teams used battering rams or other" aggressive breaching devices to gain entry into individual's homes.<sup>126</sup> Similarly, "in a majority of drug cases SWAT teams employed no-knock warrants, which dispense with the Fourth Amendment requirements that officers announce their presence and authority before (forcibly) entering a home."<sup>127</sup> Of course, as detailed above, in most of these "instances of forcible entry and no-knock warrants" SWAT teams found either no drugs at all or inconsequential quantities of drugs.<sup>128</sup> And these community SWAT team assaults were conducted in, even targeted at, black urban communities.<sup>129</sup>

By the late 1980s, the Reagan Administration set its sights on crack cocaine. "Crack was perfectly suited for Reagan's anti-drug campaign . . . because media attention ensured that no one would miss its connection with the terrifying inner city and its reckless Black youth."<sup>130</sup> After the death of basketball player Len Bias in 1986, a media explosion (encouraged by the government) took hold across America, which according to studies vilified black offenders versus white offenders.<sup>131</sup> Predictably, expert analysis of the

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122. Reagan and Nixon's WOD can most realistically be viewed as a continuation of the oppressive through line for black Americans leading from slavery, to convict leasing, to Jim Crow, to lynching, to mass incarceration instrumentalized currently through the War on Drugs. *See generally* Billie Holiday, *Strange Fruit* (Commodore Records, 1939) ("Southern trees bear strange fruit; Blood on the leaves and blood at the root; Black bodies swinging in the southern breeze; Strange fruit hanging from the poplar trees.").

123. Luna, *supra* note 17, at 862.

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.* at 862–63

128. Luna, *supra* note 17, at 863.

129. ALEXANDER, *supra* note 36, at 56.

130. UNEQUAL UNDER LAW, *supra* note 33, at 104.

131. *Id.* at 105–08 (citing JIMMIE L. REEVES & RICHARD CAMPBELL, *CRACKED COVERAGE: TELEVISION NEWS, THE COCAINE CRUSADE AND THE REAGAN LEGACY* 42 (1994)).

*Congressional Record* found that racialized themes drove draconian legislation in the form of the Anti-Drug Abuse Act of 1986 and the Anti-Drug Abuse Act of 1988.<sup>132</sup> These Acts created the infamous 100-1 ratio for sentencing users of crack-cocaine (often people of color) versus users of powder cocaine (often white).<sup>133</sup>

President Reagan's drug war devastated minority communities and exploded the U.S. prison population. His legacy will forever be saddled by the destruction he visited upon black and brown men and communities. Regrettably, Reagan and Nixon were not alone in their wreckage. Bill and Hillary Clinton intensified the War on Drugs when they took the nation's helm in the 1990s.

### C. Bill Clinton's "War" on Drugs

Democrats joined the War on Drugs fray when President Clinton, determined not to appear soft on crime, signed the draconian Violent Crime Control and Law Enforcement Act of 1994<sup>134</sup> which, among other things, exploded the WOD, sent hundreds of thousands more black and brown men to prison, and "even imposed the death penalty on those convicted of large-scale drug distribution."<sup>135</sup> One commentator notes that "[f]ar from resisting the emergence of the new caste system that Ronald Reagan had codified into law through the Anti-Drug Abuse Acts of 1986 and 1988, Clinton escalated the drug war beyond what conservatives had imagined possible a decade earlier."<sup>136</sup> While candidate Bill Clinton strongly advocated drug treatment instead of jail time "during his 1992 presidential campaign, after his first few months in the White House he reverted to the drug war strategies of his Republican predecessors by continuing to escalate the drug war."<sup>137</sup>

To begin, President Clinton famously rejected a U.S. Sentencing Commission recommendation to jettison the infamous crack versus powder cocaine sentencing disparity referenced above, enacted during the Reagan Administration.<sup>138</sup> Clinton also rejected, at "the encouragement of [then-] drug czar General Barry McCarey, Health Secretary Donna Shalala's advice

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132. *Id.* at 111–17 (and authorities cited therein).

133. *Id.* at 115.

134. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796.

135. cummings & Ramirez, *supra* note 3, at 477; *see also* ALEXANDER, *supra* note 36, at 56.

136. Murch, *supra* note 18 (internal quotations omitted).

137. *A History of the Drug War*, DRUG POLICY ALLIANCE, <https://drugpolicy.org/issues/brief-history-drug-war>; *see also* S. Joyce, *Environmental Casualties of the War on Drugs*, 107 ENV'T HEALTH PERSP. 74 (Feb. 1999).

138. *See A History of the Drug War*, *supra* note 137; *see also* David Yellen, *The Sentencing Commission Takes on Crack, Again*, 20 FED. SENT. R. 227 (2008).

to end the federal ban on funding for syringe access programs.”<sup>139</sup> Thereafter, Clinton was responsible for making “60 new crimes eligible for the death penalty and fellow Democrats bragged about their specific additions to the list.”<sup>140</sup> Thus, “Bill Clinton and his allies embarked on a draconian punishment campaign to outflank the Republicans[:] ‘I can be nicked a lot, but no one can say that I’m soft on crime,’” Clinton boasted.<sup>141</sup>

To that end, in 1994, President Clinton passed and signed the Violent Crime Control and Law Enforcement Act.<sup>142</sup> At its base, this crime statute was a “federal three strikes bill” that imposed life sentences on certain drug offenders—including non-violent offenders.<sup>143</sup> The Act “established a \$30.2 billion Crime Trust Fund to allocate monies for state and municipal police and prison expansion.”<sup>144</sup> The law made it possible to prosecute 13-year-old children as adults in some cases and included new funding to place 100,000 additional police onto the nation’s streets.<sup>145</sup> The law provided for a dramatic expansion of crimes eligible for the death penalty and included “gang enhancements” for federal defendant sentencing.<sup>146</sup> The sweep of Clinton’s crime bill was breathtaking in scope and its results were as racially and economically destructive in communities of color as anything Reagan or Nixon “accomplished.”

In support of the 1994 crime bill, Hillary Clinton famously dog whistled that young black males were “super predators”<sup>147</sup>—forever tarnishing her reputation as a civil rights proponent.<sup>148</sup> Hillary Clinton is on record stat-

139. *A Brief History of the Drug War*, *supra* note 107; *see also* Murch, *supra* note 18.

140. Murch, *supra* note 18.

141. *Id.*

142. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796 (codified in scattered sections of 16, 18, 20, 26, 31, 42 U.S.C.).

143. Murch, *supra* note 18; *see also* 18 U.S.C. § 3559(c)(1)(A)(i) (2012).

144. *See* Murch, *supra* note 18.

145. *See id.*

146. *Id.*

147. *See* 13<sup>TH</sup> (Netflix 2016) (quoting Hillary Clinton describing young black males as “super predators” while supporting passage of the 1994 crime bill as documented in Ava Duvernay’s documentary film connecting the Thirteenth Amendment through to mass incarceration); *see also* Anne Gearan & Abby Phillip, *Clinton Regrets 1996 Remark on ‘Super-Predators’ after Encounter with Activist*, WASH. POST (Feb. 25, 2016), <https://www.washingtonpost.com/news/post-politics/wp/2016/02/25/clinton-heckled-by-black-lives-matter-activist/> (Secretary Clinton is quoted as saying “Looking back, I shouldn’t have used those words, and I wouldn’t use them today.”); Priyanka Boghani, *They Were Sentenced as “Superpredators.” Who Were They Really?*, FRONTLINE (May 2, 2017), <https://www.pbs.org/wgbh/frontline/article/they-were-sentenced-as-superpredators-who-were-they-really/> (noting that the super predator stereotype led to more youths getting sentenced to life without parole and that youths of color suffered disproportionately).

148. *See generally* STANLEY B. GREENBERG, *MIDDLE CLASS DREAMS: THE POLITICS AND POWER OF THE NEW AMERICAN MAJORITY* (rev. ed. 1996) (describing the Clinton Presidency,

ing: “Just as in a previous generation, we had an organized effort against the mob. We need to take these people on. They are often connected to big drug cartels; they are not just gangs of kids anymore. They are often the kinds of kids that are called *super predators*. No conscience, no empathy. We can talk about why they ended up that way, but first we have to bring them to heel.”<sup>149</sup> Thus, Hillary “stood resolutely behind her husband’s punishment campaign,” stating in 1994, “[w]e need more police, we need more and tougher prison sentences for repeat offenders.”<sup>150</sup> She continued, “The ‘three strikes and you’re out’ for violent offenders has to be part of the plan. We need more prisons to keep violent offenders for as long as it takes to keep them off the streets.”<sup>151</sup> Hillary concluded, “We will finally be able to say, loudly and clearly, that for repeat, violent, criminal offenders: three strikes and you’re out.”<sup>152</sup> Thus, President Clinton and Hillary firmly placed the War on Drugs on steroids, further crushing communities of color.

In sum, during the Reagan and Clinton presidential administrations in the 1980s and 1990s, new “[l]egislation was passed to impose mandatory minimums, deny public housing to entire families if any member was even suspected of a drug crime, expand federal death penalty-eligible crimes, and impose draconian restrictions of parole.”<sup>153</sup> “Ultimately, multiple generations of America’s most vulnerable populations, including drug users, African Americans, [Latinx populations], and the [indigent]” found themselves bushwhacked as they were “confined to long-term prison sentences and life-long social and economic marginality,” all in the name of drugs, despite rampant drug use among white populations.<sup>154</sup> In truth, state and federal prisons locked up “more people under Clinton’s watch than under any previous administration,” including Reagan’s incarceration rampage.<sup>155</sup> “During [Clinton’s] two terms, the inmate population grew from roughly 1.3 million to 2 million, and the number of executions to 98 by 1999.”<sup>156</sup>

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including Hillary’s role, and both Bill and Hillary fashioning themselves as Civil Rights champions).

149. Reuters Staff, *Fact Check: Hillary Clinton, Not Joe Biden, Used the Term Super Predator in 1990’s*, REUTERS (Oct. 26, 2020) (emphasis added), <https://www.reuters.com/article/uk-factcheck-hillary-clinton-biden-super/fact-checkhillary-clinton-not-joe-biden-used-thetermsuperpredatorin1990s-idUSKBN27B1PQ>; see also Bidish J. Sarma & Sophie Cull, *The Emerging Eighth Amendment Consensus Against Life Without Parole Sentences for Nonviolent Offenses*, 66 CASE W. RES. L. REV. 525, 541 (2015-2016).

150. Murch, *supra* note 18.

151. *Id.*

152. *Id.*

153. *Id.*

154. *Id.*

155. *Id.*

156. Murch, *supra* note 18 (“Significantly, the Democratic president even refused to support the Congressional Black Caucus’s proposed Racial Justice Act, which would have prevented discriminatory application of the death penalty.”); see also Justice Policy Institute,

Despite the Clintons' record of "racialized punishment for political gain, [their] peculiar ability to reinvent themselves has erased memory of many of their past misdeeds."<sup>157</sup> Both however, have expressed regret for the role they played in supercharging the WOD and shattering black and brown communities. A month before leaving office, President Clinton claimed, "we really need a re-examination of our entire policy on imprisonment' of people who use drugs, and said that marijuana use 'should be decriminalized."<sup>158</sup> Hillary Clinton, when running for President in 2016, was confronted by Black Lives Matter activists at a campaign stop for her use of the term "super predators" and her role in exacerbating the War on Drugs, to which she replied, "Looking back, I shouldn't have used those words, and I wouldn't use them today."<sup>159</sup>

In the face of this regret, criminologist and University of Minnesota law professor Michael Tonry penned a book entitled *Malign Neglect: Race, Crime and Punishment in America*, wherein Tonry argues that the architects of the War on Drugs, namely Presidents Nixon, Reagan and Clinton *knew* that the War on Drugs was unnecessary, and that the ineffective policies proposed and enacted would adversely impact African American males and communities of color.<sup>160</sup> Nixon, Reagan and Clinton will forever be coupled and bonded to the racist timeline that has beset black Americans from slavery to convict leasing, to Jim Crow, to the era of mass incarceration fueled by the WOD—a deliberate and systematic obliteration of the human and civil rights of black citizens.

Of course, such deliberate and systematic discrimination ought to run afoul of the equal protection guarantee of the United States Constitution.<sup>161</sup>

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*Too Little Too Late: President Clinton's Prison Legacy*, CTR. ON JUVENILE AND CRIM. JUST. (Feb. 2001), [https://justicepolicy.org/wpcontent/uploads/justicepolicy/documents/too\\_little\\_too\\_late.pdf](https://justicepolicy.org/wpcontent/uploads/justicepolicy/documents/too_little_too_late.pdf).

157. Murch, *supra* note 18; *see also* Justice Policy Institute, *supra* note 156, at 2 ("Now, eight years later, the latest criminal justice statistics show that it was actually Democratic President Bill Clinton who implemented arguably the most punitive platform on crime in the last two decades. In fact, 'tough on crime' policies passed during the Clinton Administration's tenure resulted in the largest increases in federal and state prison inmates of any president in American history.").

158. *A History of the Drug War*, *supra* note 105.

159. Gearan & Phillip, *supra* note 147.

160. *See* Nunn, *supra* note 40, at 409.

161. *See* U.S. CONST. amend. XIV, § 1 ("All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."); *See also* U.S. CONST. amend. V ("No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Mili-



The next Section will show that today the War on Drugs continues its grossly disproportionate impact upon communities of color.

## II. THE RACIST ROOTS OF THE WAR ON DRUGS MANIFESTS TODAY

*The Sentencing Project* summed up the carceral state of the United States in a report to the United Nations in 2018:

The United States criminal justice system is the largest in the world. At yearend 2015, over 6.7 million individuals were under some form of correctional control in the United States, including 2.2 million incarcerated in federal, state, or local prisons and jails. The U.S. is a world leader in its rate of incarceration, dwarfing the rate of nearly every other nation.<sup>162</sup>

Moreover, “African-American adults are 5.9 times [more] likely to be incarcerated than whites and Hispanics are 3.1 times [more] likely.”<sup>163</sup>

One key cause of these disparities is the WOD and the concentration of policing in communities of color accompanying it.<sup>164</sup> Given that the U.S. government’s own data show that whites use drugs at rates that generally exceed those of people of color, these rates simply show a criminal injustice system that has fulfilled the expectations of the architects of the WOD with breathtaking efficacy.<sup>165</sup> In fact, new analysis of government data demonstrates that overwhelmingly the people of color ensnared in the WOD consist not of dealers but small-time users.<sup>166</sup> We as a nation insist on continu-

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tia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.”).

162. THE SENTENCING PROJECT, REPORT OF THE SENTENCING PROJECT TO THE UNITED NATIONS SPECIAL RAPPORTEUR ON CONTEMPORARY FORMS OF RACISM, RACIAL DISCRIMINATION, XENOPHOBIA, AND RELATED INTOLERANCE 1 (2018).

163. *Id.* at 1.

164. *Id.* at 1–5. The Sentencing Project came to essentially the same conclusion with respect to the state level. THE SENTENCING PROJECT, THE COLOR OF JUSTICE: RACIAL AND ETHNIC DISPARITY IN STATE PRISONS 6 (2021) (“Black Americans are incarcerated at 4.8 times the rate of white Americans. Nationally, Latinx individuals are held in state prisons at a rate of 349 per 100,000 residents, producing a disparity ratio of 1.3 to 1 when compared with white non-Latinx Americans.”). The main driver: criminalization of low-level drug offenses. *Id.* at 5.

165. *See supra* Introduction and Part I.

166. Based upon the most comprehensive and recent government data available:

[A]bout 40% of drug arrests are for possessing or selling a quarter of a gram or less, and about 20% of arrests for possession or sale are between one-quarter of a gram and one gram. The arrests for various quantities above one gram range over the single digits with arrests for a kilogram or more being less than one percent.

ing the destruction of communities of color for penny-ante crimes that even our leaders and their families commit with impunity, in a way that can only amount to animus against those communities.<sup>167</sup>

Indeed, every phase of our criminal injustice system plays a complicit role in producing its oppressive outcome, from the police officers who pull over vehicles with burned out tail lights to the Supreme Court of the United States. As Professor David Cole stated in 1999:

These double standards are not, of course, explicit; on the face of it, the criminal law is color-blind and class-blind. But in a sense, this only makes the problem worse. The rhetoric of the criminal justice system sends the message that our society carefully protects everyone's constitutional rights, but in practice the rules assure that law enforcement prerogatives will generally prevail over the rights of minorities and the poor. By affording criminal suspects substantial constitutional protections in theory, the Supreme Court validates the results of the criminal justice system as fair. That formal fairness obscures the systemic concerns that ought to be raised by the fact that the prison population is overwhelmingly poor and disproportionately black.<sup>168</sup>

Cole's observation aptly describes the state of the system in 1999; over two decades later its perpetuation with full knowledge of its racist impact amounts to knowing intent on the part of all key actors that allow the American oppression machine to ramble on.

With a faint glimmer of hope, politicians, pundits, and voters seem to recognize now that the War on Drugs is a failure. This "war" looks to be in the beginning stages of dismantlement. Despite the legalization of marijuana

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We do not seem to be using minnows to catch big fish. Instead, we are catching mainly minnows, occasionally slightly larger fish, and only very rarely a big fish. Furthermore, . . . [t]he racial distribution of these small quantity arrests drives massive racial disparities in the war on drugs. Our data confirms that Blacks are disproportionately arrested for crack cocaine offenses and Whites for meth/amphetamine and heroin offenses. What has not been demonstrated until now, however, is that these racial disparities are not the result of greater involvement in the selling and distribution of drugs by Blacks and Hispanics. There are just as many minnows among Blacks as among Whites; we are just arresting a lot more of the Black minnows.

Joseph E. Kennedy et al., *Sharks and Minnows in the War on Drugs: A Study of Quantity, Race and Drug Type in Drug Arrests*, 52 U.C. DAVIS L. REV. 729, 732–33 (2018).

167. See *id.* at 784 ("Exactly how and why we have spent billions of dollars prosecuting drug crime and incarcerated hundreds of thousands of offenders for millions of hours without keeping more careful track of whom we were arresting and for what quantity is a question that may someday puzzle future, more enlightened, generations.").

168. DAVID COLE, NO EQUAL JUSTICE: RACE AND CLASS IN THE AMERICAN CRIMINAL JUSTICE SYSTEM 8–9 (1999).

in some states across the nation (as of this writing, seventeen states have legalized marijuana), if the enduring theme of the WOD was its racist roots and evisceration of communities of color, then particular attention must be paid to whether the dismantlement of the drug war will be applied equally to all populations. At this moment, the future is not clear as to what impact the new marijuana legalization measures will hold for urban communities and people of color, “who have long been disproportionately targeted in the war on drugs.”<sup>169</sup> Early evidence is troubling.

In states that have enacted relaxed drug laws, racial disparities in enforcement have not disappeared. A 2020 ACLU report found that “Black people are still more likely to be arrested for marijuana possession than white people in every state, including those that have legalized marijuana.”<sup>170</sup> Thus, “[b]eing caught with large amounts of marijuana, selling it, using it in a school zone or underage use is still illegal in states that have legalized,” and for those arrested for these crimes, the racial disparities remain astonishing, with black Americans being arrested at rates that far surpass white Americans.<sup>171</sup> “In states like Maine and Vermont, according to the ACLU, racial disparities in weed arrests worsened after legalization passed.”<sup>172</sup> As has been noted often, even if these arrests do not lead to serving long sentences for simple drug possession, the negative “impact of an arrest or a criminal conviction can follow [individuals] for years . . . . And for repeat offenders, a drug conviction can mean a longer sentence for any future offense.”<sup>173</sup>

Further troubling early evidence indicates that in South Dakota, which recently legalized marijuana, arrests for possession and distribution “have increased significantly since 2007, and the racial disparities for Indigenous people are especially stark.”<sup>174</sup> American Indians are ten percent of the South Dakota population but constituted “nearly 20 percent of marijuana possession arrests in 2018,” and in 2020 comprised nearly 33 percent of the state prison population.<sup>175</sup> Further, “[m]any states prohibit people with felo-

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169. Wilbert L. Cooper & Christie Thompson, *Will Drug Legalization Leave Black People Behind?*, THE MARSHALL PROJECT (Nov. 11, 2020), <https://www.themarshallproject.org/2020/11/11/will-drug-legalization-leave-black-people-behind>.

170. *A Tale of Two Countries: Racially Targeted Arrests in the Era of Marijuana Reform*, ACLU (Apr. 2020), <https://www.aclu.org/report/tale-two-countries-racially-targeted-arrests-era-marijuana-reform>.

171. Cooper & Thompson, *supra* note 169.

172. *Id.*

173. *Id.*

174. *Id.*

175. *Id.*

ny convictions from working for or owning dispensaries—convictions that are disproportionately saddled on people of color.”<sup>176</sup>

Chicago appears to be off to an even more dispiriting start in this new era of legal marijuana. “Three times the number of African Americans were arrested for marijuana-related offenses in Chicago than other ethnicities combined in 2020.”<sup>177</sup> Chicago presents a distressing double standard: “At the same time the state’s legal weed industry is making millions and white smokers are enjoying the boutique experience with designer weed in clean, fashionable North Side dispensaries, Black and brown people are left out of the windfall and continue to be arrested for selling weed illegally.”<sup>178</sup> Additionally, in March of 2021, “Illinois set a record with \$109 million in sales of recreational marijuana, a 35% increase from the previous month,” yet Chicago “has no minority-owned dispensaries, and felons are barred from working within the industry.”<sup>179</sup>

New York City fares no better than Chicago or South Dakota when it comes to racially discriminatory marijuana arrests in a newly legal construct. According to a recent analysis by New York’s Legal Aid Society, “93% of those arrested for marijuana in NYC last year [2020] were Black or Hispanic.”<sup>180</sup> Disturbingly, “[w]hite people—who make up 45% of the city’s population, and have been shown to use marijuana at equal rates as other racial groups—accounted for less than 5% of citywide arrests.”<sup>181</sup> And, even as arrests for marijuana have decreased in New York City, “police have increasingly turned to marijuana summonses, while maintaining an almost identical focus on” African American and Latinx New Yorkers.<sup>182</sup> “Data shows that 10,374 people received a criminal court summons for marijuana last year—of which more than 93 percent were Black or Hispanic.”<sup>183</sup>

Additional demoralizing evidence comes from Colorado. Black and Latinx adolescents in Colorado are being arrested for marijuana offenses at more disproportionate rates than before the state formally legalized recrea-

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176. *Id.*

177. William Lee, *Legal Weed’s First Year in Chicago: High Arrest Rates for Black People, a Boutique Experience for Others*, CHICAGO TRIBUNE (Apr. 15, 2021), <https://www.chicagotribune.com/news/breaking/ct-marijuana-legalization-parallel-worlds-20210415-4hydfuinve27mtctklm7dq4r4-story.html>.

178. *Id.*

179. *Id.*

180. Jake Offenhartz, *NYPD’s Enforcement of Marijuana Laws Still Plagued by Extreme Racial Disparities*, GOTHAMIST (Mar. 10, 2021), <https://gothamist.com/news/nypds-enforcement-marijuana-laws-still-plagued-extreme-racial-disparities>.

181. *Id.*

182. *Id.*

183. *Id.*

tional use.<sup>184</sup> A Colorado Public Safety report, released in March 2021, found a stunning racial disparity “in how adolescents aged 10–17 are being arrested: White juvenile marijuana arrests decreased by 8% between 2012 and 2014, while black juvenile arrests increased by 58% and Latino juvenile arrests increased 29%.”<sup>185</sup> Colorado officials also found “that while marijuana arrests among adults have nearly been cut in half since legalization, the racial disparities among those still being arrested grew slightly worse.”<sup>186</sup> In 2014, following legalization, black Coloradans “were arrested and cited for marijuana-related offenses at almost triple the rate of white people. Back in 2012, black people in Colorado were being arrested for pot crimes at a little less than double the rate of whites.”<sup>187</sup>

As evidenced above, the racist roots of the WOD continues to manifest itself today in the disparate impact the WOD inflicts upon communities of color, despite the successes of recent legalization and decriminalization of marijuana. With this continuing manifestation, a simple inquiry emerges: Does the pernicious discriminatory application of the War on Drugs, as catalogued above, violate the Equal Protection Clause of the United States Constitution?

### III. TAKING EQUAL PROTECTION SERIOUSLY?

Notions of constitutional equal protection under law ought to disrupt the War on Drugs which rests upon a foundation of racial and out-group animus.<sup>188</sup> As demonstrated above, mass incarceration of people of color plays the lead role in the failed WOD—incarceration of people of color for the same conduct that wealthy empowered whites routinely pursue with impunity.<sup>189</sup> The government’s laws and policies underlying the WOD accomplish the deeply disparate impact intended by its key progenitors with no

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184. See Amanda Chicago Lewis, *Marijuana Arrests Down in Colorado for White Teens, Up for Black and Latino Teens*, BUZZFEED NEWS (May 10, 2016), <https://www.buzzfeednews.com/article/amandachicagolewis/marijuana-arrests-down-in-colorado-for-white-teens-up-for-bl>; see generally *Marijuana Legalization in Colorado: Early Findings*, CO DEP’T OF PUB. SAFETY (Mar. 2016), <https://www.documentcloud.org/documents/2829054-2016-SB13-283-Rpt-Colorado-Early-Findings-in.html>.

185. *Marijuana Legalization in Colorado*, *supra* note 184, at 8; Lewis, *supra* note 184.

186. Lewis, *supra* note 184; see *Marijuana Legalization in Colorado*, *supra* note 184, at 20–21.

187. Lewis, *supra* note 184.

188. See WILLIAM D. ARAIZA, *ANIMUS: A SHORT INTRODUCTION TO BIAS IN THE LAW* 7 (2017) (“[S]ubjective dislike of a group lies at the core of legislation we can legitimately condemn as based in animus.”).

189. *Supra* Parts I & II. See *id.* at 87–112 (discussing “constructed intent” and the subjective dislike that underlies animus claims and concluding that if a law is based upon animus its “game over” and no further showing is needed).

public health justification at all—and the continuing carnage in communities of color points to animus as the sole basis for the entire WOD.<sup>190</sup> The WOD literally drives the replication of the American racial hierarchy through mass incarceration, disenfranchisement, and post-prison encumbrances.<sup>191</sup>

The sole viable reason for the continuation of the WOD in recent years and beyond amounts to racial and political animus.<sup>192</sup> Simply stated, the brutal disparate impact marking the War on Drugs continues because of the disparate impact of the WOD as envisioned and implemented by its original propagators—particularly Presidents Nixon and Reagan.<sup>193</sup> In terms of the oppression suffered in communities of color from the racial animus driving the WOD, the mass incarceration of people of color devastates those communities *more* today than ever before, as our population shifts and ever more people of color suffer the sting of the fundamentally racist WOD.<sup>194</sup> The Supreme Court of the United States plays a central role in giving legal effect to this manifest racial animus.<sup>195</sup>

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190. See *id.* at 151 (“[A]nimus doctrine’s underlying concern [is] ensuring that government decision making is motivated by legitimate, public-regarding goals.”).

191. See Dale Carpenter, *Windsor Products: Equal Protection from Animus*, 2013 SUP. CT. REV. 183, 245 (“Animus is a desire to disparage and to injure a person or group of people.”); see Susannah W. Pollvogt, *Unconstitutional Animus*, 81 FORDHAM L. REV. 887, 926 (2012) (“[A]nimus is present where the public laws are harnessed to create and enforce distinctions between social groups—that is, groups of persons identified by status rather than conduct.”).

192. *E.g.*, PROVINE, *supra* note 33, at 3–5. “Racial minorities have always been the target of the harshest drug laws. Those who have actively promoted these laws, the moral entrepreneurs of drug legislation, have relied on racial slurs and allusions to bolster their arguments for criminal controls.” *Id.* at 3.

193. The federally-sponsored and federally-directed WOD also impinges upon the traditional police powers of the state, which suggests the use of power for the sake of animus instead of sound public policy. See, e.g., *Standing Akimbo, LLC v. United States*, 141 S. Ct. 2236, 2236–37 (2021) (statement of Thomas, J., regarding denial of *cert.*); see *United States v. Windsor*, 570 U.S. 744, 770 (2013) (“In determining whether a law is motivated by an improper animus or purpose, ‘[d]iscriminations of an unusual character’ especially require careful consideration.” (quoting *Romer v. Evans*, 517 U.S. 620, 633 (1996))).

194. Since 2010, the white population of the United States has decreased by 8.6 percent, the only group contracting in size. Meanwhile, the multiracial population has increased by 276 percent. African Americans (including those identifying as multiracial African Americans) now constitute 14.2 percent of the population, Latinos of all races constitute 18.7 percent, and Native Americans 1.1 percent. Nicholas Jones et al., *2020 Census Illuminates Racial and Ethnic Composition of the Country*, U.S. CENSUS BUREAU (Aug. 12, 2021), <https://www.census.gov/library/stories/2021/08/improved-race-ethnicity-measures-reveal-united-states-population-much-more-multiracial.html>. Thus, our criminal racial hierarchy ensnares more than one in three Americans today and will ensnare even higher proportions in the future.

195. *E.g.*, *Standing Akimbo*, 141 S. Ct. at 2236 (denying *cert.* for challenge to federal tax law regarding substance prohibited under Controlled Substances Act); *Gonzales v. Raich*, 545 U.S. 1, 24–33 (2005) (holding Congress may regulate cannabis under Controlled Sub-



The Court's opinion in *Department of Homeland Security v. Regents of the University of California*<sup>196</sup> illustrates the difficulty facing plaintiffs claiming racial discrimination arising from government action animated by animus, in this case the rescission of the Deferred Action of Childhood Arrivals program (DACA).<sup>197</sup> Chief Justice Roberts found that the animus President Trump displayed toward Mexican immigrants on the campaign trail and thereafter could not support a violation of equal protection.<sup>198</sup> Justice Roberts found that Trump's comments were "remote in time and made in unrelated contexts."<sup>199</sup> He also suggested that the relevant actors did not include President Trump but rather government officials.<sup>200</sup> Thus, the Chief Justice permitted the Trump Administration to impose a regulatory action with disparate impact upon a group whom the President publicly vilified repeatedly without violating the Constitution.<sup>201</sup> The Chief Justice denied that the rescission of DACA entailed any disparate impact upon the Mexican-American community "because Latinos make up a large share of the unauthorized alien population [and] one would expect them to make up an outsized share of recipients of any cross-cutting immigration relief program."<sup>202</sup>

Justice Sotomayor's dissent took the plurality opinion to task on its judicial fact-finding.<sup>203</sup> For example, she countered the Chief Justice by stat-

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stances Act pursuant to Commerce Clause). The Court also aided and abetted the WOD through its consistent curtailment of individual rights. *See* *cummings & Ramirez, supra* note 3, at 482–83.

196. 140 S. Ct. 1891 (2020). In *Regents*, the plaintiffs sought equitable relief against the Department of Homeland Security (DHS) and other federal officials. The plaintiffs challenged the constitutionality, and legality under the Administrative Procedure Act (APA), of the rescission of the Deferred Action for Childhood Arrivals (DACA) program. The DACA program provided work authorization, eligibility for various federal benefits, and protections from removal, for certain unauthorized aliens who had entered the United States as children. *Id.* at 1901. The Court held that DHS's rescission of DAC violated the APA. *Id.* In Part IV of its opinion, the Court held that the plaintiff's equal protection claims failed. *Id.* at 1916.

197. Much of the scholarly commentary on *Regents* focuses upon the Court's APA analysis. *See* William D. Araiza, *Regents: Resurrecting Animus/Renewing Discriminatory Intent*, 51 SETON HALL L. REV. 983, 985 (2021).

198. 140 S. Ct. at 1916 (holding that President Trump's anti-Mexican statements "fail to raise a plausible inference" that the rescission of DACA "was motivated by animus").

199. *Id.*

200. *Id.*

201. *See id.*

202. *Id.* at 1915.

203. Justice Sotomayor, alone, dissented from the majority's denial of the equal protection claim. *Regents*, 140 S. Ct. at 1916–18 (Sotomayor, J., concurring in part, concurring in the judgment in part, and dissenting in part). She alone argued that the equal protection claim should go forward so that plaintiffs could develop their allegations in discovery. *Id.* at 1917 (Sotomayor, J., concurring in part, concurring in the judgment in part, and dissenting in part) ("[T]he Court forecloses any challenge to the rescission under the Equal Protection Clause. I

ing: “At the motion-to-dismiss stage, I would not so readily dismiss the allegation that an executive decision disproportionately harms the same racial group that the President branded as less desirable mere months earlier.”<sup>204</sup> Justice Sotomayor further explained: “Taken together, ‘the words of the President’ help to ‘create the strong perception’ that the rescission decision was ‘contaminated by impermissible discriminatory animus.’ This perception provides respondents with grounds to litigate their equal protection claims further.”<sup>205</sup> Finally, the dissent argued that the Administration’s shifting of positions regarding DACA “plausibly suggests that something other than questions about the legality of DACA motivated the rescission decision.”<sup>206</sup>

In the end, the Court in *Regents* discounted the possibility of animus’s driving the rescission of the DACA program, in the absence of compelling evidence linking the rescission to the putative animus of those in the chain of command, including the President and any underlings.<sup>207</sup> The Court apparently found Presidential animus insufficient to plead an animus claim, leaving some commentators puzzled due to precedents seemingly lending great weight to Presidential authority in other cases not involving racial discrimination.<sup>208</sup> The Court simply refuses to permit the conclusion that the President can act with racial animus—a sort of executive exemption from unlawful conduct.<sup>209</sup> This all caused the *Harvard Law Review* to conclude

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believe that determination is unwarranted on the existing record and premature at this stage of the litigation. I would instead permit respondents to develop their equal protection claims on remand.”).

204. *Id.* at 1918 (Sotomayor, J., concurring in part, concurring in the judgment in part, and dissenting in part).

205. *Id.* at 1917 (Sotomayor, J., concurring in part, concurring in the judgment in part, and dissenting in part).

206. *Id.* at 1918 (Sotomayor, J., concurring in part, concurring in the judgment in part, and dissenting in part).

207. As such, the Court imposed a constipated level of review for claims of racial discrimination—allowing much discrimination to pass under the radar. *See Fifth Amendment—Due Process Clause—Equal Protection—Department of Homeland Security v. Regents of the University of California*, 134 HARV. L. REV. 510, 519 (2020) (concluding that “the Court’s latest effort to avoid acknowledging the administration’s real reasons may create unnecessary obstacles for future claims of discriminatory intent.”).

208. *Id.* at 519 (“[T]he Court’s one-page dismissal of the equal protection claims in this case indicates that it is unwilling to consider the possibility that the Executive intends to discriminate.”).

209. “But, especially given its decision in *Seila*, if the Court wanted to exempt the President from such inquiries into motive, it should have provided an explicit reason for doing so.” *Id.* at 519 (citing *Seila L. LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2211 (2020) (holding that: “In our constitutional system, the executive power belongs to the President, and that power generally includes the ability to supervise and remove the agents who wield executive power in his stead. . . . The Constitution requires that such officials remain dependent on the President, who in turn is accountable to the people.”)). Apparently, however, despite

that “[t]he *Regents* Court’s hasty dismissal of the equal protection claims at the pleading stage may therefore make claims of discrimination by the government even harder to prove.”<sup>210</sup> More disturbingly, the upshot of the Court’s analysis expansively licenses executive racial animus—which itself leads to bloodshed, insurrection, hate crimes, and geopolitical vulnerability.<sup>211</sup> Strange days, indeed.<sup>212</sup>

So far, the animus doctrine in the Roberts Court appears to protect white, conservative plaintiffs over the claims of people of color.<sup>213</sup> As such, in *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*<sup>214</sup> the Court protected bakers who declined to bake a wedding cake for a same-sex couple. In *Trump v. Hawaii* the Court reversed the lower courts’ finding that President Trump’s hostility to Muslims justified overturning the Administration’s travel restrictions which largely focused on Muslims.<sup>215</sup> The Roberts Court cannot see racial animus, however, suggesting that Whites only need apply for equal protection in the United States today, regardless of the scope of suffering.

Thus, the Roberts Court rejected animus claims brought by Muslims and Mexican Americans against the Trump Administration—featuring a President whose hate speech<sup>216</sup> (aimed at Muslims and Mexican Americans)

the expansive executive power, the Court will not hold the President accountable for his racial animus.

210. *Id.* at 519.

211. See Steven A. Ramirez, *Hate on the Ballot: Election 2020 and the Quest for a Diverse and Inclusive Democracy*, 23 HARV. LATINX L. REV. 255, 258–59 (2020).

212. Once plaintiffs claiming violations of equal protection prove they are victims of a law based in animus, no need for further inquiry exists. ARAIZA, *supra* note 188, at 112–119. “No additional scrutiny required. Game over.” *Id.* at 112. In *Regents* the Court never bothered with any determination of discriminatory intent or strict scrutiny of the government’s action. See, e.g., *Washington v. Davis*, 426 U.S. 229, 241–42 (1996).

213. Compare *Trump v. Hawaii*, 138 S. Ct. 2392, 2416–23 (2018) (considering, but rejecting under deferential review, a claim that presidential travel restrictions were motivated by animus and therefore were purposefully designed to discriminate against Muslims in violation of the Establishment Clause) with *Masterpiece Cakeshop, Ltd. v. Colo. Civ. Rts. Comm’n*, 138 S. Ct. 1719, 1729–32 (2018) (finding that a state civil rights commission violated the Free Exercise Clause when it acted with hostility toward a Christian baker who had objected on First Amendment grounds to creating a custom wedding cake for a same-sex couple).

214. 138 S. Ct. 1719 (2018).

215. *Id.* at 2406–07, 2416–17, 2423 (“Because plaintiffs have not shown that they are likely to succeed on the merits of their claims, we reverse the grant of the preliminary injunction as an abuse of discretion.”).

216. Ramirez, *supra* note 211, at 260 (“Trump opened his presidential campaign with a libelous characterization of Mexican immigrants. He stated, ‘They’re bringing drugs. They’re bringing crime. They’re rapists. And some, I assume, are good people.’ . . . When similarly hateful rhetoric was employed by a president over one hundred years ago during wartime, murders and hate crimes accompanied it.”). As the United States becomes more diverse, more

inspired more hate crime than any President in over 100 years.<sup>217</sup> Such a position simply bespeaks a Court that lives in a detached reality and fails to comprehend the increasingly soaring costs of racial hierarchy.<sup>218</sup> The War on Drugs alone costs the nation hundreds of billions per year.<sup>219</sup> Neither legal doctrine nor legal policy supports the Court's apparent blindness to racial animus in the United States.

The Roberts Court does not stand alone in protecting whites from animus rather than litigants claiming racial discrimination.<sup>220</sup> In general, the Supreme Court experiences tremendous difficulty in seeing racial discrimination against people of color. Professor Juan Perea highlights, for example, that when white plaintiffs challenge affirmative action the Court dispenses with the need for the white litigants to show constitutional harm.<sup>221</sup> The Court also does not require white plaintiffs challenging affirmative action to make any showing of animus or that race, as opposed to some other objec-

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fellow citizens will become enmeshed in the racial hierarchy, causing increasingly greater costs.

217. *Id.*

218. "Maintenance of a socially constructed racial hierarchy within any society entails huge costs because race necessarily involves the mass destruction of human potential and human capital." Ramirez & Williams, *supra* note 12, at 310 (citing Byron G. Auguste et al., *The Economic Cost of the US Education Gap*, MCKINSEY & COMPANY (June 2009), <http://www.mckinsey.com/industries/social-sector/our-insights/the-economic-cost-of-the-us-education-gap> [<https://perma.cc/3QVF-2SWT>] (finding educational costs alone of socially constructed racial hierarchy of about \$525 billion per annum in 2009 dollars)); *see also* Steven A. Ramirez, *What We Teach When We Teach About Race: The Problem of Law and Pseudo-Economics*, 54 J. LEGAL EDUC. 365, 375 (2004) (estimating macroeconomic costs of race to approach \$1 trillion per year in foregone GDP in 2004 dollars).

219. Cummings & Ramirez, *supra* note 3, at 487 (quoting economist Joseph Stiglitz: "As a perpetual drag on the earning potential of tens of millions of Americans, these costs are not only borne by individuals, their families, and their communities[; t]hey are also system-wide drivers of inequality and are so large as to have macroeconomic consequences."). In all, the War on Drugs costs the nation \$550 billion per year in GDP and wasted government expenditures. *Id.* at 487–90.

220. *See, e.g.*, U.S. Dep't of Agric. v. Moreno, 413 U.S. 528 (1973) (protecting hippies living in communes from food stamp ineligibility); City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 446–48 (1985) (protecting mentally challenged from zoning restrictions); Romer v. Evans, 517 U.S. 620 (1996) (protecting non-heterosexuals from state constitutional amendment imposing political encumbrances). The point is not that these classes did not deserve protection. Instead, the point revolves around a simple question: how exactly did the Court fail to find racial animus for nearly a half century in America during the era of mass incarceration?

221. Juan F. Perea, *Doctrines of Delusion: How the History of the G.I. Bill and other Inconvenient Truths Undermine the Supreme Court's Affirmative Action Jurisprudence*, 74 U. PITT. L. REV. 583, 622–24 (2014) ("[T]he Court places this mantle of innocence and victimization upon the plaintiffs in the leading affirmative action cases, most (perhaps all) of whom would have been denied admission in the absence of affirmative action.").

tive, is the motivating factor behind admissions decisions.<sup>222</sup> Consequently, equal protection for non-whites only rarely warrants court intervention.

Indeed, the very essence of the institutional structure and role of the Supreme Court with respect to power strongly suggests that at least for the foreseeable future, claims of animus will not likely benefit disempowered groups such as the people of color mired in the lethal grips of our racial hierarchy, entrenched since 1980 through the War on Drugs.<sup>223</sup> The Court seems more prone to preserve the socioeconomic power structure (including the racial hierarchy supporting it) rather than disrupting its replication.<sup>224</sup> Indeed, the Supreme Court only rarely takes equal protection seriously to protect African Americans and other disempowered groups.<sup>225</sup>

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222. For example, the Court will routinely authorize searching inquiry into university admissions policies seeking cultural diversity but will nevertheless fail to address the increasingly corrupt admissions practices for the rich and powerful, such as legacy admits or children of donors. *See* Peter Arcidiacono et al., *Legacy and Athlete Preferences at Harvard*, 40 J. LABOR ECON. 133 (2021) (finding that white students benefit from legacy and other preferences far more than students of color benefit from affirmative action).

223. *See generally* ADAM COHEN, *SUPREME INEQUALITY: THE SUPREME COURT'S FIFTY-YEAR BATTLE FOR A MORE UNJUST AMERICA* xv (2020) (showing that for 50 years the Supreme Court protected the rich and powerful at the expense of the poor and marginalized); ERWIN CHEMERINSKY, *THE CASE AGAINST THE SUPREME COURT* 41, 293–94 (2014) (stating that and concluding that institutionally, the Court operates to protect the interests of dominant political and economic elites, and that these outcomes reflect the backgrounds of the Justices); Lewis R. Katz, *supra* note 13, at 924–25.

224. In 2013, the Supreme Court struck down key elements of the Voting Rights Act of 1965. *Shelby Cty. v. Holder*, 570 U.S. 529, 556–57 (2013) (holding unconstitutional a provision of the Voting Rights Act of 1965 relating to a formula used to determine which states were subject to preclearance requirements before they could implement any changes to their voting procedures). This decision vivifies neo-Confederate doctrine. *See, e.g.*, Peggy Cooper Davis et al., *The Persistence of the Confederate Narrative*, 84 TENN. L. REV. 301, 356 (2017) (“Justice Roberts, speaking for the Court, embellished the Confederate narrative, elevating the status of States to both horizontal and vertical sovereignty.”).

225. *Conn. Gen. Life Ins. Co. v. Johnson*, 303 U.S. 77, 90 (1938) (Black, J., dissenting) (“Yet, of the cases in this Court in which the Fourteenth Amendment was applied during the first fifty years after its adoption, less than one-half of one per cent. invoked it in protection of [African Americans], and more than fifty per cent. asked that its benefits be extended to corporations.”). One commentator calls the Supreme Court “one of the most powerful and most malign institutions in American history.” IAN MILLHISER, *INJUSTICES*, at x (2016) (citing *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310 (2010) (expanding the power of corporations’ electioneering abilities and thereby empowering the CEOs of such corporations)). The injustices perpetrated by the Court that Millhisser highlights include the use of the Fourteenth Amendment to protect the powerful instead of the most vulnerable, empowering billionaires to “corrupt American democracy,” and neutering voting-rights protections for minorities. *Id.* at xii–xiii. Essentially, Millhisser argues that the Supreme Court embraces “extra-constitutional limits on the government’s ability to protect the most vulnerable Americans, while simultaneously refusing to enforce rights that are explicitly enshrined in the Constitution’s text.” *Id.* at xiii.

Redesigning the Supreme Court to impose some level of democratic accountability now occupies center stage in political commentary.<sup>226</sup> It may now be time to restructure the Court before its backward-looking jurisprudence leads to massive bloodshed and the loss of American exceptionalism, with all that entails in terms of the well-being of all Americans.<sup>227</sup> After all, the Court continues to allow our legal system to promote grave injustice and suffering without any sense of concern for propagating the rampant racism of the past, and thereby projects that racism into the indefinite future.<sup>228</sup> Now, the stakes could not be higher.

To be clear, the Court's jurisprudence on race risks civil war and insurrection, like that seen on January 6, 2021, empowering our adversaries to exploit our lack of social cohesion,<sup>229</sup> and macroeconomic contraction as well as the unremitting oppression of millions of fellow citizens.<sup>230</sup> There is overwhelming evidence that the Court's tone-deaf approach to race and inequality generally is empowering and encouraging our international adversaries to exploit the divisions the Court ignores and foments.<sup>231</sup> Racism now poisons America generally, far beyond the nearly forty percent of the minority population directly ensnared in the legally constructed racial hierarchy.<sup>232</sup> The Court's narrow and indulgent doctrine regarding race harms every American and risks every value our nation holds dear—national security, democracy, constitutional government, and any semblance of capitalistic meritocracy.

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226. E.g., Kermit Roosevelt III, *I Spent 7 Months Studying Supreme Court Reform. We Need to Pack the Court Now*, TIME, <https://time.com/6127193/supreme-court-reform-expansion/> (Dec. 10, 2021) (“Court expansion may be the only thing that will save our democracy for the next generation.”); Nancy Gertner & Laurence H. Tribe, *Opinion: The Supreme Court Isn't Well. The Only Hope for a Cure is More Justices.*, WASH. POST (Dec. 9, 2021), <https://www.washingtonpost.com/opinions/2021/12/09/expand-supreme-court-laurence-tribe-nancy-gertner/> (identifying three major problems with the current Court: 1) “the dubious legitimacy of the way some justices were appointed;” 2) “the ‘stench’ of politics hovering over this court’s deliberations about the most contentious issues;” and, 3) “the anti-democratic, anti-egalitarian direction of this court’s decisions about matters such as voting rights, gerrymandering and the corrupting effects of dark money.”).

227. See *The Attack*, WASH. POST, [www.washingtonpost.com/politics/interactive/2021/jan-6-insurrection-capitol/](http://www.washingtonpost.com/politics/interactive/2021/jan-6-insurrection-capitol/) (detailing the bloodshed and violence of the January 6, 2021 insurrection).

228. PROVINE, *supra* note 33, at 167–68.

229. See generally Jack Stubbs, *Russian Operation Masqueraded as Right-Wing News Site to Target U.S. Voters*, REUTERS (OCT. 2, 2020), <https://www.reuters.com/article/us-election-russia-disinformation/exclusive-russian-operation-masqueraded-as-right-wing-news-site-to-target-u-s-voters-sources-idUSKBN26M5OP>; Zach Dorfman, *How the Far Right Made Itself a Russian Intel Target*, AXIOS (Jan. 20, 2021), <https://www.axios.com/how-the-far-right-made-itself-a-russian-intel-target-8767ac92-8d68-420d-85d3-2382694c861f.html>.

230. See PROVINE, *supra* note 33, at 167–68.

231. See Ramirez, *supra* note 211, at 257.

232. *Id.*



As described, the Supreme Court indulges white litigants claiming animus, even while refusing the searching inquiry that it requires for black and brown litigants claiming animus. This position makes it nigh impossible for communities of color to challenge the WOD as racially discriminatory and a violation of the Equal Protection clause of the United States Constitution. While we have provided ample evidence above that the very purpose of the WOD, the root, was intentionally designed to harm, disempower, and disenfranchise black and brown voters and citizens, the Supreme Court has staked its claim: “Your Injuries, Though Intentionally Inflicted by the Government, Shall Not Be Resolved Here.”

#### CONCLUSION

The War on Drugs produces massive suffering, pain and misery on an almost unimaginable scale—suffering that, as intended, falls disproportionately upon people of color. The animus motivating the WOD continues today, making a mockery of equal protection under law for Americans of color. Indeed, rarely has any public policy initiative been marked by such brazen political and racial animus, as demonstrated above,<sup>233</sup> and yet like a bone-crushing bulldozer it simply continues grinding up human lives, particularly devastating communities of color.

The Supreme Court of the United States as presently constituted simply can no longer maintain any veneer of legitimacy if it continues to silently allow the WOD to destroy the lives of millions of our people. The Supreme Court acts with naked political partisanship and the continuation of the WOD proves its divorce from reality and political accountability. The Court cluelessly hobbles us economically and compromises our national security by failing to even consider building national cohesion, unity, and human development. It instead foments division and mass incarceration, alienating an ever-growing proportion of our population from its government. The Court must end the self-destructive and evil War on Drugs—or it must be institutionally overhauled and restructured. As presently structured, the Court transmogrifies the Constitution into a national suicide pact.

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233. See *supra* Part III.