

# The Discriminatory Purpose of the 1994 Crime Bill

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*Harsh criminal sentencing laws enacted in the 1980s and 1990s have received renewed attention through a confluence of two seemingly contradictory events: an awakening to racial justice concerns through protests against the police killings of George Floyd and Breonna Taylor (among many others), and the election of President Joseph R. Biden, Jr., who, as a senator, was one of the chief architects of policies that fueled mass incarceration and exacerbated racial disparity in the criminal legal system. Historians in particular have begun to study declassified documents and newly available archival evidence that provide critical insight into the behind-the-scenes deal-making and legislative intent that led to the crime control policies that emerged at the federal level since the 1960s. Specifically, historical research indicates that federal lawmakers were well aware of the racially disparate impact of mandatory minimum sentencing schemes and the death penalty, yet chose to double down on those policies and reject alternative proposals that would have made the application of criminal law more equitable. This new frontier of historical research is not merely of academic interest; it has important implications for constitutional scholars and defense attorneys who can draw on these findings to challenge criminal statutes under the Equal Protection Clause.*

*This Article highlights the power of collaboration between historians and legal scholars and practitioners who wish to train this new historical analysis on the modes and means by which our criminal legal system reinforces racial inequality. We focus our approach through the lens of a relatively obscure provision of the Violent Crime Control and Law Enforcement Act of 1994, which imposed a one-year mandatory minimum for distributing narcotics within 1,000 feet of a public housing project. We examine the barriers to challenging such a statute under the Equal Protection Clause based on current Supreme Court precedent and circuit caselaw. We suggest a jurisprudential avenue for renewed equal protection challenges, namely, supplying evidence that Congress adhered to particular policies with full knowledge of their discriminatory impact. We examine the disparate enforcement of the public housing provision and its discriminatory purpose, as informed by newly developed historical evidence about the 1994 Crime Bill. Finally, we consider the lessons criminal defense attorneys and policymakers may learn from our example. We argue that a nuanced understanding of the true history of the war on crime is essential if President Biden and those in his administration who played instrumental roles in creating these discriminatory policies are serious about responding to the demand from the streets to dismantle them.*

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### INTRODUCTION

Kendall Johnson<sup>1</sup> is a 32-year-old Black man from Brooklyn. He grew up in the Bushwick Houses, a housing project run by the New York City Housing Authority (NYCHA) in a historically poor and crime-ridden neighborhood on the border of Brooklyn and Queens. Mr. Johnson's parents still live in the Bushwick Houses. Because of a drug conviction he received in his early twenties, Mr. Johnson is unable to live with them. After graduating high school and attending some college, Mr. Johnson worked for a time at a clothing retailer. He was let go from that job and struggled to find employment. He turned to selling drugs for money and thus began a cycle of criminal convictions and incarceration that has persisted for the better part of a decade. In the summer of 2019, Mr. Johnson was released from New York state prison and returned to Brooklyn. Without a job, stable housing, or economic prospects, he agreed to sell less than a gram of cocaine base—commonly known as crack—and 0.03 grams of heroin. He arranged to make the sale to a buyer in the vicinity of the Bushwick Houses. The buyer, however, was a confidential informant, and on June 25, 2019, Mr. Johnson was arrested and charged federally in the United States District Court for the Eastern District of New York with narcotics conspiracy and distributing narcotics within 1,000 feet of a public housing project. Because the aggregate weight of narcotics sold by the conspiracy was so small, the mandatory minimum sentences determined by drug weight<sup>2</sup> were not triggered. But the government's decision to charge him based on his proximity to the Bushwick Houses, under 21 U.S.C. § 860(a), threatened a one-year mandatory minimum sentence if Mr. Johnson were convicted of that count.

The Bushwick Houses and other NYCHA housing projects in New York City are concentrated in neighborhoods with a much higher percentage

<sup>1</sup> The authors wish to thank Mr. Johnson for his willingness to share his story.

<sup>2</sup> See, e.g., 21 U.S.C. § 841(b)(1)(A)–(B).

of Black and Latino residents than the City at large. Nationally, although African Americans and Latinos make up approximately one-third of the U.S. population, the population that resides in public housing is two-thirds Black and Latino. In New York City, that ratio exceeds 90%. Further, charging data from a representative sample of federal judicial districts indicates that nearly 93% of defendants charged with violating the public housing provision of § 860(a) are Black or Latino, while 7% are white. These statistics demonstrate that people of color are charged with narcotics offenses based on proximity to public housing projects at rates far in excess of their representation in the general population, in the public housing population, and even at a significantly higher rate than their representation among defendants in federal drug cases, a demographic already racially skewed. Based on these statistics, which provide strong evidence of selective enforcement of the statute, could Kendall Johnson challenge his prosecution under the Equal Protection Clause, the provision of the Fourteenth Amendment whose “central purpose . . . is the prevention of official conduct discriminating on the basis of race”?<sup>3</sup>

Under prevailing law, the answer is no. In a series of cases in the 1970s, the Supreme Court held that simply showing a discriminatory impact of legislation is insufficient to sustain an equal protection challenge. The challenger must additionally demonstrate discriminatory *intent* or *purpose* of the legislature in enacting the legislation. This standard makes proving a violation of the Equal Protection Clause far more difficult (indeed, some courts and commentators have remarked that it is virtually impossible) since legislators learned quickly to draft statutes that were facially neutral and to avoid outright racist commentary in their statements in favor of such statutes. Thus, efforts to challenge arbitrary and racially discriminatory sentencing schemes, such as the 100-to-1 crack/powder cocaine federal sentencing disparity, all ran aground based on defendants’ failure to prove discriminatory intent. Federal appellate courts deployed a variety of arguments to turn back such challenges, including relying on assumptions Congress made about crack being more addictive (even while acknowledging the lack of scientific basis for such assumptions), the presence of Black members of Congress who voted for tough sentencing laws, and the notion that to the extent such laws disproportionately affected minority communities they actually constituted a disproportionate *benefit* and thus could not indicate racial animus.

Recent examinations by historians of the political motivations and policy concerns surrounding these legislative decisions thoroughly debunk such already questionable rationales. Historians have begun to unearth evidence from newly available archival sources of Congress’s awareness of the disparate racial impact of crime legislation, and legislative trade-offs and missed opportunities to address that impact in the Violent Crime Control and Law Enforcement Act of 1994, referred to hereinafter as the 1994 Crime Bill. This new historical evidence informs a picture of Congress’s “[a]dherence to

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<sup>3</sup> *Washington v. Davis*, 426 U.S. 229, 239 (1976).

a particular policy or practice, ‘with full knowledge of the predictable effects of such adherence upon racial imbalance,’<sup>4</sup> which the Supreme Court has held may provide circumstantial evidence of discriminatory intent. Historical research, combined with the increased accessibility of federal charging and sentencing data, may be fruitfully employed to reframe how courts consider equal protection challenges to facially neutral sentencing statutes.

This Article provides an example of such a challenge, focusing on a provision of the 1994 Crime Bill that amended the Controlled Substances Act, title 21, section 860(a), to impose a one-year mandatory minimum sentence for drug crimes committed within 1,000 feet of a public housing project. Part I begins by providing the legal framework for establishing a violation of the Equal Protection Clause with the Supreme Court’s requirement of proof of discriminatory intent. Part II reviews prior failed efforts to challenge federal sentencing schemes under this rubric. Part III lays out the components of an equal protection challenge to the public housing provision: the origin of the statute; its disparate impact on Black and Latino communities; and the history of federal regulation of crime in public housing, leading up to and culminating in the 1994 Crime Bill generally and the inclusion of the public housing provision in particular. Part IV describes the application of this approach in Kendall Johnson’s case, in which the defense deployed this argument in a motion to dismiss the count carrying a mandatory minimum sentence. It concludes by considering the implications of our approach for criminal defense attorneys, as well as for policymakers facing calls for reform from the streets — a forceful demand for a gut renovation of the legal structures President Biden and others built a quarter century ago.

## I. LEGAL FRAMEWORK: DISCRIMINATORY INTENT AND ADHERENCE TO DISCRIMINATORY POLICY

Adopted in response to the Civil War and the notorious *Dred Scott* decision, the Fourteenth Amendment to the Constitution broadly guarantees “equal protection of the laws” to “[a]ll persons born or naturalized in the United States.”<sup>5</sup> “The central purpose of the Equal Protection Clause . . . is the prevention of official conduct discriminating on the basis of race.”<sup>6</sup> The Supreme Court has held that, to violate the Clause a statute need not be facially discriminatory, because even “[a] statute, otherwise neutral on its face,” may violate the Fourteenth Amendment if it is applied “so as invidiously to discriminate on the basis of race.”<sup>7</sup> Thus, in several decisions follow-

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<sup>4</sup> *Columbus Bd. of Educ. v. Penick*, 443 U.S. 449, 464–65 (1979) (quoting *Penick v. Columbus Bd. of Educ.*, 429 F. Supp. 229, 255 (1977)).

<sup>5</sup> U.S. CONST. amend. XIV, § 1.

<sup>6</sup> *Davis*, 426 U.S. at 239.

<sup>7</sup> *Id.* at 241.

ing the adoption of the Fourteenth Amendment, the Supreme Court struck down facially neutral laws that had a stark discriminatory impact.

In the 1886 case of *Yick Wo v. Hopkins*,<sup>8</sup> for example, the Court overturned a San Francisco ordinance governing the permitting of laundry businesses. The absence of any standards guiding the decision making of the city's Board of Supervisors overseeing such permitting, the Court held, meant that "[t]he power given to them is not confided to their discretion in the legal sense of that term, but is granted to their mere will. It is purely arbitrary, and acknowledges neither guidance nor restraint."<sup>9</sup> Moreover, statistics showing how that discretion was applied revealed a stark pattern of discrimination: Approximately 200 permits of Chinese laundry businesses were denied, and only one was approved.<sup>10</sup> Based on these statistics alone, the Supreme Court struck down the laundry-permitting ordinance on equal protection grounds, holding that such a stark discriminatory impact bespoke a discriminatory purpose.<sup>11</sup>

Similarly, in *Gomillion v. Lightfoot*,<sup>12</sup> a redistricting case, the City of Tuskegee, Alabama had redrawn its municipal limits "to remove from the city all save four or five of its 400 Negro voters [more than 98%] while not removing a single white voter or resident."<sup>13</sup> In response to these stark statistics, the Supreme Court noted that the defendants "invoke[d] generalities expressing the State's unrestricted power—unlimited, that is, by the United States Constitution—to establish, destroy, or reorganize by contraction or expansion its political subdivisions, to wit, cities, counties, and other local units."<sup>14</sup> Acknowledging the breadth of such power, the Supreme Court nevertheless held, based on the statistical effect of the municipal boundary-making, "[i]f these allegations upon a trial remained uncontradicted or unqualified, the conclusion would be irresistible, tantamount for all practical purposes to a mathematical demonstration, that the legislation is solely concerned with segregating white and colored voters by fencing Negro citizens out of town so as to deprive them of their pre-existing municipal vote."<sup>15</sup> In other words, as in *Yick Wo*, while the state enjoyed broad discretion in drawing political subdivisions, the statistical evidence of discriminatory impact was so stark that it indicated, on its own, a discriminatory purpose in the redrawing of the city's limits.

One might think, based on these decisions, that stark statistical disparity on racial lines would be grounds to challenge the statute causing the disparity under the Equal Protection Clause, and that the statistics cited above

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<sup>8</sup> 118 U.S. 356 (1886).

<sup>9</sup> *Id.* at 366–67.

<sup>10</sup> *See id.* at 356 (providing, in the syllabus of the Opinion, the precise statistics indicating that one Chinese laundry was approved).

<sup>11</sup> *Id.* at 374.

<sup>12</sup> 364 U.S. 339 (1960).

<sup>13</sup> *Id.* at 341.

<sup>14</sup> *Id.* at 342.

<sup>15</sup> *Id.* at 341.

regarding the public housing provision would provide at least a colorable claim of a constitutional violation. But in a series of decisions in the mid-1970s, the Court erected a formidable barrier to such challenges, holding proof of discriminatory impact to be insufficient on its own, and holding instead that “[p]roof of racially discriminatory *intent* or *purpose* is required to show a violation of the Equal Protection Clause.”<sup>16</sup> Justice Byron White, who was instrumental in the advancement of the Kennedy Administration’s civil rights agenda while in the Justice Department but took a decidedly conservative turn as a justice after his appointment in 1962,<sup>17</sup> played a critical role in several of these decisions, first setting forth a strict new standard for establishing an equal protection violation, and then, in subsequent cases, seeking to limit that decision from its arguable implication, *i.e.*, that proof of discrimination was a near impossibility.

The first of these cases, *Washington v. Davis*, decided in 1976, involved a qualifying exam for police officer positions in Washington, D.C. The district court found no discriminatory intent in instituting the exam and held that the Black plaintiff’s claim of a violation of the Due Process Clause (incorporating the Equal Protection Clause) failed. The Court of Appeals reversed, holding that the “lack of discriminatory intent in designing and administering [the exam] was irrelevant; the critical fact was, rather, that a far greater proportion of blacks — four times as many—failed the test than did whites.”<sup>18</sup> The Supreme Court, with Justice White writing for the majority, held that sole focus on the discriminatory impact of a policy, while mandated by Title VII of the Civil Rights Act of 1964, was in error when the plaintiff brought a constitutional claim. The Court stated, “our cases have not embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional *solely* because it has a racially disproportionate impact.”<sup>19</sup> The Court noted: “This is not to say that the necessary discriminatory racial purpose must be express or appear on the face of the statute, or that a law’s disproportionate impact is irrelevant in cases involving Constitution-based claims of racial discrimination.”<sup>20</sup> “Necessarily,” the Court added, “an invidious discriminatory purpose may often be inferred from the totality of the relevant facts, including the fact, if it is true, that the law bears more heavily on one race than another.”<sup>21</sup> “Nevertheless,” the Court stated, “we have not held that a law, neutral on its face and serving ends otherwise within the power of gov-

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<sup>16</sup> *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265 (1977) (emphasis added).

<sup>17</sup> See generally Dennis J. Hutchinson, *The Man Who Once was Whizzer White*, 103 YALE L.J. 43 (1993).

<sup>18</sup> *Washington v. Davis*, 426 U.S. 229, 237 (1976).

<sup>19</sup> *Id.* at 239.

<sup>20</sup> *Id.* at 241.

<sup>21</sup> *Id.* at 242.

ernment to pursue, is invalid under the Equal Protection Clause simply because it may affect a greater proportion of one race than of another.”<sup>22</sup>

The Court expanded on *Davis* the following year in the 1977 decision *Village of Arlington Heights v. Metropolitan Housing Development Corporation* (*Arlington Heights*), a case involving a zoning ordinance.<sup>23</sup> The Court, in an opinion by Justice Powell, stated that *Davis* reaffirmed that racially disproportionate impact is insufficient on its own to show discriminatory purpose. The Court recognized that “[d]etermining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available.”<sup>24</sup> While the impact of an official action “may provide an important starting point” to the analysis, *unless* the pattern were “as stark as that in *Gomillion* or *Yick Wo*,” which the Court noted will only be in “rare” cases, courts must “look to other evidence” for proof of discriminatory intent.<sup>25</sup> The Court suggested several “evidentiary source[s]” from which proof may be drawn, including, “[t]he historical background of the decision . . . particularly if it reveals a series of official actions taken for invidious purposes,” “[d]epartures from the normal procedural sequence,” “[s]ubstantive departures,” and “[t]he legislative or administrative history . . . especially where there are contemporary statements by members of the decisionmaking body, minutes of its meetings, or reports.”<sup>26</sup> This list did not “purport [ ] to be exhaustive,”<sup>27</sup> and the presence or absence of one particular factor is not dispositive.

Despite having written the *Davis* decision, Justice White dissented in *Arlington Heights*, arguing that the Court should have remanded to the Court of Appeals to reconsider its decision in light of the intervening authority of *Davis*. Justice White wrote, “The Court’s articulation of a legal standard nowhere mentioned in *Davis* indicates that it feels that the application of *Davis* to these facts calls for substantial analysis. If this is true, we would do better to allow the Court of Appeals to attempt that analysis in the first instance.”<sup>28</sup> Justice White also objected to the Court’s “embark[ing] on a lengthy discussion of the standard for proving the racially discriminatory purpose required by *Davis* for a Fourteenth Amendment violation” because, since the district court had found that the zoning decision “was motivated ‘by a legitimate desire to protect property values and the integrity of the Village’s zoning plan’ . . . [t]here is thus no need for this Court to list various

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<sup>22</sup> *Id.*

<sup>23</sup> 429 U.S. 252 (1977).

<sup>24</sup> *Id.* at 266; *see also* *Orange Lake Assocs., Inc. v. Kirkpatrick*, 21 F.3d 1214, 1226 (2d Cir. 1994).

<sup>25</sup> *Arlington Heights*, 429 U.S. at 266.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* at 268.

<sup>28</sup> *Id.* at 272 (White J., dissenting).

‘evidentiary sources’ or ‘subjects of proper inquiry’ in determining whether a racially discriminatory purpose existed.”<sup>29</sup>

Following *Arlington Heights*, the Supreme Court has noted the “difficulties” it erected for proving the “motives or purposes” of legislation, especially when such motives can be gleaned only from statements of a few legislators.<sup>30</sup> Lower courts have also commented that the Supreme Court’s standard is especially hard to meet because “discriminatory intent is rarely subject to direct proof,”<sup>31</sup> and because “[t]he task of recognizing intent is made particularly difficult by ‘the growing unacceptability of overtly bigoted behavior, and a growing awareness of the possible legal consequences of such behavior.’”<sup>32</sup> Notably, however, even under the unforgiving *Arlington Heights* standard, “a plaintiff need not prove that the ‘challenged action rested solely on racially discriminatory purposes.’”<sup>33</sup> Rather, it is necessary to prove only “that a discriminatory purpose has been a motivating factor in the decision” to establish a violation of the Equal Protection Clause.<sup>34</sup>

Moreover, “[c]ontext matters when reviewing race-based governmental action under the Equal Protection Clause,”<sup>35</sup> and in a pair of decisions two terms after *Arlington Heights*, the Court further refined the discriminatory intent standard, in different contexts and in seemingly contradictory terms. First, in June 1979, the Supreme Court applied the standard to a claim of gender discrimination. In *Personnel Administrator of Massachusetts v. Feeney* (*Feeney*),<sup>36</sup> a woman challenged a Massachusetts law that gave preference to veterans for civil service jobs because, as there were few female veterans at the time, the law had “a devastating impact upon the employment opportunities of women.”<sup>37</sup> The Supreme Court had previously vacated the judgment and remanded to the lower court to reconsider its ruling in light of the intervening authority of *Davis*. On remand, the district court concluded that the veterans’ hiring preference was “inherently nonneutral because it favors a class from which women have traditionally been excluded.”<sup>38</sup> The Attorney

<sup>29</sup> *Id.* at 273 (White J., dissenting).

<sup>30</sup> *Hunter v. Underwood*, 471 U.S. 222, 228 (1985) (“Proving the motivation behind official action is often a problematic undertaking.”).

<sup>31</sup> *Hayden v. Paterson*, 594 F.3d 150, 163 (2d Cir. 2010).

<sup>32</sup> *United States v. Bannister*, 786 F. Supp. 2d 617, 665 (E.D.N.Y. 2011) (quoting *United States v. Yonkers Bd. of Educ.*, 624 F. Supp. 1276, 1369 (S.D.N.Y. 1985)).

<sup>33</sup> *Hayden*, 594 F.3d at 163 (quoting *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265 (1977)); see also *Hunter*, 471 U.S. at 232 (“[A]n additional purpose . . . would not render nugatory the purpose to discriminate against all [B]lacks.”); accord *Pers. Adm’r of Mass. v. Feeney*, 442 U.S. 256, 277 (1979) (“Discriminatory intent is simply not amenable to calibration. It either is a factor that has influenced the legislative choice or it is not.”).

<sup>34</sup> *Vill. of Arlington Heights*, 429 U.S. at 265–66 (emphasis added); accord *id.* at 265 (“[R]acial discrimination is not just another competing consideration.”).

<sup>35</sup> *Grutter v. Bollinger*, 539 U.S. 306, 327 (2003).

<sup>36</sup> 442 U.S. 256 (1979).

<sup>37</sup> *Id.* at 260.

<sup>38</sup> *Id.*



General of Massachusetts again sought Supreme Court review, and this time the Court reversed.

The Court, in an opinion by Justice Stewart, began by noting that the Federal Government and virtually all of the states granted some sort of hiring preference to veterans, and that the Massachusetts law at issue expressly applied to “any person, male or female, including a nurse” who was honorably discharged from military service.<sup>39</sup> Nevertheless, despite “the apparent attempts by Massachusetts to include as many military women as possible within the scope of the preference,” at the time, 98% of veterans in Massachusetts were male.<sup>40</sup> Turning to the legal framework, the Court cited race as the “paradigm” for classifications that “in themselves supply a reason to infer antipathy.”<sup>41</sup> Gender classifications were “not unlike those based upon race,” and recent cases had required that such classifications be subjected to heightened scrutiny (though not the touchstone of strict scrutiny that the Court applied to race-based classification).<sup>42</sup> Based on *Davis* and *Arlington Heights*, however, the disproportionate impact of a statute on gender should be treated only as “an important starting point,” given that “purposeful discrimination” alone “offends the Constitution.”<sup>43</sup> Applying these principles to the Massachusetts hiring scheme, the Supreme Court cited two factual findings that the district court had made, which the plaintiff had conceded: that the preference for veterans was “legitimate and worthy” and that it was “not a pretext for gender discrimination.”<sup>44</sup> The Court then discounted the evidence of disparate impact, since, unlike in *Yick Wo*, in which the impact of the ordinance provided evidence of its underlying discriminatory purpose, here “the purposes of the statute provide the surest explanation for its impact.”<sup>45</sup> The Court then stated that the “dispositive question” was whether “a gender-based discriminatory purpose has, at least in some measure, shaped the Massachusetts veterans’ preference legislation.”<sup>46</sup> In light of the district court’s finding—and the plaintiff’s concession—that the legislative purpose of advancing the hiring of veterans was legitimate and non-discriminatory, the plaintiff could not claim that the preference was inherently “gender-biased” based on its impact.<sup>47</sup>

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<sup>39</sup> *Id.* at 261–62.

<sup>40</sup> *Id.* at 269–70.

<sup>41</sup> *Id.* at 272.

<sup>42</sup> *Id.* at 272–73.

<sup>43</sup> *Id.* at 274 (emphasis added) (internal quotation marks omitted).

<sup>44</sup> *Id.* at 274–75 (emphasis added).

<sup>45</sup> *Id.* at 275.

<sup>46</sup> *Id.* at 276. Justice Stevens concurred, and was joined by Justice White, in questioning whether this was in fact the relevant question, stating, “If a classification is not overtly based on gender, I am inclined to believe the question whether it is covertly gender based is the same as the question whether its adverse effects reflect invidious gender-based discrimination.” *Id.* at 281 (Stevens, J., concurring). But because there was a sufficiently large number of non-veteran men disadvantaged by the statute, the statistics were, for Justices Stevens and White, sufficient to find no invidious discrimination.

<sup>47</sup> *Id.* at 277.

The plaintiff was thus left to argue that the “natural and foreseeable consequences” of the legislation indicated the intent behind it.<sup>48</sup> The Supreme Court declined to incorporate this kind of presumption of intent based on natural and foreseeable consequences from criminal law, holding that discriminatory intent in the equal protection context requires more—“it implies that the decisionmaker, in this case a state legislature, selected or reaffirmed a particular course of action at least in part ‘because of,’ not merely ‘in spite of,’ its adverse effects upon an identifiable group.”<sup>49</sup> Notably, for this gloss on intent, the Court cited no prior authority, other than a concurrence by Justice Stewart that stated that “awareness” of race is not “the equivalent of discriminatory intent.”<sup>50</sup> Yet the Court qualified this statement in a footnote, stating:

This is not to say that the inevitability or foreseeability of consequences of a neutral rule has no bearing upon the existence of discriminatory intent. Certainly, when the adverse consequences of a law upon an identifiable group are as inevitable as the gender-based consequences of [the Massachusetts law], a strong inference that the adverse effects were desired can reasonably be drawn. But in this inquiry—made as it is under the Constitution—an inference is a working tool, not a synonym for proof. When, as here, the impact is essentially an unavoidable consequence of a legislative policy that has in itself always been deemed to be legitimate, and when, as here, the statutory history and all of the available evidence affirmatively demonstrate the opposite, the inference simply fails to ripen into proof.<sup>51</sup>

Put another way, the Court stated, “What a legislature or any official entity is ‘up to’ may be plain from the results its actions achieve, or the results they avoid.”<sup>52</sup> Nevertheless, the Court held, “When the totality of legislative actions establishing and extending the Massachusetts veterans’ preference are considered, the law remains what it purports to be: a preference for veterans of either sex over nonveterans of either sex, not for men over women.”<sup>53</sup>

As we will see, *Feeney*’s mode of analysis—brushing aside evidence of discriminatory impact and even awareness of such impact where a plaintiff could not show that a legislature selected its course of conduct “because of” rather than “in spite of” such impact—was oft-repeated by courts in assessing equal protection claims in the criminal sentencing context without the qualification or nuance suggested in the decision’s footnote.

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<sup>48</sup> *Id.* at 278.

<sup>49</sup> *Id.* at 279 (emphasis added).

<sup>50</sup> *United Jewish Orgs. of Williamsburgh, Inc. v. Carey*, 430 U.S. 144, 179 (1977) (Stewart, J. concurring).

<sup>51</sup> *Feeney*, 442 U.S. at 279 n.25.

<sup>52</sup> *Id.* at 279 n.24.

<sup>53</sup> *Id.* at 280 (internal citation omitted).

While *Feeney* completed a triumvirate of decisions making equal protection claims virtually impossible to prove, another 1979 case, decided less than a month after *Feeney*, notably drew a line against the encroachment of the demanding *Davis/Arlington Heights* standard from an area where it had traditionally been far more active in rooting out discrimination — school desegregation. The Court had been active in the years since *Brown v. Board of Education* in pursuing its mandate to end segregation in schools. In *Columbus Board of Education v. Penick*, the Court encountered an argument by a “highly segregated”<sup>54</sup> school district in Columbus, Ohio, that lower courts’ desegregation orders violated *Davis* and *Arlington Heights* because the plaintiff could not show a discriminatory purpose.<sup>55</sup> Justice White, who as Deputy Attorney General had dispatched federal marshals to oversee integration efforts in the South,<sup>56</sup> wrote for the majority (with Justice Powell in dissent), this time holding that *Davis* posed no barrier to the lower courts’ desegregation mandate. The Court rejected the argument that by relying on the “natural and foreseeable consequences” of the school board’s practices was “nothing more than equating impact with intent, contrary to the controlling precedent.” Justice White’s opinion quoted the district court’s statement that *Davis* and *Arlington Heights* did not forbid “the foreseeable effects standard from being utilized as one of the several kinds of proofs from which an inference of segregative intent may be properly drawn.”<sup>57</sup> Further, the Court added, “Adherence to a particular policy or practice, ‘with full knowledge of the predictable effects of such adherence upon racial imbalance in a school system is one factor among many others which may be considered by a court in determining whether an inference of segregative intent should be drawn.’”<sup>58</sup> Thus, the combination of the qualifying language noted in *Feeney* and the Supreme Court’s embrace of the district court’s reasoning in *Penick* demonstrate that disparate impact remains a relevant factor—indeed, potentially a powerful one—in determining discriminatory purpose, where legislators are aware of such an impact and nevertheless adhere to the policy that causes it.

## II. FAILED EFFORTS TO CHALLENGE CRACK SENTENCING LAWS IN THE FEDERAL CIRCUIT COURTS

Whatever nuance the Supreme Court introduced into the demanding standard of discriminatory purpose, however, lower courts largely overlooked it in assessing equal protection claims arising from the harsh federal sentenc-

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<sup>54</sup> 443 U.S. 449, 452 (1979).

<sup>55</sup> *Id.* at 464.

<sup>56</sup> Justice Byron White, N.Y. TIMES (Apr. 16, 2002), <https://www.nytimes.com/2002/04/16/opinion/justice-byron-white.html> [<https://perma.cc/Q648-JVKL>].

<sup>57</sup> *Penick*, 443 U.S. at 464–65 (quoting *Penick*, 429 F. Supp. at 255).

<sup>58</sup> *Id.* at 465. Notably, the decision in *Penick* did not discuss *Feeney*, except to cite its footnote acknowledging that when disproportionate impact is “inevitable . . . , a strong inference that the adverse effects were desired can reasonably be drawn.”

ing regimes enacted in the 1980s and 1990s. In challenges to the 100-to-1 crack/powder cocaine sentencing disparity enacted in the Anti-Drug Abuse Act of 1986 (and incorporated into both substantive criminal law under 21 U.S.C. § 841(b) and the U.S. Sentencing Guidelines' drug quantity table), defendants repeatedly brought dramatic evidence of disparate impact to the attention of courts in nearly every federal circuit. Yet the circuit courts uniformly rejected these challenges,<sup>59</sup> discounting evidence of discriminatory impact and holding that even if Congress was aware of such impact, that was immaterial in the absence of proof that the disparity was enacted *because of* rather than *in spite of* its racist results.

For example, in *United States v. Lattimore*,<sup>60</sup> the Eighth Circuit addressed statistical evidence from Minnesota that showed that, in 1988, 96.6% of those charged with crack offenses were Black, whereas 79.6% charged with powder offenses were white.<sup>61</sup> Although acknowledging these statistics, the court held that they “do not indicate a violation of equal protection in the federal constitution sense” because, as in *Feeney*, Congress did not “select[ ] or reaffirm[ ]” the policy “because of” rather than “in spite of,” the adverse effects on people of color.<sup>62</sup> Instead, the Eighth Circuit stated, “the legitimate noninvidious purposes” of the 100-to-1 ratio “cannot be missed,”—namely, the assumption (unsupported by science) that crack was more addictive and more dangerous—and thus there was no equal protection violation. This holding plainly did not adhere to the Supreme Court’s admonition that disparate impact remained important evidence of discriminatory intent; to the contrary, it held that such impact had *no* constitutional weight where there was a non-discriminatory rational basis for the policy. That holding not only contravened *Feeney* and *Penick*; it avoided the application of strict scrutiny to equal protection analysis and ignored the Supreme Court’s statements in *Arlington Heights* and subsequent cases that a discriminatory intent need not be the *sole* rationale for legislation to violate the Equal Protection Clause.

Other courts followed similar erroneous pathways. In *United States v. Moore*,<sup>63</sup> the Second Circuit noted that “statistical evidence of [the] discriminatory impact” of the 100-to-1 ratio was “irresistible,” and that certain debates surrounding the legislation in 1986 described “gangs of young black men push[ing] their rocks on passing motorists . . . [l]ess than a block from where unsuspecting white retirees play tennis.”<sup>64</sup> But although these facts “raise[d] the judicial eyebrow,” the Circuit rejected the defendant’s equal

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<sup>59</sup> See, e.g., *United States v. Thurmond*, 7 F.3d 947, 951 (10th Cir. 1993); *United States v. Reece*, 994 F.2d 277, 278–79 (6th Cir. 1993); *United States v. Frazier*, 981 F.2d 92, 94–95 (3d Cir. 1992); *United States v. Galloway*, 951 F.2d 64, 65–66 (5th Cir. 1992); *United States v. House*, 939 F.2d 659, 664 (8th Cir. 1991).

<sup>60</sup> 974 F.2d 971 (8th Cir. 1992).

<sup>61</sup> *Id.* at 975 (citing *State v. Russell*, 477 N.W.2d 886, 887 (Minn. 1991)).

<sup>62</sup> *Id.* (internal quotation marks omitted).

<sup>63</sup> 54 F.3d 92 (2d Cir. 1995).

<sup>64</sup> *Id.* at 98 (quoting 132 CONG. REC. S4668 (daily ed. Apr. 22, 1986)).

protection claim because, it held, “Congress enacted the sentencing ratio for a valid, stated purpose,” thus applying rational basis review rather than strict scrutiny.<sup>65</sup> The court dismissed as irrelevant that the medical establishment had discredited the notion that crack is more addictive than powder cocaine because subsequent scientific disagreement with congressional findings did not establish discriminatory purpose and because “this reason was never the *sole* rationale justifying the 100 to 1 ratio.”<sup>66</sup> The Second Circuit hastened to add that its decision was unaffected by recent conclusions of the Sentencing Commission and arguments in the media that the ratio should be revised.<sup>67</sup>

Other examples of tortured logic abound in these decisions. In reasoning that would echo in *post hoc* defenses of the 1994 Crime Bill, the D.C. Circuit held that the 1986 Act could not have had a discriminatory purpose because, “[a]fter all, the Congress of 1986 was composed of many congressmen, including a number of African-Americans, who could have been expected to attack promptly any legislation thought to stem from discriminatory purpose—let alone legislation accompanied by racist remarks.”<sup>68</sup> For good measure, the D.C. Circuit added that “the legislation may actually disproportionately *benefit* African-Americans who live in areas plagued with crack distribution and use.”<sup>69</sup>

Notably, although all equal protection challenges to the 100-to-1 ratio failed in the circuit courts, and none were taken up by the Supreme Court,<sup>70</sup> the circuits felt compelled to issue repeated precedential opinions rejecting such challenges—as though the same rule of law had to be justified again and again in the face of an ever-increasing body of statistics showing stark discrimination. Over time, a few decisions recognized the deficiencies in the reasoning of these opinions. Although concurring in the result of one such decision, Judge Gerald Heaney of the Eighth Circuit wrote that the disparate treatment of Black and white drug suspects “makes the war on drugs look like a war on minorities.”<sup>71</sup> While Judge Heaney acknowledged there may be legitimate, non-discriminatory reasons to treat crack cocaine differently from powder, at least some portion of the disparity could be accounted for, he argued, because “parts of our society view the young black male as a figure of social disruption, and will seek to punish him more harshly than his white suburban counterpart.”<sup>72</sup> Nevertheless, Judge Heaney—whose remarks

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<sup>65</sup> *Id.* (citing *United States v. Stevens*, 19 F.3d 93, 97 (2d Cir. 1994)).

<sup>66</sup> *Id.* at 99 (emphasis added).

<sup>67</sup> *Id.*

<sup>68</sup> *United States v. Johnson*, 40 F.3d 436, 440 (D.C. Cir. 1994).

<sup>69</sup> *Id.* at 441 n.2.

<sup>70</sup> The Supreme Court did not address the 100-to-1 ratio in any fashion until its 2007 decision *Kimbrough v. United States*, 552 U.S. 85 (2007), which held that district courts had discretion to vary downward from the Sentencing Guidelines to account for policy disagreements with the Sentencing Commission on its disparate treatment of crack and powder cocaine.

<sup>71</sup> *United States v. Willis*, 967 F.2d 1220, 1226 (8th Cir. 1992) (Heaney, J., concurring) (internal quotation marks and alteration omitted).

<sup>72</sup> *Id.*

were joined by another judge of the three judge panel, thus representing a majority—was constrained to concur based on “our prior decisions that hold there is no merit in [the defendant’s] equal protection argument.”<sup>73</sup>

One final decision merits note: in yet another case from the Eighth Circuit, *United States v. Clary*, the district court had gone below the ten-year mandatory minimum sentence in a crack case on equal protection grounds.<sup>74</sup> The district court analyzed the equal protection claim “by examining the role that racism has played in criminal punishment in this country since the late seventeenth century,” citing “the unconscious predisposition of legislators,” and discussing news articles about “gang-affiliated, gun-toting, young black males” that were entered into the *Congressional Record* in support of the statute, as well as Congress’s arbitrary doubling of the ratio from 50-to-1 to 100-to-1.<sup>75</sup> Despite recognizing that the district court’s “painstakingly crafted opinion” was “the most complete record on this issue to come before this court,” the Eighth Circuit rejected its reasoning as failing to meet *Fenehey*’s standard of showing a decision made “because of” rather than “in spite of” discriminatory impact.<sup>76</sup> The Circuit dismissed entirely the notion that “unconscious racism” could have anything whatsoever to do with the question of discriminatory purpose.<sup>77</sup> The court also discounted the evidence of media reports entered into the *Congressional Record* because, it stated, while “this information may have affected at least some legislators, these articles hardly demonstrate that the stereotypical images ‘undoubtedly’ influenced the legislators’ racial perceptions.”<sup>78</sup> Finally, the court cited evidence in the record that demonstrated, in its view, that Congress had acted without racial animus. For this conclusion, the court cited testimony before the district court of Eric E. Sterling, Counsel to the Subcommittee of Criminal Justice of the House of Representatives at the time the statute was enacted, who stated that “the members of Congress did not have racial animus, but rather ‘racial consciousness,’ an awareness that the ‘*problem in the inner cities . . . was about to explode into the white part of the country.*’”<sup>79</sup> That testimony—which reads to the modern eye as an *admission* of discriminatory purpose—was “the most pertinent” factor for the Eighth Circuit in holding that Congress acted without such purpose.<sup>80</sup> The Circuit reversed the district court’s decision and remanded with instructions to impose the mandatory minimum sentence.

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<sup>73</sup> *Id.*

<sup>74</sup> 34 F.3d 709 (8th Cir. 1994).

<sup>75</sup> *Id.* at 711 (citing *United States v. Clary*, 846 F. Supp. 768, 774–84 (E.D. Mo. 1994)).

<sup>76</sup> *Id.* at 713.

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> *Id.* at 714 (emphasis added).

<sup>80</sup> *Id.*

### III. REGULATING NARCOTICS IN PUBLIC HOUSING: THE 1994 CRIME BILL AND FEDERAL CRIME POLICY

We now turn to our case study of the public housing provision of the 1994 Crime Bill. We will first describe briefly the legislative history of the provision prior to the 1994 Bill, then discuss its disparate impact since passage, and finally return to the social and political cross-currents that led to its adoption in the Clinton Administration's 1994 crime legislation. We are not making an argument about individual legislators' subjective states of mind (although some of the comments in the *Congressional Record* quoted below certainly raise questions about the subjective intent of the speakers). Indeed, courts' demand for evidence of such subjective animus reflects a misunderstanding of what the Equal Protection Clause requires and how racial bias operates. Instead, we are making an argument about congressional intent, based on objective historical evidence of the policies debated and political trade-offs made in a specific historical context, from which, we argue, discriminatory purpose may be deduced.

#### A. Statutory Framework

As amended by the 1994 Crime Bill, section 860(a) of Title 21 of the United States Code makes it a federal crime to distribute, possess with intent to distribute, or manufacture narcotics "in or on, or within one thousand feet of, the real property comprising a public or private elementary, vocational, or secondary school or a public or private college, junior college, or university, or a playground, or housing facility owned by a public housing authority, or within 100 feet of a public or private youth center, public swimming pool, or video arcade facility."<sup>81</sup> Section 860(a) (originally § 405A) was added to the Controlled Substances Act of 1970 in the joint budget resolution for fiscal year 1985, covering drug manufacturing and distribution within one thousand feet of public or private elementary and secondary schools and providing no mandatory minimum sentence for a first offense.<sup>82</sup> After the powder cocaine-related death of University of Maryland basketball star Len Bias, the statute was amended in the Anti-Drug Abuse Act of 1986 to include colleges and universities, with enhanced penalties for repeat offenses.<sup>83</sup> In 1988, Congress added playgrounds, youth centers, swimming pools and video arcades, though restricting the statute's reach to one hundred feet of those facilities.<sup>84</sup> The Crime Control Act of 1990 imposed a one-year mandatory minimum sentence for a first offense under the statute (which it recodified at

<sup>81</sup> 21 U.S.C. § 860(a).

<sup>82</sup> Pub. L. No. 98-473, 98 Stat. 1873 (1984).

<sup>83</sup> Pub. L. No. 99-570 § 1104, 100 Stat. 3207 (1986).

<sup>84</sup> Pub. L. No. 100-690 § 6458, 102 Stat. 4181 (1988). Following the 1988 law, the Sentencing Guidelines added a section carrying enhanced penalties for narcotics offenses committed near "protected locations." U.S. SENT'G GUIDELINES MANUAL § 2D1.2 (U.S. SENT'G COMM'N 2018).

21 U.S.C. § 860) but did not modify its substantive provisions focusing on locations where children were likely to be targeted by drug dealers.<sup>85</sup>

Senator Bill Bradley, Democrat of New Jersey, first introduced the expansion of the statute to public housing as an amendment to the Senate version of the 1991 Violent Crime Control Act, which was authored by then-Senator Biden. The legislative debate, such as it was, covers only a single page of the *Congressional Record*. Senator Bradley introduced the amendment, contrasting public housing residents to “[m]ost” people who “do not need criminal penalties to declare our homes drug-free zones.”<sup>86</sup> He characterized public housing projects as “open-air drug markets, full of violence” where “by the afternoon or early evening, the streets and hallways are abuzz with drug trafficking and violence.”<sup>87</sup> He added that parents of children who live in public housing “know the calendar. They breathe easier in the winter, when some of the drug dealers actually prefer to be in prison, where it is warm and cheap, and they can stay in business. Come spring and summer, they are back on the streets.”<sup>88</sup> The 1991 bill did not become law, but as will be discussed below, the Clinton Administration later endorsed the inclusion of Senator Bradley’s proposal in the 1994 Crime Bill.

### B. Disparate Impact

Although African Americans and Latinos represent collectively 31.7% of the U.S. population,<sup>89</sup> and demographic statistics from 2017 of the approximately two million Americans residing in public housing indicate that 67% are people of color,<sup>90</sup> statistics in a representative sample of defendants charged with violating the public housing provision of § 860(a) reveal that among 807 defendants for whom race can be determined, 91.7% of defendants charged with violating the public housing provision were African American, Latino or Native American, while 8.3% were non-Hispanic white.<sup>91</sup>

<sup>85</sup> Pub. L. No. 101-647 § 1214, 104 Stat. 4789 (1990).

<sup>86</sup> 137 CONG. REC. S8878-03 (1991).

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> *Quick Facts*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/US/IPE120218> [<https://perma.cc/V6UW-RXZF>].

<sup>90</sup> *Assisted Housing: National and Local Datasets*, U.S. DEP’T OF HOUS. & URBAN DEV., <https://www.huduser.gov/portal/datasets/assthsq.html> [<https://perma.cc/G3Q6-LGZW>].

<sup>91</sup> We sampled data from sixty-one judicial districts—representing approximately 65% of the ninety-four judicial districts throughout the country—to determine charging statistics for section § 860(a); how often federal prosecutors charge the public housing provision in particular when charging defendants under the statute; and the race of the defendants in those cases. The data was obtained by conducting searches of criminal reports on Pacer of cases from the last twenty years (earlier cases do not have electronic records) and sorting those cases by codes related to the statute (there are six codes associated with 21 U.S.C. § 860(a)—we searched each of these codes). The sixty-one districts we searched were selected solely based on their electronic filing system’s having a fee exemption for counsel appointed under the Criminal Justice Act, 18 U.S.C. § 3006A, and represent a cross-section of circuits and geographic regions throughout the country. Further information about the specific provision of section § 860(a) charged in each case was obtained by reviewing the charging instrument. Finally, the race of the defendant was determined by cross-referencing the name of the individual on Pacer



Notably, a study of drug defendants generally in Bureau of Prisons custody (for fiscal year end 2012) found that 76% of such defendants were Black or Latino, while 22% were white.<sup>92</sup> Thus, people of color are overrepresented in cases charging the public housing provision well beyond their proportion of the general population and the population of public housing residents *and* to an even greater degree than in the already-skewed federal drug defendant population.<sup>93</sup>

Section 860(a) is disparately charged in judicial districts throughout the country. Some districts have never charged a § 860(a) case relating to public housing, schools, playgrounds, or any other provision of the statute, while other districts regularly deploy the statute. For example, the statute has rarely been charged in the last twenty years in the Second Circuit, which covers New York, Connecticut and Vermont, except in the Western District of New York, which has charged the statute twenty-seven times. Meanwhile the Northern District of Iowa and the District of Kansas have each charged the statute over one hundred times in that same period (though neither has ever charged the public housing provision).

Charging of the public housing provision specifically is even more haphazard and discriminatory. The provision is virtually never used in some districts that include the country's most populous metropolitan centers. For

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and the three-digit code associated with the judicial district with information on the Bureau of Prisons' "inmate locator" function on the BOP's website. The BOP distinguishes between "black" and "white" individuals but does not indicate whether the "white" individuals are "Hispanic or non-Hispanic." Accordingly, we kept track of the names of individuals classified as "white" and assumed that any individual who does not have a well-recognized "Hispanic" surname is "non-Hispanic." Of the 862 overall defendants charged with the public housing provision, race could not be determined for 55 defendants, or approximately 6% of the sample. Data supporting these statistics are on file with the authors.

<sup>92</sup> See SAM TAXY, JULIE SAMUELS, & WILLIAM ADAMS, U.S. DEP'T OF JUST., BUREAU OF JUST. STAT., DRUG OFFENDERS IN FEDERAL PRISON: ESTIMATES OF CHARACTERISTICS BASED ON LINKED DATA 3 (2015).

<sup>93</sup> These differences are statistically significant; in other words, a random draw of each population is highly unlikely to produce the statistics represented in our data set. We used a Welch's test to compare the difference between the distributions around two means to assess the likelihood that they could be drawn from the same overall proportion in a population. The t-statistic for Welch's test is calculated as:

Calculating the t-statistic provides a p-value, which, if less than or equal to 0.05, is considered to be statistically significant. For all comparisons, X1 (the portion of all section 860(a) defendants who are Black and/or Latino) is 0.917, N1 (the total number of 860(a) defendants) is 807, and S1 (the standard deviation) is 0.0097115. When compared with the population at large, X2 is 0.32 (the portion that is Black and Latino), N2 is 328,239,523 (the total US population), and S2 = 0.0000257, t=1,746 and the value of p is less than 0.001 (highly statistically significant). When compared with the population in public housing, X2 is 0.67 (the portion of the public housing population that is Black, Latino, or both), N2 is 2,000,000 (the total public housing population), and S2 = 0.00003325 (the standard deviation), t = 723 and the value of p is less than 0.001 (highly statistically significant). And, when compared with the federal prison population reflected in the BJS study, X2 is 0.76 (the portion of the 2012 federal prison population serving time for all drug offenses that is Black, Latino, or both), N2 is 94,678 (the total federal prison population serving time for drug offenses), and S2 = 0.0013886 (the standard deviation), t = 460 and the value of p is less than 0.001 (highly statistically significant). Accordingly, in each one of these scenarios, the percentage of minorities charged with the public housing provision could not be the result of a random sampling of any of these three populations.

example, the sixty-nine defendants charged with the statute in the last two decades in New York City and Connecticut all come from three federal cases, and *not a single one* (for whom race information was available) was white. Meanwhile, data from districts where the public housing provision was used frequently strongly reinforce the inference of discriminatory enforcement. Federal prosecutors in the Northern District of West Virginia have used the provision frequently, charging 125 defendants in the last twenty years (the Southern District of West Virginia has no such cases). Those 125 cases accounted for the vast majority—76%—of white defendants who had been charged with the provision nationally. But in a state which, according to recent census figures is 92% “non-Hispanic white,”<sup>94</sup> whites still made up *only 40%* (51/125) of the defendants charged with the public housing provision, while Black Americans, who made up 3.6% of the population, represented 44% of the defendants charged with the provision. If one removes the Northern District of West Virginia from national statistics, the disparate impact of the public housing provision nationally shifts to 97.7% minority and 2.28% white,<sup>95</sup> arguably approaching *Yick Wo* and *Gomillian*-level disparate impact.

In addition to this statistical disparity, the geographic history of public housing suggests a disparate impact. In New York City, for example, African Americans and Latinos make up 91.5% of public housing residents, as compared with approximately 67% nationally.<sup>96</sup> The location of public housing projects is historically bound to the City’s history of segregation. As millions of Black people fled racial terrorism in the deep South and migrated North in the 1920s and 30s, thousands settled in Brooklyn attracted by the promise of safety and employment opportunities at the Navy Yard.<sup>97</sup> At the same time, two social programs were being implemented that would change the makeup of neighborhoods and shape the City as we know it today. First, the process known as “redlining,” undertaken by the Federal Housing Administration (FHA), designated certain neighborhoods as ineligible for federal backing of mortgages, thus eliminating one of the critical stepping stones out

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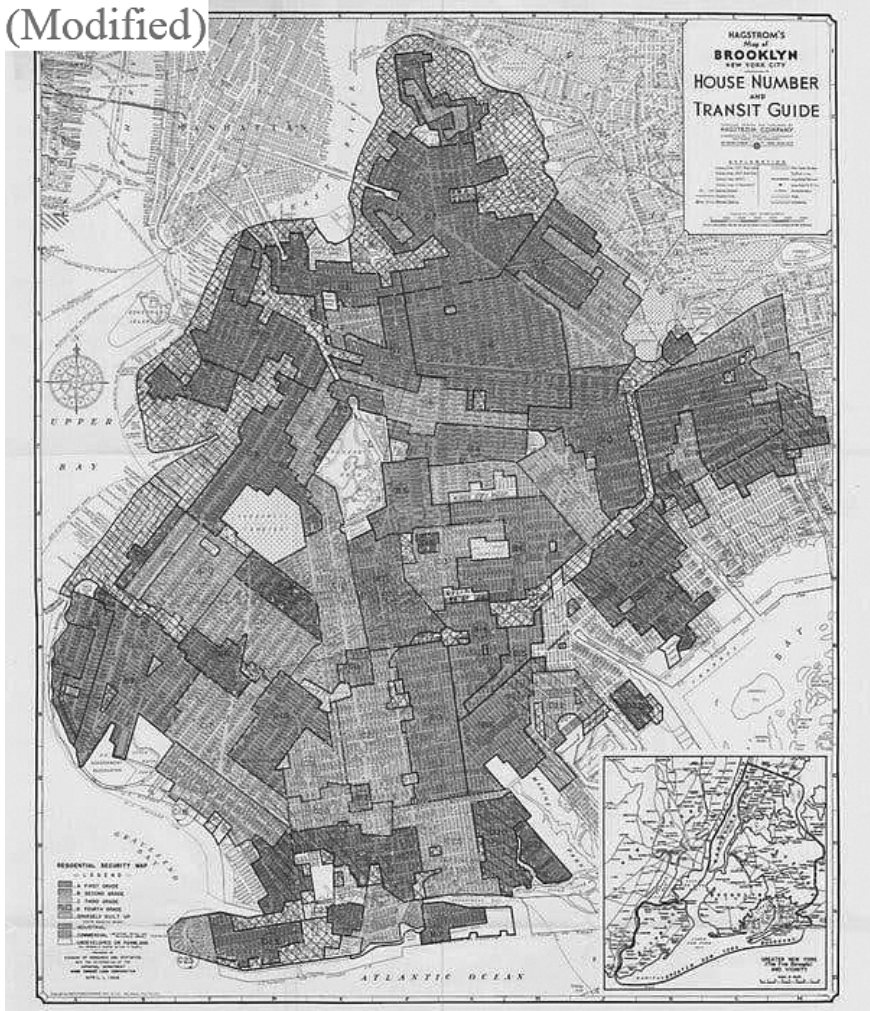
<sup>94</sup> *QuickFacts: West Virginia*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/WV> [<https://perma.cc/YB48-LZKX>].

<sup>95</sup> If one also removes the District of Puerto Rico, the other district that makes up a substantial portion of cases and is also largely homogenous, the numbers shift slightly from the national figures to 93.6% African American and Latino and 6.3% white.

<sup>96</sup> NYU FURMAN CTR., FACT BRIEF: HOW NYCHA PRESERVES DIVERSITY IN NEW YORK’S CHANGING NEIGHBORHOODS 3 (April 2019), [https://furmancenter.org/files/NYCHA\\_Diversity\\_Brief\\_Final-04-30-2019.pdf](https://furmancenter.org/files/NYCHA_Diversity_Brief_Final-04-30-2019.pdf) [<https://perma.cc/962P-22GX>]; NAT’L LOW INCOME HOUS. COAL., WHO LIVES IN PUBLIC HOUSING? 3 (2012), <https://nlhc.org/sites/default/files/HousingSpotlight2-2.pdf> [<https://perma.cc/G8R5-YSKC>]. And nationwide, people of color constitute 67% of public housing residents. U.S. DEP’T OF HOUS. & URBAN DEV., ASSISTED HOUSING: NATIONAL AND LOCAL DATASETS, <https://www.huduser.gov/portal/datasets/assths.html> [<https://perma.cc/E7DZ-YA5X>].

<sup>97</sup> See generally ISABEL WILKERSON, THE WARMTH OF OTHER SUNS: THE EPIC STORY OF AMERICA’S GREAT MIGRATION (2010); Alison Gregor, *Bedford-Stuyvesant: Diverse and Changing*, N.Y. TIMES (Jul. 9, 2014), <https://www.nytimes.com/2014/07/13/realestate/bedford-stuyvesant-diverse-and-changing.html> [<https://perma.cc/YG87-FDNX>].

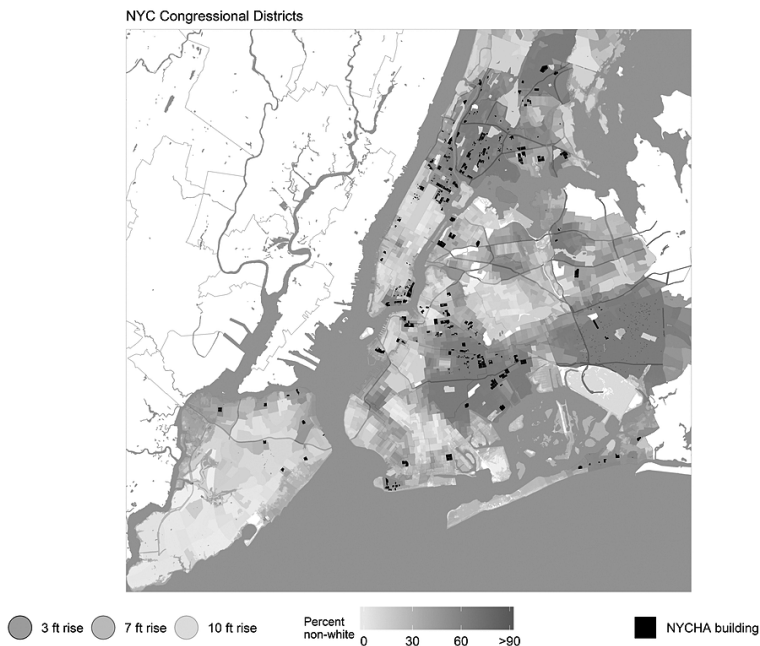
of poverty for African Americans and other ethnic minorities.<sup>98</sup> A 1938 map showing the FHA’s division of Brooklyn reflects neighborhoods designated as “D – Fourth Grade,” i.e., hazardous for underwriting mortgages in red (hence the term “redlining”).<sup>99</sup>



<sup>98</sup> See Emily Badger, *How Redlining’s Racist Effects Lasted for Decades*, N.Y. TIMES (Aug. 24, 2017), <https://www.nytimes.com/2017/08/24/upshot/how-redlinings-racist-effects-last-ed-for-decades.html> [<https://perma.cc/D5Q5-UT8X>]. See generally Ta-Nehisi Coates, *The Case for Reparations*, ATLANTIC (June 2014), <https://www.theatlantic.com/magazine/archive/2014/06/the-case-for-reparations/361631/> [<https://perma.cc/J37T-5N2N>] (“Redlining went beyond FHA-backed loans and spread to the entire mortgage industry, which was already rife with racism, excluding black people from most legitimate means of obtaining a mortgage.”).

<sup>99</sup> Badger, *supra* note 98.

At the same time, “NYCHA was organized in the 1930s with the hope of ‘eliminating the crime, illness, poverty, and moral decay bred by slums.’”<sup>100</sup> The earliest developments were racially segregated low-rise buildings built for middle-income families.<sup>101</sup> In an effort termed “slum clearance,” entire blocks of deteriorating tenements were demolished and, in some cases, replaced with cheaply constructed, often high-density apartment buildings.<sup>102</sup> As a result of these processes and white flight to the suburbs, by the 1960s, the population of NYCHA buildings was mostly minority tenants.<sup>103</sup> According to NYCHA’s Special Tabulation of Resident Characteristics, the most recent available statistics being from 2016, 45.6% of resident families are Black; 44.4% of resident families are Latino; 4.8% are white; and 4.6% are Asian.<sup>104</sup> A recent map of congressional districts in New York City shows demographic patterns and the location of public housing projects reflecting their location in predominantly minority communities:<sup>105</sup>



<sup>100</sup> *United States v. Bannister*, 786 F. Supp. 2d 617, 633 (E.D.N.Y. 2011) (alterations omitted) (quoting KENNETH T. JACKSON, *ENCYCLOPEDIA OF NEW YORK* 954 (1995)).

<sup>101</sup> *Id.*

<sup>102</sup> *Id.* (quoting NICHOLAS DAGEN BLOOM, *PUBLIC HOUSING THAT WORKED: NEW YORK IN THE TWENTIETH CENTURY* 129–32, 142–43 (2008)).

<sup>103</sup> *Id.* at 634.

<sup>104</sup> N.Y.C. HOUS. AUTH., *SPECIAL TABULATION OF RESIDENT CHARACTERISTICS 3* (2016), <https://www1.nyc.gov/assets/nycha/downloads/pdf/Resident-Data-Summaries.pdf> [<https://perma.cc/LPJ5-V78F>].

<sup>105</sup> *Mapping NYCHA Communities’ Disinvestment: Segregation, Police Stops, Unemployment, and Poverty*, DATA FOR PROGRESS, <https://www.dataforprogress.org/nycha-maps> [<https://perma.cc/QV6F-GPRX>].

Comparing the areas of the two maps where the Federal Housing Authority designated neighborhoods unworthy of home loans and the location of housing projects today shows the endemic, systematic segregation of race and poverty in Brooklyn, which echoes across New York City generally. Thus, the stark overrepresentation of African Americans and Latinos in the few New York City cases charging § 860(a) should come as no surprise based on the demographics of individuals residing not just in NYCHA housing, but also in the neighborhoods in which such housing is located. Although the statute had been infrequently deployed in New York City, its enforcement was virtually guaranteed to result in a stark disparate impact on minorities, since it would inevitably target residents living in the most heavily non-white communities in the City.<sup>106</sup> This is so despite consistent evidence that whites use and sell narcotics at rates similar to or greater than people of color.<sup>107</sup> In other words, the statute targets enforcement in geographic areas in New York City that have no correlation with rates of drug sales and use; enforcement is targeted instead where the greatest number of African Americans and Latinos will be captured. Of course, in the post-*Davis/Arlington Heights* world, that, in and of itself, is likely insufficient to make out an equal protection claim. Thus, a careful and nuanced understanding of the history of the public housing provision—and the social and political circumstances in which it arose—is necessary to launch a credible attack on the statute.

### C. *History of the Public Housing Provision*

The modern prosecution of the wars on crime and drugs at the federal level stretches back to President Lyndon Johnson's declaration of a "War on Crime" in 1965 and had produced such disparate racial impact within the American criminal legal system by the time of the debate over the 1994 Crime Bill that the historical record makes clear Congress's awareness of such disparate impact. Indeed, federal policymakers were presented with several alternative strategies to address the problem of crime and drugs that involved treatment and prevention measures, as well as redirecting power and economic resources to low-income communities of color. Yet the White House and Congress pursued a course of action that rejected such proposals and instead vastly expanded policing, surveillance, and incarceration. In the 1994 Bill's final version, Congress opted to expand the nation's policing apparatus without addressing the apparent racial disparities that sustained that system in any meaningful way.

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<sup>106</sup> Cf. *Floyd v. City of New York*, 959 F. Supp. 2d 540, 660–64 (S.D.N.Y. 2013) (holding NYPD policy of targeting "the right people" for *Terry* stops in NYCHA housing projects with demonstrated discriminatory effect violated Equal Protection Clause).

<sup>107</sup> See, e.g., Michelle Y. Ewert, *One Strike and You're Out of Public Housing: How the Intersection of the War on Drugs and Federal Housing Policy Violates Due Process and Fair Housing Principles*, 32 HARV. J. RACIAL & ETHNIC JUST. 57, 73 (2016); see generally MICHELLE ALEXANDER, *THE NEW JIM CROW* 8 (2012).

### 1. *Racialized Roots of Federal Crime Policy*

The roots of the 1994 Crime Bill and the rise of mass incarceration date back far beyond the “War on Drugs” of the 1980s. When President Johnson began the national law enforcement program in the context of landmark civil rights legislation and unprecedented social change in the 1960s, federal policymakers established a role for the federal government in police, courts, and prison systems for the first time in American history.<sup>108</sup> The Omnibus Crime Control and Safe Streets Act of 1968, the first major piece of national law enforcement legislation, marked the official beginning of federal investment and influence in local policing and criminal justice that endured through subsequent reauthorizations and major federal crime control bills from the Anti-Drug Abuse Acts of 1986 and 1988 to the 1994 Crime Bill to, most recently, the First Step Act of 2019.

From the Johnson Administration onwards, federal crime control policies targeted young Black men between the ages of fifteen and twenty-four with new policing and surveillance programs, as well as ever-increasing harsh sentencing measures.<sup>109</sup> A growing consensus of policymakers, social scientists, and law enforcement officials concluded that only intensified enforcement of the criminal law in Black urban neighborhoods, combined with greater punishment, would prevent crime and “disorder” in the future.<sup>110</sup> Na-

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<sup>108</sup> Indeed, Johnson’s declaration broke from the previous two centuries of federal approaches to local law enforcement. Crime control matters had previously rested under the domain of state governments.

<sup>109</sup> The specific targeting of Black men between the ages of fifteen and twenty-four for national law enforcement programs runs through the memoranda and internal reports examined in ELIZABETH HINTON, *FROM THE WAR ON POVERTY TO THE WAR ON CRIME: THE MAKING OF MASS INCARCERATION* (2016). Within the Johnson Administration, PRESIDENT’S COMM’N ON LAW ENF’T & ADMIN. OF JUST., *THE CHALLENGE OF CRIME IN A FREE SOCIETY: A REPORT BY THE PRESIDENT’S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE* 5, 35, 44 (1967); and NAT’L ADVISORY COMM’N ON CIV. DISORDERS, *REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS* (1968) contain the most clearly articulated public expressions of this agenda. See also NAOMI MURAKAWA, *THE FIRST CIVIL RIGHT: HOW LIBERALS BUILT PRISON AMERICA* (2014); Naomi Murakawa, *The Origins of the Carceral Crisis: Racial Order as ‘Law and Order’ in Postwar American Politics*, in RACE AND AMERICAN POLITICAL DEVELOPMENT 234–55 (Joseph Lowndes, Julie Novkov & Dorian T. Warren eds., 2008); Vesla Mae Weaver, *Frontlash: Race and the Development of Punitive Crime Policy*, 21 *STUD. AM. POL. DEV.* 230 (2007); Vesla Mae Weaver, *Frontlash: Race and the Politics of Punishment* (2007) (Ph.D. dissertation, Harvard University) (ProQuest).

<sup>110</sup> The mission of Johnson’s War on Crime was to expand surveillance and police patrol in low-income urban communities. Without invoking race explicitly, the White House and Congress built a set of punitive policies that focused on controlling this group by expanding the field of surveillance and patrol around them. Across political and ideological lines, federal policymakers shared a set of assumptions about African Americans, poverty, and crime, namely, they interpreted Black urban poverty as pathological—as the product of individual and cultural “deficiencies.” The seemingly neutral statistical and sociological “truth” of Black criminality was wholly unsupported by empirical data, yet this stereotype guided the strategies federal policymakers developed for the War on Crime, first in the 1960s, then through the 1970s and the War on Drugs in the 1980s and beyond. See HINTON, *supra* note 110; HEATHER ANN THOMPSON, *WHOSE DETROIT?: POLITICS, LABOR, AND RACE IN A MODERN AMERICAN CITY* (2004); MICHAEL W. FLAMM, *IN THE HEAT OF THE SUMMER: THE NEW YORK*

tional law enforcement programs that focused on Black neighborhoods from the outset heightened the chance of arrest for young African American men and fostered the rise of a statistical apparatus primarily concerned with measuring street crime. All of these reinforced the association between Black neighborhoods and criminality and the escalation of punitive policies for the remainder of the 20th Century and into the 21st.

In the 1970s, the arrest and incarceration of young African American men became a deliberate strategy to prevent future crime. From the perspective of President Richard Nixon's Advisory Council, his closest aides, and Nixon himself, at the heart of the crime problem lay the *street* crime problem, which was seen as a Black, urban issue.<sup>111</sup> Nixon officials assumed that the "criminal species" could be "found predominantly in the slums of urban America and not in the suburbs."<sup>112</sup> The President himself expressed this sentiment bluntly: "You have to face the fact that the whole problem is really the blacks," Nixon's chief of staff H.R. Haldeman quoted Nixon as saying in Haldeman's diary entry from April 1969. "The key is to devise a system that recognizes this while not appearing to."<sup>113</sup> In a systematic way, Nixon recognized that the politics of crime control could effectively conceal the racist intent behind his administration's punitive domestic policies that directly targeted low-income African Americans.

Meanwhile, the racially targeted crime control strategies adopted by Johnson, Nixon, and subsequent presidential administrations yielded increased possibilities for supervision in the halls of urban schools, in the elevators of housing projects, and in the reception rooms of welfare offices in low-income communities of color. Soon, federal policymakers required employment initiatives, public schools, and grassroots organizations to partner with juvenile courts, police departments, and correctional facilities in order to receive funding. Over time, the vast and ever-expanding network of institutions responsible for surveillance, arrest, and incarceration evolved out of the fusion of law enforcement and social welfare programs—including public housing. The result was a historical and legal shift from controlling individuals to controlling communities and spaces.

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RIOTS OF 1964 AND THE WAR ON CRIME (2016); JORDAN T. CAMP, INCARCERATING THE CRISIS: FREEDOM STRUGGLES AND THE RISE OF THE NEOLIBERAL STATE (2016); MAX FELKER-KANTOR, POLICING LOS ANGELES: RACE, RESISTANCE, AND THE RISE OF THE LAPD (2018).

<sup>111</sup> The decision on the part of the Nixon Administration to target young Black men as a strategy to fight the War on Crime was further rationalized by the new theoretical and scientific approaches to understanding Black criminal behavior. The influential political scientist James Q. Wilson worked in the Nixon Administration and attributed the increase of violent crime in the 1960s to the nation's growing youth population and urged policymakers to develop crime control programs based on demographic realities. "The only sure way we know of fighting crime is birth control," Wilson concluded. James Q. Wilson, *Crime in the Streets*, 5 PUB. INT. 26, 32 (1966). For Wilson, to curtail crime rates "short of locking up everyone under 30 years of age," urban police needed to make "the scene of the prospective crime" more secure. *Id.* at 34.

<sup>112</sup> See HINTON, *supra* note 110.

<sup>113</sup> H. R. HALDEMAN, THE HALDEMAN DIARIES: INSIDE THE NIXON WHITE HOUSE 53 (1994).

## 2. *The Criminalization of Public Housing*

As described above in the New York City example, structural racism and state-sponsored segregation measures such as redlining played an important role in skewing the population of urban public housing projects to be majority minority. The federal government aided in facilitating this segregation by actively redlining Black neighborhoods, supporting racially restrictive covenants that forbid Black people from buying property, and subsidizing segregated white suburbs.<sup>114</sup>

By the late 1970s, public housing developments suffered from extreme rates of racial segregation, poverty, residential abandonment, and crime. These problems continued to escalate when President Ronald Reagan launched the “War on Drugs” in 1984, amid a policy climate of disinvestment and federal retrenchment from social programs.<sup>115</sup> As it evolved during the Reagan Administration, antidrug policy forged even stronger linkages between social welfare and crime control programs, expanding general surveillance and the rise of mass incarceration in the process.

To implement the Reagan Administration’s strategies nationwide and coordinate the activities of criminal justice, law enforcement, and military officials at all levels of government, White House officials created the Drug Policy Board. This body designed and oversaw national punitive programs and developed the policies that would go on to inform the Omnibus Anti-Drug Abuse Act of 1988.<sup>116</sup> Institutionalizing the recommendations of the Drug Policy Board, this Act began an unprecedented, targeted attack on drugs in public housing. The congressional findings labeled drug dealers as

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<sup>114</sup> In effect, by guaranteeing home equity loans while simultaneously divesting and diverting resources from urban areas to suburban ones, the federal government redistributed wealth to middle-class white suburbanites. Beginning in 1934, Federal Housing Authority (FHA) loans made mortgages easier to attain than ever before for middle-class homebuyers. KENNETH T. JACKSON, *CRABGRASS FRONTIER: THE SUBURBANIZATION OF THE UNITED STATES* 203–05 (1987). But because FHA insurance required appraisals, homeowners were unable to purchase in neighborhoods deemed risky. *Id.* at 209–10. Segregated black neighborhoods automatically received the lowest-quality rating, often colored red on real estate maps (hence the term “redlining”). *Id.* at 200. Appraisers consulted the FHA’s *Underwriting Manual*, which instructed that “inharmonious racial or nationality groups” made a neighborhood undesirable for a prospective buyer.” *Id.* at 208.

<sup>115</sup> Between fiscal year 1981 and fiscal year 1982, the Reagan Administration cut annual federal spending on social programs from \$94.8 billion to \$88.8 billion, including a decrease of \$490 million from child nutrition programs, and a \$341 million reduction in Aid to Families with Dependent Children payments. Richard S. Williamson, *A New Federalism: Proposals and Achievements of President Reagan’s First Three Years*, 16 *PUBLICUS* 11, 14 (1986). The poverty rate itself also rose from 15 percent in 1975 to 23 percent by 1987. See MARGY WALLER, BROOKINGS INST., *BLOCK GRANTS: FLEXIBILITY VS. STABILITY IN SOCIAL SERVICES* (2005), <http://www.brookings.edu/es/research/projects/wrb/publications/pb/pb34.pdf> [<https://perma.cc/FC8N-XD5B>]; ANDREW E. BUSCH, *RONALD REAGAN AND THE POLITICS OF FREEDOM* (2001); Charlotte Saikowski, *Strengthening the Social Fabric*, *CHRISTIAN SCI. MONITOR*, Nov. 15, 1988; Leith Mullings, *Losing Ground: Harlem, the War on Drugs, and the Prison Industrial Complex*, 5 *SOULS* 1 (2003); Ronald Reagan, *Radio Address to the Nation on Welfare Reform*, AM. PRESIDENCY PROJECT, <https://www.presidency.ucsb.edu/documents/radio-address-the-nation-welfare-reform-0> [<https://perma.cc/3VLJ-PHAW>].

<sup>116</sup> Pub. L. No. 100-690, 102 Stat. 4181 (1988).



“imposing a reign of terror on public and other federal assisted low-income housing tenants.”<sup>117</sup>

To fight drugs in public housing and ensure that they remained drug-free, Congress amended the Housing Act of 1937 and required Public Housing Authorities (PHAs) to add clauses to their leases prohibiting tenants, their household members, and guests from engaging in any drug-related criminal activity “on or near the public housing premises.”<sup>118</sup> Under the terms of the policy, any tenant who engaged in illegal activity in the vicinity of a public housing site could be evicted, and any person convicted of a drug offense would be permanently eliminated from all federal benefits. The legislation also required PHAs to collaborate with local police departments in developing crime prevention plans under the Public Housing Drug Elimination Program (DEP) section of the law. Following the enactment of the law, across the United States, Housing Authorities and local police departments shared records and worked to increase surveillance.<sup>119</sup> The DEP provided funding through the Department of Housing and Urban Development (HUD) for anti-drug efforts by local housing authorities, including collaboration with local police.<sup>120</sup> The effect of these and other efforts federal policymakers created to increase patrol and surveillance in public housing areas criminalized entire low-income communities of color.

During the 1990s, policing tactics in public housing developments became even more aggressive. The leading research institute for policing practices, the Police Executive Research Forum, published a book in 1990 that examined drug crime-specific policing strategies employed in public housing.<sup>121</sup> It described approaches for “occupying the community,” such as opening “mini-police stations” and increasing police presence and enforcement efforts within public housing developments,<sup>122</sup> with partial funding of these efforts coming from DEP.<sup>123</sup> It was in this context that Senator Bradley initially introduced his amendment to the Controlled Substances Act to provide enhanced penalties for drug crimes in and around public housing sites. As noted, while this proposal generated little controversy or debate, it did not become law until the political winds that ushered in the 1994 Crime Bill were blowing at full force following the election of Bill Clinton as the 42nd President.

<sup>117</sup> Congressional findings, 42 U.S.C. §?11901.

<sup>118</sup> 42 U.S.C. § 1437d(1)(5).

<sup>119</sup> Emily Ponder Williams, *Fair Housing’s Drug Problem: Combating the Racialized Impact of Drug-Based Housing Exclusions Alongside Drug Law Reform*, 54 HARV. C.R.-C.L. L. REV. 769 (2019).

<sup>120</sup> BARBARA WEBSTER & EDWARD F. CONNORS, NAT’L INST. OF JUST., THE POLICE, DRUGS, AND PUBLIC HOUSING (1992).

<sup>121</sup> DEBORAH LAMM WEISEL, POLICE EXECUTIVE RESEARCH FORUM, TACKLING DRUG PROBLEMS IN PUBLIC HOUSING: A GUIDE FOR POLICE (1990).

<sup>122</sup> *Id.* at 101–02.

<sup>123</sup> Jeffrey Fagan, Garth Davies & Jan Holland, *The Paradox of the Drug Elimination Program in New York City*, 13 GEO. J. ON POVERTY, L. & POL’Y 416, 417 (2006).

### 3. *The Politics of Crime Control: Public Housing and the 1994 Crime Bill*

As it became clear to Democrats that Republicans had taken control of “the crime issue,” then-Senator Joe Biden (D-DE) and Representative Chuck Schumer (D-NY) led the party in their quest to reclaim it for the Democratic platform.<sup>124</sup> Schumer declared that “it was imperative for the Democrats to put their own stamp on crime.”<sup>125</sup> This became a central political strategy despite lawmakers’ full awareness of widespread and pervasive discriminatory impacts within the criminal legal system. They chose *not* to address these issues meaningfully, opting instead to expand the system as-is. As early as August 1991, the United States Sentencing Commission concluded in a special report to Congress that racial disparities in sentencing began to increase after 1984.<sup>126</sup> “This differential application on the basis of race,” the Commission wrote, “reflects the very kind of disparity and discrimination the Sentencing Reform Act [of 1984], through a system of guidelines, was designed to reduce.”<sup>127</sup> In response, Representative Don Edwards (D-CA) introduced the Sentencing Uniformity Act of 1992. On the House Floor, Edwards cited the Sentencing Commission’s discovery that decisions to prosecute under the mandatory minimum sentences enacted in the 1980s “are based not on neutral factors, but rather on factors such as race, gender, crime rates and caseloads, circuit, and prosecutorial practices.”<sup>128</sup> “In particular,” he stated, “a greater proportion of black defendants received sentences at or above the mandatory minimum level, followed by Hispanics, and then whites. Departures from the mandatory minimum are most likely to be granted to whites, and least likely to Hispanics.”<sup>129</sup>

Nevertheless, Democrats pushed forward while Republicans also worked to retain control of the crime issue. In 1992, during his first term as Attorney General, William P. Barr released the Justice Department report *The Case for More Incarceration*, which argued for implementing policies that would greatly increase the level of incarceration in the United States, even asserting that “[the] benefits of increased incarceration would be enjoyed disproportionately by black Americans living in inner cities.”<sup>130</sup> That same year,

<sup>124</sup> Guy Gugliotta, *Crime Bill a Hostage of Politics*, WASH. POST (Aug. 5, 1992), <https://www.washingtonpost.com/archive/politics/1992/08/05/crime-bill-a-hostage-of-politics/e3ecbbdb-8259-4cc7-a407-deee5038bbd0/> [<https://perma.cc/B2RK-RDCR>].

<sup>125</sup> *Id.*

<sup>126</sup> U.S. SENT’G COMM’N, SPECIAL REPORT TO THE CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM (AS DIRECTED BY SECTION 1703 OF PUBLIC LAW 101-647) 82 (1991), [https://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/mandatory-minimum-penalties/1991\\_Mand\\_Min\\_Report.pdf](https://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/mandatory-minimum-penalties/1991_Mand_Min_Report.pdf) [<https://perma.cc/5QN8-CRAH>].

<sup>127</sup> *Id.* at ii.

<sup>128</sup> 102 CONG. REC. H6079 (daily ed. Oct. 1, 1992) (statement of Rep. Don Edwards).

<sup>129</sup> *Id.*

<sup>130</sup> U.S. DEP’T OF JUST., OFF. OF POL’Y DEV., *THE CASE FOR MORE INCARCERATION* vi (1992), <https://www.ojp.gov/pdffiles1/Digitization/139583NCJRS.pdf> [<https://perma.cc/G7GR-KJYH>].

Barr testified in a congressional hearing that “our criminal justice system is designed to be fair and, in fact, is the fairest known to man.”<sup>131</sup> This was despite all evidence to the contrary of pervasive discrimination in the criminal legal system.

It was in this political context that then-Governor Bill Clinton utilized a “New Democrat” political strategy, fully embracing the crime issue while running for president. He courted endorsements from police associations and unions,<sup>132</sup> touted his support for the death penalty (even leaving the campaign trail to oversee the execution of Ricky Ray Rector, an incarcerated Black man who was so intellectually disabled that he saved the dessert from his last meal to eat after his execution),<sup>133</sup> and promoted a crime plan that called for more cops and fewer guns on the street.<sup>134</sup> In a particularly poignant moment, just before Super Tuesday, the Clinton campaign organized a press conference at Stone Mountain Correctional Facility. This small prison is located in Stone Mountain, Georgia, a town best-known for hosting the rebirth of the Ku Klux Klan.<sup>135</sup> The photograph that circulated in newspapers the following day was striking: four white politicians speaking in front of a group of nearly all Black men in prison uniforms.<sup>136</sup>

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<sup>131</sup> *Role of the Department of Justice and the Drug War, Weed and Seed: Hearing Before the Select Committee on Narcotics Abuse and Control*, 102nd Cong. 24 (1992) (remarks of William P. Barr).

<sup>132</sup> The Associated Press, *Fraternal Order of Police to Endorse Clinton*, N.Y. TIMES (Sept. 16, 1996), <https://www.nytimes.com/1996/09/16/us/fraternal-order-of-police-to-endorse-clinton.html> [<https://perma.cc/ZD95-S3A4>]; Russell L. Riley, *Bill Clinton: Campaigns and Elections*, MILLER CENTER (n.d.), <https://millercenter.org/president/clinton/campaigns-and-elections> [<https://perma.cc/D9DR-EPU4>].

<sup>133</sup> Nathan J. Robinson, *The Death of Ricky Ray Rector*, JACOBIN (Nov. 5, 2016), <https://jacobinmag.com/2016/11/bill-clinton-klan-rickey-rector-death-penalty-execution-crime-racism> [<https://perma.cc/NSG6-HE94>].

<sup>134</sup> Gwen Ifill, *Clinton in Houston Speech, Assails Bush on Crime Issue: The Democrats*, N.Y. TIMES (Jul. 24, 1992) <https://www.nytimes.com/1992/07/24/us/1992-campaign-democrats-clinton-houston-speech-assails-bush-crime-issue.html> [<https://perma.cc/F6QK-UMAG>].

<sup>135</sup> Jess Engebretson, *How the Birthplace of the Modern Ku Klux Klan Became the Site of America's Largest Confederate Monument*, KQED (Jul. 24, 2015), <https://www.kqed.org/low-down/19119/stone-mountains-hidden-history-americas-biggest-confederate-memorial-and-birthplace-of-the-modern-ku-klux-klan> [<https://perma.cc/BW5M-BTRR>].

<sup>136</sup> Greg Gibson, *Bill Clinton at Stone Mountain Correctional Facility* ASSOCIATED PRESS (1992).



Once elected, President Clinton retreated briefly on crime to focus instead on his ultimately unsuccessful battle for healthcare reform. Yet, as internal memoranda reveal, close advisors saw an opportunity in shifting the administration's attention more permanently to "the crime issue." White House Director of Political Affairs Rahm Emanuel and Domestic Policy Advisor Bruce Reed counseled the President on a "crime strategy with passage of the Crime Bill as the central vehicle," arguing that "cement[ing] public perception of [him] as tough on crime" would not only benefit his image, "but also that of the Democratic Party which lost almost every major race in 1993 on the crime issue."<sup>137</sup> Reed and another advisor, Jose Cerda, drafted a memorandum arguing that crime was one of two of the "most powerful realignment issues" the president could "seize," and "at a time when public concern about crime is the highest it has been since Richard Nixon stole the issue from the Democrats in 1968."<sup>138</sup> If he did indeed seize the opportunity, he could harken back to the era of Robert Kennedy, when "crime was a linchpin that helped hold the Democratic majority together across racial and class lines."<sup>139</sup>

Key to this strategy was an intensification of the criminalization of public housing residents.<sup>140</sup> One prominent example of this occurred in 1993 in

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<sup>137</sup> Memorandum from Rahm Emanuel and Bruce Reed to Bill Clinton (Feb. 18, 1994) ("Crime Bill Communications," Box 7, Rahm Emanuel, William J. Clinton Presidential Library, hereinafter "WJCPL").

<sup>138</sup> Draft Memorandum from Bruce Reed and Jose Cerda to Bill Clinton (Oct. 27, 1993) ("1994 Crime Bill - Memos to POTUS," Box 85, Domestic Policy Council, Bruce Reed, and Crime Series, WJCPL).

<sup>139</sup> *Id.*

<sup>140</sup> This occurred despite a lack of sound data on the problem—one HUD official asserted in a memorandum to the Clinton Administration that "[t]here are no national figures on crime

Chicago when the Chicago Housing Authority and its police department engaged in “Operation Clean Sweep,”<sup>141</sup> a series of paramilitary raids that involved “pre-dawn surprise [warrantless] searches of buildings leading to mass arrests in violation of basic constitutional rights quite similar to the periodic ‘shakedowns’ intended to rid prison wards of shanks and other contraband.”<sup>142</sup> The sweeps garnered the attention of the Clinton Administration, so much so that mere hours after the sweeps were ruled unconstitutional,<sup>143</sup> Clinton ordered Attorney General Janet Reno and HUD Secretary Henry Cisneros “to develop—within the next 10 days—a search policy for public housing that is both constitutionally permissible and effective, and that can be implemented on a nationwide basis.”<sup>144</sup> In response, the Department of Justice drafted a proposal that included seven steps PHAs should take to combat crime, the majority of which related to searches.<sup>145</sup> This move was described by one Congressman as a “shocking directive” to find a “way around the Constitution” with Clinton acting “almost alarmingly in respect to the residents’ fourth amendment privacy protection.”<sup>146</sup>

In addition to Operation Clean Sweep and similar efforts that followed across the country, a primary driver of the criminalization of public housing

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in public housing.” Memorandum from David Shipley to Bruce Katz and Amy Liu (Mar. 27, 1996), <https://clinton.presidentiallibraries.us/items/show/14483> [<https://perma.cc/3DHC-V48V>] (“FOIA 2006-1734-F - David Shipley, Speechwriter”).

<sup>141</sup> The first CHA searches began in 1988 as a response to increased levels of violence in CHA housing. The ACLU filed a class action suit on behalf of residents. The ACLU and CHA negotiated for several months, agreeing to terms of a consent decree that a federal judge approved in August 1989. CHA engaged in searches over the next several years that complied with the consent decree until a series of searches in 1992, and then another in 1993 (the subject of Pratt). For more on the earlier history of these searches, see Charles Hellman, *Secure in Their Houses? Fourth Amendment Rights at Public Housing Projects*, 40 N.Y.L. SCH. L. REV. 189 (1995).

<sup>142</sup> Loïc Wacquant, “Deadly Symbiosis: When Ghetto and Prison Meet and Mesh” in *MASS IMPRISONMENT: SOCIAL CAUSES AND CONSEQUENCES* 94 (David Garland ed., 2001).

<sup>143</sup> See *Pratt v. Chicago Hous. Auth.*, 848 F. Supp. 792 (N.D. Ill. 1994).

<sup>144</sup> President William J. Clinton, Statement of the President on the Court Decision Regarding the Chicago Housing Authority’s “Operation Clean Sweep,” (n.d.) (“Public Housing - Sweeps,” Box 78, Domestic Policy Council, Bruce Reed, Crime, WJCPL).

<sup>145</sup> Draft Proposals for Restoring Safety to Public Housing (n.d.) (“Public Housing - Sweeps,” Box 78, Domestic Policy Council, Bruce Reed, Crime, WJCPL). The proposal included the following: (1) Public housing agencies (PHAs) should include in their lease agreements a provision banning the possession of firearms; (2) Public housing lease agreements should be amended to allow periodic administrative inspections for firearms; (3) PHAs should rely on their ability to obtain warrants to conduct administrative inspections of their buildings; (4) PHA tenant associations should adopt resolutions approving lease agreement provisions banning weapons and providing consent for firearms inspections; (5) PHAs should take steps to secure buildings through use of metal detectors, identification cards, and effective security guards; (6) Police patrolling public housing should attempt to take weapons from violent criminals by aggressively using their authority to stop and frisk suspicious individuals; and (7) Public housing authorities should rely on the exigent circumstances doctrine to conduct warrantless searches of individual units where there is probable cause to believe that evidence of a crime will be found in that unit or when emergency conditions require immediate action such as to pursue persons fleeing from the scene of a crime or to investigate a possible medical emergency resulting from a shooting incident.

<sup>146</sup> 103 CONG. REC. S12567 (daily ed. Aug. 25, 1994) (statement of Sen. Craig).

and its residents was Operation Safe Home (OSH).<sup>147</sup> Tapping into the deep fear about crime and public housing, Secretary Cisneros remarked at a 1994 OSH press briefing:

Public housing residents literally live under the gun. Gangs control the stairwells of their buildings; they have to put their children to bed in bathtubs at night to protect them from stray bullets, keep them inside during the day for fear they'll be caught in somebody's crossfire. They live in places where the police themselves won't even go . . . Operation Safe Home will bring the law enforcement resources of the federal government, in cooperation with state and local authorities, to bear on violent crime in public and assisted housing.<sup>148</sup>

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<sup>147</sup> Just two years later, and nearly a decade after Congress enacted the eviction provision in the Anti-Drug Abuse Act of 1988, President Clinton announced in his State of the Union address his own "One Strike" policy, codified in the Housing Opportunity Extension Act of 1996. One year later, newly appointed HUD Secretary Andrew Cuomo said of the law: "Make no mistake about it; in public housing, drugs are public enemy number one. We must have zero tolerance for people who deal drugs. They are the most vicious, who prey on the most vulnerable. They are the jailers, who imprison the elderly. They are the seducers, who tempt the impressionable young. They must be stopped. 'One Strike and You're Out' is doing just that." U.S. DEP'T OF HOUS. & URB. DEV., MEETING THE CHALLENGE: PUBLIC HOUSING AUTHORITIES RESPOND TO THE "ONE STRIKE AND YOU'RE OUT" INITIATIVE (1997). In 2002, the Supreme Court upheld the policy, strengthening the criminalization of public housing residents as part of the federal War on Drugs. Dep't of Hous. and Urb. Dev. v. Rucker, 535 U.S. 125 (2002). Although the one strike eviction policy remains in effect, during the Obama Administration, HUD "softened its position" as part of the administration's criminal justice reform efforts, even encouraging PHAs to exercise discretion by not strictly enforcing the policy. Michelle Y. Ewert, *One Strike and You're Out of Public Housing: How the Intersection of the War on Drugs and Federal Housing Policy Violates Due Process and Fair Housing Principles*, 32 HARV. J. ON RACIAL & ETHNIC JUST. 58, 58–60 (2016); Letter from Shaun Donovan to Public Housing Authority Executive Directors (Jun. 17, 2011), [http://usich.gov/resources/uploads/asset\\_library/Reentry\\_letter\\_from\\_Donovan\\_to\\_PHAs\\_6-17-11.pdf](http://usich.gov/resources/uploads/asset_library/Reentry_letter_from_Donovan_to_PHAs_6-17-11.pdf) [<https://perma.cc/C2DH-K7G9>]. In its capacity as an active member of the Federal Interagency Reentry Council, HUD issued guidance in late 2015 that highlighted the discriminatory impact of criminal history-based occupancy restrictions in HUD-subsidized housing. "This Council, made up of more than 23 Federal Agencies, meets on a regular basis to act on issues that affect the lives of those released from incarceration. An important aspect of the Reentry Council's work has been to have each Federal Agency identify and address 'collateral consequences' that individuals and their families may face because they or a family member has been incarcerated or has had any involvement with the criminal justice system." U.S. DEP'T OF HOUS. & URB. DEV., HUD NOTICE PIH 2015-19: GUIDANCE FOR PUBLIC HOUSING AGENCIES (PHAs) AND OWNERS OF FEDERALLY-ASSISTED HOUSING ON EXCLUDING THE USE OF ARREST RECORDS IN HOUSING DECISIONS (2015), <http://portal.hud.gov/hudportal/documents/huddoc?id=PIH2015-19.pdf> [<https://perma.cc/TP9C-G6FX>]. The following year, in a separate guidance HUD outlined the discriminatory impact of these restrictions more explicitly: "Because of widespread racial and ethnic disparities in the U.S. criminal justice system, criminal history-based restrictions on access to housing are likely disproportionately to burden African Americans and Hispanics." U.S. DEP'T OF HOUS. & URB. DEV., OFFICE OF GENERAL COUNSEL GUIDANCE ON APPLICATION OF FAIR HOUSING ACT STANDARDS TO THE USE OF CRIMINAL RECORDS BY PROVIDERS OF HOUSING AND REAL ESTATE-RELATED TRANSACTIONS (2016), [https://www.hud.gov/sites/documents/HUD\\_OGCGUIDAPPFHASTANDCR.PDF](https://www.hud.gov/sites/documents/HUD_OGCGUIDAPPFHASTANDCR.PDF) [<https://perma.cc/Z7MW-2HYY>].

<sup>148</sup> Press Briefing by Henry Cisneros (Feb. 4, 1994) ("2/94 Operation Safe Home," Box 4, Office of Speechwriting and Jonathan Prince, WJCPL).

In later campaign materials, the connection between OSH and Black communities was clear. Asserting that “[t]he Clinton Administration is committed to working with African Americans to build a better future for all of our children,” the campaign highlighted several efforts backed by the administration to purportedly aid black communities, including “[i]ntroducing Operation Safe Home to fight crime in public housing.”<sup>149</sup>

As efforts escalated to police public housing residents, Emanuel and other close advisors to the president shifted focus to the Crime Bill, pushing to “define the bill as the Clinton Crime Bill.”<sup>150</sup> In both the House and the Senate, the Sentencing Commission’s 1991 report on racial disparities in drug-related sentencing, as well as other findings on racial discrimination in capital punishment, became central to the legislative process. The Congressional Black Caucus (CBC) seized on the Commission’s findings and characterized the Crime Bill as overly punitive from the start. Stressing the structural causes of crime on the floor of the House and in op-eds, the CBC pushed for more funding for prevention efforts and programs like Head Start, an assault rifles ban, and a narrowing of the “three strikes” provision so that people who needed second chances could have them. In its 280-page alternative bill introduced to the House, the CBC pointed out that federal crime bills “do nothing to reduce crime and polarize and shift the focus and resources away from strategies that have proven to be more effective in addressing crime and violence.”<sup>151</sup> The CBC found entirely different solutions, in “crime prevention measures that include drug treatment, early childhood intervention programs, full funding for Head Start programs and the Women, Infants and Children program, rehabilitation and alternatives to incarceration, community policing, and family support programs, as well as in programs to rebuild communities through education, employment, and housing.”<sup>152</sup> Indeed, compared to the Senate version, the CBC’s bill devoted \$2 billion more to drug treatment, \$3 billion more to early intervention crime prevention programs for youth, and unlike the Senate bill, scrapped mandatory minimum sentences and money for regional prisons.<sup>153</sup> The CBC bill received little traction or support in the House.

Once its alternative bill was stymied, the CBC continued its efforts to mitigate the worst aspects of the Crime Bill. The Racial Justice Act (RJA) that the CBC introduced would have made it possible to use statistical evidence of racial bias to make habeas corpus appeals to overturn sentences of death. These provisions followed a study commissioned by Congress in which the United States General Accounting Office found “[a] pattern of

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<sup>149</sup> Clinton/Gore campaign materials (June 24, 1996) (“African Americans for C/G [Clinton/Gore] ’96,” Box 8, Office of Speechwriting and James (Terry) Edmonds, WJCPL).

<sup>150</sup> Memorandum from Rahm Emanuel to Carol Rasco, David Gergen, Mark Gearan, George Stephanopoulos, Dee Dee Myers (Jun. 24, 1993) (“Crime Poll,” Box 8, Rahm Emanuel, WJCPL).

<sup>151</sup> Crime Prevention and Criminal Justice Reform Act, H.R. 3315, 103d Cong. (1994).

<sup>152</sup> *Id.*

<sup>153</sup> Elizabeth Hinton, Julilly Kohler-Hausmann, and Vesla Weaver, *Did Blacks really endorse the 1994 Crime Bill?*, N.Y. TIMES (Apr. 13, 2016), at A25.

evidence indicating racial disparities in the charging, sentencing, and imposition of the death penalty.<sup>154</sup> CBC Chairman Kweisi Mfume (D-MD) argued on the House floor that “[t]he death penalty has proven to be the most atrocious display of government sanctioned racism that exists today in America . . . . History shows that minorities have received a disproportionate share of society’s harshest punishments, from slavery to lynchings.”<sup>155</sup> Given the sixty new offenses the Crime Bill made eligible for the federal death penalty, the sense of urgency to act was great. Many referenced Justice Blackmun’s dissent from earlier that year in which he asserted that “the death penalty remains fraught with arbitrariness, discrimination, caprice, and mistake.”<sup>156</sup> As Washington DC’s representative Eleanor Holmes Norton put it at the time, prosecutors essentially “chose blacks for death.”<sup>157</sup> Time and time again, the pleas of Holmes Norton and other Black leaders were shouted and voted down.

Citing “black-on-black crime,” those in opposition to the RJA argued that the result of the measure “might be more executions of blacks if we harshly impose a rigid quota system,”<sup>158</sup> an argument wholly unsubstantiated by facts. Moreover, many policymakers claimed that the RJA was a “death penalty abolition act,” although all the measure aimed to abolish was the disproportionate targeting of Black people for the death penalty, not an end to capital punishment.<sup>159</sup>

Still, members of the CBC went so far as to “offer[ ] to make major changes in the language that would substantially deal with the concerns of those who have been opposed to the measure.”<sup>160</sup> This was to no avail. The Clinton Administration quickly went on the offensive, charging Black staffers to aggressively lobby members of the CBC. Confronted with the refusal of Republican legislators (and some Democrats) to support a crime bill that included the RJA, Democratic leadership withdrew the provision, a move that Representative Louis Stokes (D-OH) asserted was “for reasons of racism.”<sup>161</sup> This move, and the fact that the Crime Bill authorized the death penalty for dozens of new crimes, drew strong opposition. In the words of Representative William Lacy Clay (D-MO), it was “one step removed from endorsing lynch mobs.”<sup>162</sup> The failure of the CBC’s Racial Justice Act represents a lost opportunity in our history, when the racial disparities in the criminal legal system could have been better studied and addressed.

The CBC’s strong objections to many of the Crime Bill’s punishment provisions were not out of step with contemporary Black opinion on crime

<sup>154</sup> U.S. GEN. ACCT. OFF., 101 CONG., REPORT ON DEATH PENALTY SENTENCING: RESEARCH INDICATES PATTERN OF RACIAL DISPARITIES 5 (1990).

<sup>155</sup> 140 CONG. REC. 23,611. (Aug. 21, 1994) (statement of Rep. Mfume).

<sup>156</sup> *Callins v. Collins*, 510 U.S. 1141, 1144 (1994) (Blackmun, J., dissenting).

<sup>157</sup> MURAKAWA, THE FIRST CIVIL RIGHT, *supra* note 11, at 144.

<sup>158</sup> 140 CONG. REC. 13,211 (Jun. 16, 1994) (statement of Rep. McCollum).

<sup>159</sup> 140 CONG. REC. 23,663 (Aug. 22, 1994) (statement of Sen. Hatch).

<sup>160</sup> 140 CONG. REC. 23,611 (Aug. 21, 1994) (statement of Rep. Mfume).

<sup>161</sup> 140 CONG. REC. 21,562 (Aug. 11, 1994) (statement of Rep. Stokes).

<sup>162</sup> 140 CONG. REC. 21,562 (Aug. 11, 1994) (statement of Rep. Clay).



and violence. Although African Americans are far more likely to be victimized by street crime, they are consistently less punitive in public opinion measures and tend to support the kinds of crime prevention programs the CBC brought to the policy table.<sup>163</sup> Moreover, Black journalists, city leaders, civil rights groups, and prominent ministers attacked the Bill vociferously.

Repeatedly, however, the Crime Bill's proponents endorsed a misleading narrative that the Black community was in favor of harsh, punitive policies, cherry-picking statements of support or outright misrepresenting the position of African American leaders. In one notable example, speaking against the RJA, Representative Bob Dornan (R-CA) stated:

What disturbs me most about this provision, which is adamantly supported by the Congressional Black and Hispanic Caucuses, is that minorities—especially African-Americans—are overwhelmingly more likely to be victims of violent crime. Let us not forget the words of the Rev. Jesse Jackson who said, “there is nothing more painful to me \* \* \* than to walk down the street and hear footsteps and start thinking about robbery — then look around and see somebody white and feel relieved.” This statement reveals a great deal about crime in America—especially in our inner cities. And it is just outrageous that anyone would prioritize discrimination over victimization. How do these people sleep at night?<sup>164</sup>

In other words, Republican lawmakers used the cover of Jackson's statement to argue that African Americans were largely responsible for crime, suggesting that punitive approaches enjoyed Black support (when in fact Jackson and other Black leaders opposed the Crime Bill).

The Crime Bill did contain a provision directing the Sentencing Commission to study the 100-to-1 crack cocaine sentencing disparity and report “on the current federal structure of differing penalties for powder cocaine and crack cocaine offenses and to provide recommendations for retention or modification of these differences.”<sup>165</sup> The original amendment proposed by Representative William Hughes (D-NJ), the author of the Cocaine Penalty Study provision, would have equalized mandatory minimum penalties for crack cocaine and powder cocaine. He offered the modified amendment and spoke from the House floor about why this study was needed and why the original amendment would have been justified:

The information is before us now that there is no difference pharmacologically between crack cocaine and powder cocaine. In addition to that, crack cocaine is no more addictive than powder

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<sup>163</sup> PEW RESEARCH CENTER, KING'S DREAM REMAINS AN ELUSIVE GOAL; MANY AMERICANS SEE RACIAL DISPARITIES (2013), [https://www.pewsocialtrends.org/files/2013/08/final\\_full\\_report\\_racial\\_disparities.pdf](https://www.pewsocialtrends.org/files/2013/08/final_full_report_racial_disparities.pdf) [<https://perma.cc/PKY8-XVVN>].

<sup>164</sup> 140 CONG. REC. 8,131 (Apr. 21, 1994) (statement of Rep. Dornan).

<sup>165</sup> U.S. SENT'G COMM'N, SPECIAL REPORT TO CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY (AS DIRECTED BY SECTION 280006 OF PUBLIC LAW 103-322) iii (1995).

cocaine. The bottom line is that poor people are the ones that use crack cocaine and mostly minorities. It is interesting that about 95 percent of those that are charged with crack cocaine violations are black and other minorities. Compared to coke, powder cocaine is used by the more affluent in our society. I think most people understand that it is a gross inequity and we need to rectify it. I think even my colleagues on the Republican side understand that there is a gross disparity, and we need to do something about it.<sup>166</sup>

Representative Walter Tucker (D-CA) commented, "I believe that the information will come back to corroborate what most of us already know, and that is that there is a gross disparity between the sentencing between powder cocaine and crack cocaine."<sup>167</sup> Representative John Conyers (D-MI) added, "to no one's surprise—91 percent of those sentenced for crack are African-American. Yet the majority of people who use crack every day are white—64.4 percent . . . . The impact of this on the black community is enormous."<sup>168</sup> Not all legislators agreed that a study was the best course of action, advocating instead for immediate measures given that the result of the status quo was that "our prisons are full of black males who have used crack cocaine, and the more affluent white boys in the community who have used the powder cocaine are on probation."<sup>169</sup>

The amendment calling for the Sentencing Commission's study enjoyed bipartisan support, counting among its Republican backers the author of the House amendment establishing the 100-to-1 sentencing scheme, Representative Clay Shaw (R-FL). Similarly, Representative Bill McCollum (R-FL) endorsed the study and acknowledged the sentencing disparity from the House floor. However, rather than advocating that the penalties for crack-cocaine be lessened, hence eliminating the grossly unjust disproportionate impact on Black people, McCollum argued that "we ought to be *raising* the penalties for the powder cocaine."<sup>170</sup> Shaw, McCollum, and other congressional Republicans consistently urged that the unfairness of the sentencing scheme could be addressed by raising penalties for powder cocaine. And yet no such proposal was included in the 1994 Bill. Put another way, policymakers were well aware of the racial disparity in the crack and powder cocaine sentencing scheme, systematically rejected a number of alternative solutions to address the law's impact on Black people, and yet refused to address the disparity *even with a thoroughly punitive approach*, which would have punished drugs associated with the white community more harshly.

Even beyond the debates about the 100-to-1 crack cocaine sentencing disparity, policymakers often used racially coded language when alleging associations between race and criminality or when objecting to provisions de-

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<sup>166</sup> 140 CONG. REC. 8,121 (Apr. 21, 1994) (statement of Rep. Hughes).

<sup>167</sup> 140 CONG. REC. 8,121 (Apr. 21, 1994) (statement of Rep. Tucker).

<sup>168</sup> 140 CONG. REC. 8,122 (Apr. 21, 1994) (statement of Rep. Conyers).

<sup>169</sup> 140 CONG. REC. 8,122 (Apr. 21, 1994) (statement of Rep. Rose).

<sup>170</sup> 140 CONG. REC. 8,121 (Apr. 21, 1994) (statement of Rep. McCollum) (emphasis added).

signed to alleviate racial discrimination in the criminal legal system. Senator Biden, for example, described the targets of the legislation as “predators” who were “beyond the pale,” and argued in a floor speech that would later become the subject of controversy in the 2020 presidential campaign:

It doesn't matter whether or not the person that is accosting your son or daughter, or my son or daughter, my wife, your husband, my mother, your parents—it doesn't matter whether or not they were deprived as a youth. It doesn't matter whether or not they had no background that would enable them to have . . . become socialized into the fabric of society. It doesn't matter whether or not they're the victims of society. The end result is they're about to knock my mother on the head with a lead pipe, shoot my sister, beat up my wife, take on my sons . . . .<sup>171</sup>

At times, the racially coded language of senators' arguments bordered on explicit references to race. In an appeal to Republicans, Senator John Kerry (D-MA) urged passage of the Bill by evoking the earlier rhetoric of James Q. Wilson and others who linked Black family dysfunction to crime. He argued that in certain segregated Black and Latino communities, “you will find a rate of illegitimate birth at 70 to 80 percent.” He argued that in these communities, one saw “crack houses replacing some communities as the focus of life” and young Black men “dying at a rate that exceeds any American war in history.”<sup>172</sup> In another instance, Senator Bob Dole (R-KS) declared:

Unfortunately, the American family today is in tatters. More than two-thirds of all black children, and nearly 25 percent of all white children, are born to unwed mothers. In some inner-city communities, the illegitimacy rate is a staggering 80 percent, as thousands of children are born each year into a world without fathers and to mothers who are simply unprepared for the responsibilities of Motherhood.<sup>173</sup>

In a later debate, Dole, who would soon become the Republican Party's next nominee for the presidency (Kerry would of course be the Democrats' nominee in 2004), entered into the record and recommended to his colleagues an “important” article authored by controversial social scientist Charles Murray, who the following year gained notoriety for authoring *The Bell Curve*, an argument for the innate inferiority of African American intelligence. In the article, Murray asserted that “the brutal truth is that American society as a whole could survive when illegitimacy became epidemic within a comparatively small ethnic minority. It cannot survive the same

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<sup>171</sup> Andrew Kaczynski, *Biden in 1993 speech pushing Crime Bill warned of 'predators on our streets' who were 'beyond the pale,'* CNN (Mar. 7, 2019), <https://www.cnn.com/2019/03/07/politics/biden-1993-speech-predators/index.html> [<https://perma.cc/GV25-UZYV>].

<sup>172</sup> 103 CONG. REC. S12,324 (daily ed. Aug. 23, 1994) (statement of Sen. Kerry).

<sup>173</sup> 103 CONG. REC. S16,272 (daily ed. Nov. 18, 1993) (statement of Sen. Dole).

epidemic among whites.”<sup>174</sup> Murray’s arguments have since been debunked, but in the mid-1990s they had a profound influence on policymakers and the American public.

In a speech that is surprisingly explicit in its discussion of the racial subtext of the legislation, Senator Bradley reintroduced his provision to the Crime Bill that provided for enhanced penalties for drug dealing in or near housing facilities owned by a public housing authority.<sup>175</sup> Speaking in support of the Crime Bill generally and the public housing provision specifically, Bradley gave a floor speech stoking such racialized fear of crime:

We have all heard the stories: a child killed in a drive-by shooting, an elderly woman afraid to walk out of her home for fear of being robbed in broad daylight by some drugged up young thug, a businessman driving in his car, the random victim of a car-jacking. These are the headlines. They disgust us, enrage us, frighten us, and then fade from our memories once another outrage is committed. We have become hardened to this senselessness. We turn on the nightly news expecting it.<sup>176</sup>

In this context, Bradley explicitly referred to “young, black, and Hispanic men” as meeting the “*profile of the threatening person*” and acknowledged their already “disproportionate presence in our prisons[:.]”

But every day, in ways that have become part of our normal routine, we do little things to avoid becoming victims of crime. We lock our doors. Some people might laugh at this, but there was a

<sup>174</sup> Charles Murray, *The Coming White Underclass*, WALL ST. J., Oct. 29, 1993; entered into the record by Sen. Dole, 103 CONG. REC. S15316 (daily ed. Nov. 8, 1993).

<sup>175</sup> Bradley’s provision became federal law in the 1994 Crime Bill. Although the overall Bill was the product of the extensive debate discussed above, virtually no discussion (and no sustained study) accompanied the adoption of the public housing provision. Our research reveals, however, that the driving force behind the 1994 push for amending Section 615 of the Senate bill to include public housing in its list of drug-free zones came directly from HUD. In an April 1994 memorandum to members of the President’s domestic policy council, HUD officials named the provision as one of the proposals for which HUD requested support and assistance as the bill moved through conference negotiations. In this memorandum, HUD included this sentencing enhancement as one of “a few items within our joint efforts under Operation Safe Home that we would suggest as additional eligible activities under certain provisions in the crime bill.” Memorandum from Bruce Katz, Bill Gilmartin, and Liz Arky to Rahm Emanuel, Bruce Reed, Ron Klain, and Chris Edley (Apr. 12, 1994) (“Crime Bill - Prevention,” Box 74, Domestic Policy Council, Bruce Reed, and Crime Series, WJCPL). In a June 1994 letter to Representative Jack Brooks (D-TX), the lead sponsor of the House bill, Attorney General Reno included this provision in her “recommendations of the Administration concerning the reconciliation of the final House and Senate versions” of the Crime Bill but tied it directly to “[m]easures to combat youth gangs and facilitate gang prosecutions.” Letter from Janet Reno to Jack Brooks (Jun. 13, 1994) (“Conference Report,” Box 70, Domestic Policy Council, Bruce Reed, and Crime Series, WJCPL). It could not have been lost on policymakers that this would most clearly impact Black youth. A 1992 Congressional Research Service Report for Congress on youth gangs found that “[c]urrent studies indicate that gang members are predominantly black or Hispanic.” SUZANNE CAVANAUGH & DAVID TEASLEY, CONG. RESEARCH. SERV., YOUTH GANGS: AN OVERVIEW 4 (1992).

<sup>176</sup> 139 CONG. REC. S15958-04.

time when we did not lock our doors. We hold our possessions closely as we walk through crowded areas. We do not walk out alone at night. We take quick glances behind ourselves when we take money out of ATM machines. We cross the street in an effort to avoid people that we think are threatening. Increasingly, the profile of the threatening person at least as depicted by the media and suggested by their disproportionate presence in our prisons, are *young, black, and Hispanic men*. We don't like to talk about that perception, but it is there.<sup>177</sup>

Without disabusing this stereotype, Senator Bradley went on to say that “many people” rely on this perception—i.e., fear of “young, black, and Hispanic men”—when taking steps to protect themselves when local law enforcement fails:

Regardless of how much the statistics show that most victims of crime share the same race as their victimizers, we have to acknowledge that many people take subtle and not-so-subtle actions based on their fears about who is committing crime. We buy guns under the mistaken impression that we can protect ourselves, even if our local police force cannot, and even if we know that for every intruder shot in self-protection there are 43 murders, suicides, and accidental killings, often a family member. This crime bill attempts to respond to some of these concerns. It attempts to give people the ability to regain control of their communities.<sup>178</sup>

In other words, Bradley acknowledged that the Bill was designed, at least in part, to respond to these race-based fears. It was in this context that he highlighted the public housing provision as among certain provisions that would be “particularly helpful in making our communities safer” and “effective in shoring up public confidence in our criminal justice system.”<sup>179</sup>

Despite sustained public concern about the crime issue, “the crime wave of the late 1980s and early 1990s had already begun to recede by the time Clinton and Congress acted in 1994.”<sup>180</sup> After years of debates and multiple iterations, the final version of the 1994 Crime Bill was the most expansive crime control legislation in the history of the United States.<sup>181</sup> It authorized the expenditure of \$30.2 billion, including funding to hire 100,000 more cops, \$9.7 billion for prison construction, and \$6.1 billion for crime prevention. Moreover, it included a ban on certain semi-automatic assault weapons,

<sup>177</sup> *Id.* (emphases added).

<sup>178</sup> *Id.*

<sup>179</sup> *Id.*

<sup>180</sup> MICHAEL W. FLAMM, LAW AND ORDER: STREET CRIME, CIVIL UNREST, AND THE CRISIS OF LIBERALISM IN THE 1960s 184 (2005).

<sup>181</sup> Lauren-Brooke Eisen, *The 1994 Crime Bill and Beyond: How Federal Funding Shapes the Criminal Justice System*, BRENNAN CTR. FOR JUST. (Sept. 9, 2019), <https://www.brennancenter.org/our-work/analysis-opinion/1994-crime-bill-and-beyond-how-federal-funding-shapes-criminal-justice> [https://perma.cc/3CK2-CR2T].

made sixty federal crimes eligible for the death penalty, tied federal funding to states' adoption of truth-in-sentencing laws, and mandated life sentences for defendants charged with their third "strike."<sup>182</sup> As the Bill went through the legislative process, Clinton sacrificed the interests of the CBC and their allies in order to concede to the Republican Party's demands to limit the prevention aspects of the legislation.<sup>183</sup> As a result of its passage, prisons and police departments ballooned and the Democratic Party fully committed to the tough-on-crime approach that had long been a hallmark of Republicans.

During the debates, CBC Chair Mfume had "implore[d]" his colleagues to retain the prevention measures in the Bill. He asked that they "[p]lease permit those of us facing the worst of the problem—those of us who have grown up and lived amid the crime, the drugs and the violence—some input on how we should address the situation."<sup>184</sup> This plea largely went unanswered. Mfume led twenty-six of thirty-eight members of the CBC to support the legislation. But Mfume and others did so in order to get the relatively limited prevention measures that were included in the Crime Bill to their constituents. This was hardly a full endorsement. In fact, a sizable number of Black Democrats voted against the Bill in its final passage vote because of their opposition to its punitive features and lack of mechanisms for addressing racial impacts. As Representative Bobby Scott (D-VA) explained: "You wouldn't ask an opponent of abortion to look at a bill with the greatest expansion of abortion in the history of the United States and

<sup>182</sup> *Violent Crime Control and Law Enforcement Act of 1994: U.S. Department of Justice Fact Sheet*, NAT'L CRIM. JUST. REFERENCE SERV., <https://www.ncjrs.gov/txtfiles/billfs.txt> [<https://perma.cc/VV8Y-H3S4>].

<sup>183</sup> In the White House, despite the Clinton Administration also publicly advocating for some of the non-punitive, prevention measures of the Crime Bill—provisions that Senator Dole and many others on the political Right classified as "pork"—some high-level members of the President's domestic policy council were less enthused. In a January 1994 memorandum for circulation, Rahm Emanuel and Michael Waldman asserted: "The President has succeeded in redefining the debate on crime. No longer is it prevention vs. punishment. Instead, the issue of crime and violence has been changed to punishment and values (learning the difference between right and wrong.) Polls show that the issue of crime, along with health care and the economy, tops the public's list of concerns. In addition, polls show that a majority of Americans feel that the moral fabric of our society is disintegrating. Therefore, by redefining the issue of crime in terms of punishment and values, we get the best of both worlds." Memorandum from Rahm Emanuel and Michael Waldman (Jan. 27, 1994) ("Strategy," Box 79, Domestic Policy Council, Bruce Reed, and Crime Series, WJCPL). Writing to Bruce Reed in April 1994, Jose Cerda referred to the prevention program proponents as the "hug-a-thug crowd." Memorandum from Jose Cerda to Bruce Reed (Apr. 26, 1994) ("Crime Bill - Prevention," Box 74, Domestic Policy Council, Bruce Reed, and Crime Series, WJCPL). In July 1995, Rahm Emanuel echoed this view in a memorandum to the President in which he advocated for a revamping of the administration's drug strategy based on public opinion, not prevention. He wrote: "People fundamentally believe that hard core drug users drive crime and violence in this country, and this should be the basis of any strategy to address this problem. In essence, we need to change our focus on fighting hard core drug use away from rehabilitation and more towards fighting crime and violence, so that it is consistent with our overall crime message." Memorandum from Rahm Emanuel to Bill Clinton and Leon Panetta (Jul. 10, 1995) ("Talking Points [4]," Box 126, Domestic Policy Council, Carol Rasco, and Issues Series, WJCPL).

<sup>184</sup> 140 CONG. REC. 23,610 (Aug. 21, 1994) (statement of Rep. Mfume).

argue that he ought to vote for it because it's got some highway funding in it."<sup>185</sup>

Ultimately, federal policymakers did virtually nothing to address the racial discrimination in the criminal legal system as they set out to expand prisons, foot patrol, and surveillance in low-income communities. Thus, Clinton's celebration of the Crime Bill as "a big step towards bringing the laws of the land back into line with the values of our people," essentially brought criminal legal policy in line with one value: locking up more people of color. Although the contribution of the Crime Bill to the policing and incarceration of Black communities is difficult to estimate (the trend had been underway well before the Clinton Administration), the Bill and surrounding debates further entrenched the notion that crime in urban cores was a problem best managed through harsh punishment. In 1994, the incarceration rate was 564 per 100,000 citizens, rising to 601 in the year after the 1994 Crime Bill and steadily thereafter until hitting 684 during Clinton's last year in office (it is 655 today).<sup>186</sup> Building the largest and most expensive penal system in world history appeared to be more politically feasible than ensuring minimal levels of material security to the most marginalized populations. The aftershocks of these policy choices can still be felt today.

#### CONCLUSION: LESSONS FOR DEFENSE ATTORNEYS AND POLICYMAKERS

The foregoing makes clear that the rationales deployed by the circuit courts in the 1990s missed the mark on both law and history. They failed to account for the Supreme Court's more nuanced approach to evidence of discriminatory purpose as articulated in *Feeney*. They mischaracterized lawmakers' awareness of disparate racial impact as mere "race consciousness," which they erroneously maintained contradicts allegations of discriminatory intent. And they misconstrued the role of opposition voices like the Congressional Black Caucus as approving the ultimate sentencing policies without acknowledging the nuance of the bargains made to arrive at those policies. Presented with the full picture of the history of these policies, courts would be hard-pressed today to brush aside such powerful evidence of their discriminatory purpose.

In Kendall Johnson's case, the defense presented this evidence in a motion to dismiss the 21 U.S.C. § 860(a) count pursuant to Rule 12 of the Federal Rules of Criminal Procedure.<sup>187</sup> The prosecution, which had previously expressed confidence and welcomed the opportunity to defend the

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<sup>185</sup> Allan Smith, *Fact Check: Why Are Trump and the Democrats Talking About the 1994 Crime Bill*, NBC NEWS (May 28, 2019, 3:49 PM), <https://www.nbcnews.com/politics/2020-election/fact-check-why-are-trump-democrats-talking-about-1994-crime-n1010691> [https://perma.cc/MVA5-G8VR].

<sup>186</sup> BUREAU OF JUST. STAT., CORRECTIONAL POPULATIONS IN THE UNITED STATES (1994, 1995, 2000, 2019).

<sup>187</sup> *United States v. Johnson*, 19-CR-284 (RJD) (E.D.N.Y. May 26, 2020), ECF No. 98.

statute, withdrew the charge before its deadline to file an opposition to the motion. The government initially superseded the indictment with separate charge under § 860(a) of distributing narcotics within 1,000 feet of a school, having located an elementary school in the vicinity of the Bushwick Houses.<sup>188</sup> When Mr. Johnson requested a briefing schedule to examine the racial history of that provision, however, the government proposed a plea agreement with no § 860(a) count and no mandatory minimum. Mr. Johnson pleaded guilty pursuant to this agreement on August 20, 2020.<sup>189</sup>

The government's reticence to test the constitutionality of the public housing provision in the face of the statistical evidence of disparate impact and historical record of discriminatory purpose suggests the renewed power of these arguments, especially in the current era of widespread consciousness of racial justice issues (Mr. Johnson's motion to dismiss was filed on May 26, 2020, the day after George Floyd was murdered and just before his death sparked massive protests nationwide). But the outcome in the Johnson case is not entirely a happy one: Mr. Johnson pleaded guilty to narcotics conspiracy, which, although carrying no mandatory minimum, does mandate remand to detention if the defendant is out on bail prior to the plea.<sup>190</sup> While some courts have found that the ongoing COVID-19 pandemic constitutes extraordinary circumstances permitting defendants to stay at liberty pending sentencing, Mr. Johnson's persistent housing insecurity—caused by his inability to reside in public housing due to prior drug convictions—led him to self-surrender rather than wait indefinitely for his sentencing date, which, due to the pandemic, could not occur in person until late-April 2021.

Mr. Johnson was housed in two federal detention centers—the Metropolitan Detention Center (MDC) in Brooklyn and Metropolitan Corrections Center (MCC) in Manhattan—while he awaited sentencing. During that time, both facilities experienced a COVID-19 outbreak and one person incarcerated at the MDC died from the virus four days after that individual was given the first dose of the vaccine.<sup>191</sup> Mr. Johnson was housed at the MCC in a cell with a person who had tested positive for COVID-19, and jail facilities refused to give his cellmate medical attention or to move Mr. Johnson to another cell for weeks. Luckily, Mr. Johnson managed to avoid contracting the virus, but as a result of lockdown procedures instituted by the Bureau of Prisons to try to contain the virus, he has spent the vast majority of his detention in a cell 24 hours a day. Mr. Johnson's harrowing experi-

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<sup>188</sup> *Id.*, ECF No. 107.

<sup>189</sup> The ultimate plea agreement also did not include any sentencing enhancement based on a “protected location” pursuant to U.S.S.G. § 2A1.2.

<sup>190</sup> See 18 U.S.C. § 3143(a).

<sup>191</sup> See Noah Goldberg, *First Inmate to Die of COVID at Brooklyn Federal Jail Was Vaccinated Days Before Testing Positive for the Virus*, N.Y. DAILY NEWS (Feb. 8, 2021, 5:54 PM), <https://www.nydailynews.com/new-york/ny-edwin-segarra-inmate-mdc-brooklyn-covid19-dead-vaccinated-20210208-ovtvqfwmfzcd7drjoyq6zqluyq-story.html> [<https://perma.cc/F9KS-KHQL>]. For statistics on COVID infections at BOP facilities, including the MDC and MCC, see *COVID-19 Coronavirus*, FED. BUREAU OF PRISONS (2021) [www.bop.gov/coronavirus](http://www.bop.gov/coronavirus) [<https://perma.cc/NEV8-5WNC>].



ence—stemming from his sale of less than a gram of crack-cocaine and less than one tenth of a gram of heroin—shows that a much broader, wholesale correction is needed to policies of the 1980s and 90s that have made a story like his tragically commonplace. The history of these policies thus presents not only an avenue of legal challenge in individual criminal cases, but a demand for systemic reform at the congressional level.

The Biden Administration has a new opportunity to right the wrongs of history, many of which were exacerbated by the policies President Biden himself introduced and spearheaded through Congress during his Senate career. Recognizing that the current system of mass incarceration “does not make us safer,” President Biden began to phase out federal contracts with private prison companies such as GEO Group and CoreCivic, which net about \$2.5 and \$2 billion annually in revenue, respectively, a quarter of which is derived from the federal government.<sup>192</sup> Additionally, his administration has begun escalating “pattern or practice” investigations, a mechanism by which the Justice Department can intervene when police departments appear to violate constitutional protections against excessive force, unreasonable stops and searches, and arrests without warrant or sufficient cause.<sup>193</sup> “Pattern or practice” inquiries often lead to consent decrees, or court-ordered agreements that mandate police reforms, and can make vulnerable communities safer. Moreover, then-Acting Attorney General Monty Wilkinson rescinded the “Sessions Memo” requiring federal prosecutors to bring the most severe charges available and has called for prosecutors to make an “individualized assessment” of each defendant and case until “longer-term policy is formulated.”<sup>194</sup> Attorney General Merrick B. Garland has announced a moratorium on the federal death penalty pending a study of its fairness and efficacy.<sup>195</sup> Biden has also proposed ending at least some mandatory minimums in federal sentencing policy (such as the statute that led to the charges against Mr. Johnson) and eliminating the disparity be-

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<sup>192</sup> See GEO GROUP, 2019 ANN. REP. PART II 4 (2019), [https://s25.q4cdn.com/995724548/files/doc\\_financials/2019/ar/Annual-Report-2019.pdf](https://s25.q4cdn.com/995724548/files/doc_financials/2019/ar/Annual-Report-2019.pdf) [<https://perma.cc/BPE5-E6AS>]; CORE CIVIC, 2019 ANN. REP. (2019), <http://ir.corecivic.com/static-files/78f48d3d-5df1-44e2-ba20-fce435193496> [<https://perma.cc/N269-4A5Y>]; Alyce McFadden, *Biden Phases out Private Prisons, Which Spent Big Backing of Trump*, OPEN SECRETS (Feb. 2, 2021) <https://www.opensecrets.org/news/2021/02/biden-phases-out-private-prisons/> [<https://perma.cc/4THS-56ZX>].

<sup>193</sup> See, e.g., *Attorney General Merrick B. Garland Delivers Remarks at Announcement of Pattern or Practice Investigation into the Louisville Police Department*, U.S. DEP’T OF JUSTICE (Apr. 26, 2021), <https://www.justice.gov/opa/speech/attorney-general-merrick-b-garland-delivers-remarks-announcement-pattern-or-practice-1> [<https://perma.cc/TKM3-6SSF>].

<sup>194</sup> Memorandum from Acting Attorney General Monty Wilkinson, Interim Guidance of Prosecutorial Discretion, Charging, and Sentencing (Jan. 29, 2021).

<sup>195</sup> Pete Williams, *Attorney General Merrick Garland Suspends Federal Executions*, NBC NEWS (July 1, 2021, 8:43 PM), <https://www.nbcnews.com/politics/justice-department/attorney-general-merrick-garland-orders-pause-federal-executions-n1272951> [<https://perma.cc/9SQR-JCVC>].

tween crack and powder cocaine—injustices within the criminal legal system that were partly of his own making.<sup>196</sup>

Despite these measures, the legacy of the 1994 Crime Bill continues in new proposals from the Biden Administration and members of Congress. Doubling down on the failed policies of the past, Biden’s fiscal year 2022 budget requests \$388 million in funding to hire additional police officers through the Office of Community Oriented Policing Services (COPS), an office established by a provision of the 1994 Crime Bill.<sup>197</sup> Additionally, in June President Biden announced that his administration’s gun crime prevention strategy would include allowances for “cities experiencing an increase in gun violence” to use part of the \$350 billion American Rescue Plan “to hire police officers needed for community policing and to pay their overtime.”<sup>198</sup> Even with an already growing federal prison population,<sup>199</sup> in July Biden’s legal team determined that those people released from prison due to COVID must return when the public health emergency ends.<sup>200</sup> And finally, the efforts by members of Congress to expand the carceral state continue in a recent nonbinding budget resolution that included an amendment that would block federal funds to any municipality that defunds its police department as well as a measure to fund the hiring of 100,000 cops. The latter amendment is markedly similar to Clinton’s campaign promise to bolster policing, a promise that was ultimately achieved through the COPS program and the 1994 Crime Bill.<sup>201</sup>

Biden must reverse course on these most recent measures that expand the carceral state while also continuing to reform the criminal legal system through Executive Orders and Justice Department policies. However, the real challenge will be securing widespread congressional approval for these

<sup>196</sup> *What Biden’s Win Means for the Future of Criminal Justice*, THE MARSHALL PROJECT (Nov. 8, 2020), <https://www.themarshallproject.org/2020/11/08/what-biden-s-win-means-for-the-future-of-criminal-justice> [<https://perma.cc/B9LQ-XRTW>].

<sup>197</sup> Michael Crowley, *Biden’s Budget Steps up Spending for Criminal Justice Reform*, BRENNAN CTR. FOR JUST. (Jun. 25, 2021), <https://www.brennancenter.org/our-work/analysis-opinion/bidens-budget-steps-spending-criminal-justice-reform> [<https://perma.cc/EP84-25W5>]. His budget also includes funding for incarceration alternatives and reform efforts, but it is important to consider this increase in police funding in light of the moment and its direct connection to the 1994 Crime Bill.

<sup>198</sup> Remarks by President Biden and Attorney General Garland on Gun Crime Prevention Strategy (June 23, 2021), <https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/06/23/remarks-by-president-biden-and-attorney-general-garland-on-gun-crime-prevention-strategy/> [<https://perma.cc/N4G3-K9UD>].

<sup>199</sup> Samantha Michaels, *Biden Said He’d Cut Incarceration in Half. So Far, the Federal Prison Population Is Growing*, MOTHER JONES (Jul. 21, 2021), <https://www.motherjones.com/crime-justice/2021/07/biden-said-hed-cut-incarceration-in-half-so-far-the-federal-prison-population-is-growing/> [<https://perma.cc/5YGE-4JS6>].

<sup>200</sup> Charlie Savage & Zolan Kanno-Youngs, *Biden Legal Team Decides Inmates Must Return to Prison After Covid Emergency*, N.Y. TIMES (Jul. 19, 2021), <https://www.nytimes.com/2021/07/19/us/politics/biden-prisoners-covid.html> [<https://perma.cc/5MTD-X8TE>].

<sup>201</sup> *Senate “Vote-a-Rama” on \$3.5 Trillion Infrastructure Resolution Stretches into Wee Hours*, CBS NEWS (Aug. 11, 2021, 3:13 AM), <https://www.cbsnews.com/news/senate-vote-a-rama-on-3-5-trillion-infrastructure-resolution-stretches-into-wee-hours/> [<https://perma.cc/G6CH-Y29D>].

necessary changes. Despite the obstacles, the Biden Administration must be bold in its quest to build a more equitable and fair legal system. To do so, however, the Administration must take a clear-eyed look at what occurred during the debates over the 1994 Crime Bill. Even as he has pledged to reform the criminal legal system, Biden has continued to defend his record in Congress by pointing to purported support for the 1994 Crime Bill by Black members of Congress, including the CBC.<sup>202</sup>

As our research shows, however, the actual historical record tells a very different story. While Black and Latino communities have historically demanded increased policing and more accountable sentencing policies at times, they have also featured a host of imaginative approaches to both responding to and preventing crime.<sup>203</sup> Lawmakers from both parties, seeking to justify tough-on-crime policies that played to a white base, have often engaged in what has been termed “selective hearing” of Black and Latino community concerns, highlighting requests for more policing while drowning out broader, more systemic (and less harshly punitive) responses to crime.<sup>204</sup> When Black residents, elected officials, and prominent Black pastors have sought more aggressive policing and sometimes stiffer punishments, these calls have almost always been accompanied by urgent—and often unrequited—requests for full employment, educational access, and decent housing. Moreover, Black activists and civil rights groups have qualified demands for police and responsiveness with urgent opposition to brutality and greater influence in the form and function of law enforcement. But “when blacks ask for *better* policing, legislators tend to hear *more* instead.”<sup>205</sup>

Ending mandatory minimums at the federal level may be the first step in this respect. National reforms can inspire or entice states to adopt similar measures, just as the federal government led states in enacting mandatory minimums in the first place. But mandatory minimums are not the only sentencing regimes being deployed in a discriminatory manner; if that were true, the national prison population would look far more like the country itself. The Biden Administration could propose legislation that mandates that the Sentencing Commission and federal judges consider such disparities in making their respective determinations in both system-wide structures and individual sentencing proceedings. This could be parallel to the manner in which courts have continued to consider disparate impact on its own to

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<sup>202</sup> See Quint Forgey, *How Joe Biden Would Address Criminal Justice Reform*, POLITICO (Jul. 23, 2019, 3:39 PM), <https://www.politico.com/story/2019/07/23/joe-biden-criminal-justice-reform-1428017> [<https://perma.cc/EJ3R-FG3M>]; Kirsten West Savali, *Biden Defends 1994 Crime Bill: 'Every Black Mayor Supported It,' Still Opposes Defunding Police*, ESSENCE (Oct. 19, 2020), <https://www.essence.com/news/in-defense-of-black-lives/biden-defends-1994-crime-bill-opposes-defunding-police/> [<https://perma.cc/5JZR-62R3>].

<sup>203</sup> See JAMES FORMAN, JR., *LOCKING UP OUR OWN: CRIME AND PUNISHMENT IN BLACK AMERICA* (2017); see also Forman, *Racial Critiques of Mass Incarceration: Beyond the New Jim Crow*, 87 N.Y.U. L. REV. 21 (2012); MICHAEL JAVEN FORTNER, *BLACK SILENT MAJORITY: THE ROCKEFELLER DRUG LAWS AND THE POLITICS OF PUNISHMENT* (2015).

<sup>204</sup> Hinton et al., *supra* note 155.

<sup>205</sup> *Id.*

show discrimination under the Civil Rights Act even as *Davis* erected the intent standard for constitutional claims. In addition, Congress could amend the Federal Rules of Criminal Procedure to allow for a challenge to convictions tainted by racially discriminatory statutes—a Racial Justice Act for the federal criminal system writ large, in addition to the death penalty.

If armed with such changes in federal law—but even under current law—it is up to lawyers to continue to challenge the policies that have exacerbated the criminalization and incarceration of people of color since the 1960s.<sup>206</sup> In this respect, uncovering the previously hidden histories of how these policies came to be can function as an important new legal tool in reversing discriminatory trends and undoing the harms of the past.

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<sup>206</sup> Scholars of Latinx-American history and immigration have been instrumental in the last year in supporting challenges to Sections 1325 and 1326 of the Immigration and Nationality Act, which criminalize reentering the United States after an order of deportation. In August 2021, Chief Judge Miranda Du of the United States District Court for the District of Nevada struck down the law on equal protection grounds, citing the work of UCLA historian Kelly Lytle Hernandez, among others. *See* *United States v. Carrillo-Lopez*, No. 3:20-cr-00026-MMD-WGC, 2021 WL 3667330, at \*1 (D. Nev. Aug. 18, 2021).