

**For the Record**

# An Unjust Burden: The Disparate Treatment of Black Americans in the Criminal Justice System

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## Summary

The over-representation of black Americans in the nation's justice system is well documented. Black men comprise about 13 percent of the male population, but about 35 percent of those incarcerated. One in three black men born today can expect to be incarcerated in his lifetime, compared to one in six Latino men and one in 17 white men. Black women are similarly impacted: one in 18 black women born in 2001 is likely to be incarcerated sometime in her life, compared to one in 111 white women. The underlying reasons for this dis-proportionate representation are rooted in the history of the United States and perpetuated by current practices within the nation's justice system.

This brief presents an overview of the ways in which America's history of racism and oppression continues to manifest in the criminal justice system, and a summary of research demonstrating how the system perpetuates the disparate treatment of black people. The evidence presented here helps account for the hugely disproportionate impact of mass incarceration on millions of black people, their families, and their communities. This brief explains that:

- › Discriminatory criminal justice policies and practices have historically and unjustifiably targeted black people since the Reconstruction Era, including Black Codes, vagrancy laws, and convict leasing, all of which were used to continue post-slavery control over newly-freed people.

- › This discrimination continues today in often less overt ways, including through disparity in the enforcement of seemingly race-neutral laws. For example, while rates of drug use are similar across racial and ethnic groups, black people are arrested and sentenced on drug charges at much higher rates than white people.
- › Bias by decision makers at all stages of the justice process disadvantages black people. Studies have found that they are more likely to be stopped by the police, detained pre-trial, charged with more serious crimes, and sentenced more harshly than white people.
- › Living in poor communities exposes people to risk factors for both offending and arrest, and a history of structural racism and inequality of opportunity means that black people are more likely to be living in such conditions of concentrated poverty.

In addition to the clear injustice of a criminal justice system that disproportionately impacts black people, maintaining these racial disparities has a high cost for individuals, families, and communities. At the individual level, a criminal conviction has a negative impact on both employability and access to housing and public services. At the community level, disproportionately incarcerating people from poor communities removes economic resources and drives cycles of poverty and justice system involvement, making criminal justice contact the norm in the lives of a growing number of black Americans.

## About these briefs

Public policy—including decisions related to criminal justice and immigration—has far-reaching consequences, but too often is swayed by political rhetoric and unfounded assumptions. The Vera Institute of Justice has created a series of briefing papers to provide an accessible summary of the latest evidence concerning justice-related topics. By summarizing and synthesizing existing research, identifying landmark studies and key resources and, in some cases, providing original analysis of data, these briefs offer a balanced and nuanced examination of some of the significant justice issues of our time.

## A snapshot of current disparities in incarceration

Present day disparities show that the burden of the tough on crime and mass incarceration eras has not fallen equally on all Americans, but has excessively and unfairly burdened black people. Though these disparities have narrowed in recent years, there still remains a wide gulf between black and white incarceration rates.<sup>1</sup> Black people are represented in the American criminal justice system in unwarranted numbers given their share of the population.<sup>2</sup>

- › Black men comprise about 13 percent of the U.S. male population, but nearly 35 percent of all men who are under state or federal jurisdiction with a sentence of more than one year.<sup>3</sup>
- › One in three black men born in 2001 can expect to be incarcerated in his lifetime, compared to one in six Latino men and one in 17 white men.<sup>4</sup>
- › Black people are incarcerated in state prisons at a rate 5.1 times greater than that of white people.<sup>5</sup>
- › One in 18 black women born in 2001 will be incarcerated sometime in her life, compared to one in 45 Latina women and one in 111 white women.<sup>6</sup>
- › Forty-four percent of incarcerated women are black, although black women make up about 13 percent of the female U.S. population.<sup>7</sup>

As this brief demonstrates, these racial disparities are no accident, but rather are rooted in a history of oppression and discriminatory decision making that have deliberately targeted black people and helped create an inaccurate picture of crime that deceptively links them with criminality. (See “Black people have historically been targeted by intentionally discriminatory criminal laws,” below.) They are compounded by the racial biases that research has shown to exist in individual actors across the criminal justice system—from police and prosecutors to judges and juries—that lead to disproportionate levels of stops, searches, arrests, and pretrial detention for black people, as well as harsher plea bargaining and sentencing outcomes compared to similarly situated white people. (See “Bias by criminal justice system actors can lead to disproportionate criminal justice involvement for black people” at page 7.) Underlying all of this are deep and systemic inequities that have resulted in inordinate numbers of black Americans living in overpoliced, poor communities, surrounded by economic and educational disadvantage—known drivers of criminal behavior—resulting in a tenacious

cycle of criminal justice involvement for too many black individuals and their families. (See “Communities of color are disproportionately impacted by extreme poverty and its connection to crime” at page 10.)

## Black people have historically been targeted by intentionally discriminatory criminal laws

Racial disparities in the criminal justice system have deep roots in American history and penal policy. In the South, following Emancipation, black Americans were specific targets of unique forms of policing, sentencing, and confinement. Laws that capitalized on a loophole in the 13<sup>th</sup> Amendment that states citizens cannot be enslaved *unless* convicted of a crime intentionally targeted newly emancipated black people as a means of surveilling them and exploiting their labor. In 1865 and 1866, the former Confederate legislatures quickly enacted a new set of laws known as the **Black Codes** to force former slaves back into an exploitative labor system that resembled the plantation regime in all but name.<sup>8</sup> Although these codes did recognize the new legal status of black Americans, in most states newly-freed people could not vote, serve on juries, or testify in court.<sup>9</sup> **Vagrancy laws** at the center of the Black Codes meant that any black person who could not prove he or she worked for a white employer could be arrested.<sup>10</sup> These “vagrants” most often entered a system of incarceration administered by private industry. Known as **convict leasing**, this system allowed for the virtual enslavement of people who had been convicted of a crime, even if those “crimes” were for things like “walking without a purpose” or “walking at night,” for which law enforcement officials in the South aggressively targeted black people.<sup>11</sup>

Northern states also turned to the criminal justice system to exert social control over free black Americans. Policymakers in the North did not legally target black Americans as explicitly as did their southern counterparts, but disparate enforcement of various laws against “suspicious characters,” disorderly conduct, keeping and visiting disorderly houses, drunkenness, and violations of city ordinances made possible new forms of everyday surveillance and punishment in the lives of black people in the Northeast, Midwest, and West.<sup>12</sup> Though such criminal justice

involvement was based on racist policies, the results were nevertheless used as evidence to link black people and crime. After Reconstruction, scholars, policymakers, and reformers analyzed the disparate rates of black incarceration in the North as empirical “proof” of the “criminal nature” of black Americans.<sup>13</sup>

Higher rates of imprisonment of black people in both the North and South deeply informed ongoing national debates about racial differences. The publication of the 1890 census and the prison statistics it included laid the groundwork for discussions about black Americans as a distinctly dangerous population.<sup>14</sup> Coming 25 years after the Civil War and measuring the first generation removed from slavery, the census figures indicated that black people represented 12 percent of the nation’s population, but 30 percent of those incarcerated.<sup>15</sup> The high arrest and incarceration rates of black Americans—though based on the racist policies discussed above—served to create what historian Khalil Gibran Muhammad has called a “statistical discourse” about black crime in the popular and political imagination, and this data deeply informed national discussions about racial differences that continue to this day.<sup>16</sup> Indeed, a 2010 study found that white Americans overestimate the share of burglaries, illegal drug sales, and juvenile crime committed by black people by approximately 20 to 30 percent.<sup>17</sup> (See “The myth of black-on-black crime,” on page 4.)

These distorted notions of criminality continued to shape political discourse and policy decisions throughout the 20<sup>th</sup> century. In 1965, President Lyndon Johnson declared the “War on Crime” and began the process of expanding and modernizing American law enforcement.<sup>18</sup> Johnson made his declaration despite stable or decreasing crime levels. Perceived increases in crime in urban centers at the time may be tied in part to changes in law enforcement practices and crime reporting as jurisdictions vied for newly-available federal funding for law enforcement under his initiatives.<sup>19</sup> Nevertheless, a discourse about high crime in urban areas—areas largely populated by black people—had taken hold in the national consciousness.<sup>20</sup>

Statistics linking black people and crime have historically overstated the problem of crime in black communities and produced a skewed depiction of American crime as a whole.<sup>21</sup> The FBI’s Uniform Crime Report—one commonly cited source for U.S. crime statistics—fails to measure criminal justice outcomes beyond the point of arrest, and thus does not account for whether or not suspects are convicted.<sup>22</sup> In the 1970s, black people had the highest rate of arrest for the crimes of murder, robbery, and rape—crimes that also

had the lowest percentage of arrestees who were eventually convicted.<sup>23</sup> Yet statistical data on crime based on arrest rates deepened federal policymakers’ racialized perception of the problem, informing crime control strategies that intensified law enforcement in low-income communities of color from the 1960s onwards.<sup>24</sup> For instance, in trying to understand where and when certain crimes occur, researchers from the National Commission on Law Enforcement and Administration of Justice spoke only with law enforcement agencies and officers stationed in low-income black communities. This skewed the data—which intentionally ignored the disproportionate police presence in these neighborhoods as well as delinquency among middle class, white, young men—yet was used to craft strategies for the War on Crime, such as increased patrol and surveillance in low-income communities of color.<sup>25</sup>

## Even present-day race-neutral laws and policies can have disparate impacts on black people

Legislators in the United States no longer explicitly write laws in the racially discriminatory manner that marked the Reconstruction Era. But even laws that are neutral on their face can disparately impact black people.<sup>26</sup> The “War on Drugs,” for example, inspired policies like drug-free zones and habitual offender laws that produced differential outcomes by race.

- › **Drug-free zone laws** prohibit the use or sale of drugs in proximity of certain protected areas like schools, playgrounds, parks, and public housing projects.<sup>27</sup> Those who use or sell drugs within a certain distance from these areas typically receive punitive sentences, such as mandatory minimums (up to eight years in some states), sentence enhancements (which allow judges to increase a person’s sentence beyond the normal range), or doubling of the maximum penalty for the underlying offense (as in Washington, DC).<sup>28</sup> Because of residential segregation—which pushes low-income black people to high density areas of the city and white people often to less dense suburbs—coupled with the high density of the neighborhoods where schools in urban areas are located, people of color are disproportionately impacted by these laws.<sup>29</sup> In Massachusetts, for instance, a 2004 review of

## The myth of “black-on-black” crime

The notion that black people commit violence against other black people at greater levels than do members of other racial and ethnic groups is sometimes colloquially referred to as “black-on-black crime.” The term was originally used by those in the black community to express concerns about the safety of their neighborhoods, but has been wielded more broadly by the media and observers to portray violent crimes committed by black people.<sup>a</sup> Recently, the term has been invoked to counter #BlackLivesMatter protests of police shootings of black men by suggesting that the “real” problem is black men shooting each other.<sup>b</sup> These notions of criminality have consequences. Studies have shown that “people with racial associations of crime are more punitive regardless of whether they are overtly racially prejudiced,” making them more likely to support policies such as the death penalty.<sup>c</sup>

But the notion that black-on-black intraracial violence is greater than intraracial violence for other groups is not borne out by statistics. A report from the Bureau of Justice Statistics found that most violence occurs between victims and offenders of the same race, regardless of race: 57 percent of the nearly 3.7 million reported violent crimes committed against white victims were perpetrated by white offenders; while of the 850,720 reported violent crimes committed

against black victims, 63 percent were committed by black people.<sup>d</sup> Nor is there an epidemic of black-on-black violence: the rate of both black-on-black and white-on-white nonfatal violence declined 79 percent between 1993 and 2015.<sup>e</sup> The number of homicides involving both a black victim and black perpetrator fell from 7,361 in 1991 to 2,570 in 2016.<sup>f</sup>

The myth of black-on-black crime is likely fostered at least in part by the way that crime is measured. Federal government crime reporting portrays a skewed picture of the relationship between race and offending. The FBI’s Uniform Crime Report, which is considered the official measure of the national crime rate, has always emphasized street crime to the exclusion of organized and white-collar crime.<sup>g</sup> As such, the figures that inform law enforcement strategies and priorities tend to reflect the crimes committed by low-income and unemployed Americans who, in part because of structural inequalities, are disproportionately black. (See “Communities of color are disproportionately impacted by extreme poverty and its connection to crime” at page 10.) To the extent that black-on-black crime exists, it is better understood as a function of structural racism that has led to more black people living in conditions of concentrated poverty than as an inherently racial issue.

<sup>a</sup> For an overview of the history and usage of the phrase “black-on-black crime,” see Brentin Mock, “The Origins of the Phrase ‘Black-on-Black Crime,’” CityLab, June 11, 2015, <https://perma.cc/8267-8442>. Also see Zhai Yun Tan, “What Does ‘Black-on-Black Crime’ Actually Mean?” *Christian Science Monitor*, September 22, 2016, <https://perma.cc/85Q2-TURC>.

<sup>b</sup> Heather MacDonald, “New Data: It’s Still about Black-on-Black Crime,” *National Review*, December 12, 2014, <https://perma.cc/JP6G-K83X>; and Alexandra Boguhn, “Right-Wing Media Push ‘Black-on-Black’ Crime Canard to Deflect from Ferguson Police Shooting,” *Media Matters for America*, August 18, 2014 (collecting news articles), <https://perma.cc/LUB4-2SHE>. Also see Jamelle Bouie, “The Trayvon Martin Killing and the Myth of Black-on-Black Crime,” *Daily Beast*, July 15, 2013, <https://perma.cc/5SUB-CA34>.

<sup>c</sup> Nazgol Ghandnoosh, *Race and Punishment: Racial Perceptions of Crime and Support for Punitive Policies* (Washington, DC: The Sentencing Project, 2014), 19, <https://perma.cc/PW6M-CSQA>.

<sup>d</sup> Rachel E. Morgan, *Race and Hispanic Origin of Victims and Offenders, 2012-15* (Washington, DC: Bureau of Justice Statistics, 2017), 2, <https://perma.cc/4XNR-3DKX>. Also see David Neiwart, “White Supremacists’ Favorite Myths about Black Crime Rates Take Another Hit from BJS Study,” *Southern Poverty Law Center*, October 23, 2017, <https://perma.cc/2CK7-5QEF>.

<sup>e</sup> Morgan, *Race and Hispanic Origin of Victims and Offenders* (2017), at 4.

<sup>f</sup> For 1991 figures, see James Alan Fox and Marianne W. Zawitz, *Homicide Trends in the United States* (Washington, DC: BJS, 2010) (trends by race), <https://perma.cc/TFD2-8QRD>. For 2016 figures, see Federal Bureau of Investigation, “2016 Crime in the United States: Expanded Homicide Data Table 3,” <https://perma.cc/4UFN-KUK7>.

<sup>g</sup> See Federal Bureau of Investigation, “Uniform Crime Reporting Statistics: UCR Offense Definitions,” <https://perma.cc/2ZTB-ASCK>.

sentencing data showed that black and Latino people accounted for 80 percent of drug-free zone convictions, even though 45 percent of those arrested statewide for drug offenses were white.<sup>30</sup>

- › **Habitual offender and “three strikes” laws** penalize individuals with repeat offenses more harshly, typically increasing the sentence length for each conviction.<sup>31</sup> Under these laws, individuals charged with seemingly minor crimes, like possession of a controlled substance, can incur significantly enhanced sentences.<sup>32</sup> More and deeper criminal justice system involvement of black people is driven by overpolicing (see discussion of proactive policing, below), which leads to more arrests for black people; bias by criminal justice system actors (see “Bias by system actors can lead to disproportionate criminal justice involvement for black people” at page 7), which leads to more convictions; and structural inequality (see “Communities of color are disproportionately impacted by extreme poverty and its connection to crime” at page 10), which surrounds black people with the drivers of criminal behavior. Disproportionate numbers of black people are ensnared in the criminal justice system on multiple occasions, setting them up to be subject to the harsh impact of these laws.<sup>33</sup>
- › Location-based proactive policing practices like **hot spots policing** increase preventive police patrols in “micro-geographic locations” determined by data to have high concentrations of crime.<sup>34</sup> Such practices arose in response to violent crime in the 1980s and 1990s, and were combined with policing strategies like **zero tolerance** and the “**broken windows**” model, which focused police efforts on low-level quality-of-life crimes like public drunkenness, loitering, or littering under a theory that eliminating such small-scale disorder would also decrease more serious offenses.<sup>35</sup> Such strategies can disparately impact communities of color. In one study of law enforcement and open-air drug markets—places where drugs are sold in the open, typically outdoors or out of cars—in Seattle, researchers found that police officers are more likely to target such markets because the drug trade is visible and easier to access.<sup>36</sup> Even so, the study found that police targeted black open-air markets over white ones.<sup>37</sup> A similar study using the same data calculated both the percentage of people who delivered drugs who were black and white, as well as the percentages of drug-related arrests based on race. Researchers found that black people represented about 47 percent of those delivering crack cocaine, but 79 percent of those arrested;

while white people constituted about 41 percent of those delivering the drug, but only 9 percent of those arrested.<sup>38</sup>

Moreover, a 2018 report on proactive policing concluded that the targeting of physical locations that are deemed high risk by police data is likely to lead to “large racial disparities in the volume and nature of police-citizen encounters.”<sup>39</sup> According to legal scholar Jonathan Simon, this strategy to reduce violent crime “produced its own racially neutral rationale for targeting neighborhoods of high poverty and crime, which were generally almost 100 percent Black or Black and Hispanic.”<sup>40</sup> For example, a 2016 NYPD inspector general’s report found that “the rate of quality-of-life enforcement in precincts citywide was positively correlated with higher proportions of black and Hispanic residents....”<sup>41</sup>

One well-known example of the disproportionate effect of race-neutral laws is New York’s experiment with enhanced sentencing for drug offenses.<sup>42</sup> In 1973, New York State enacted the so-called “**Rockefeller drug laws**,” a set of statutes that established mandatory minimum prison sentences for felony drug convictions.<sup>43</sup> Under these laws, someone convicted of selling two ounces—or possessing four ounces—of heroin, morphine, opium, cocaine, or marijuana faced a minimum of 15 years in prison.<sup>44</sup> The statutes provide a stark example of the ways in which laws written in race-neutral terms can still impact people of different racial groups in markedly different ways. Research on the impacts of the Rockefeller drug laws, and later reforms to them, has found the following:

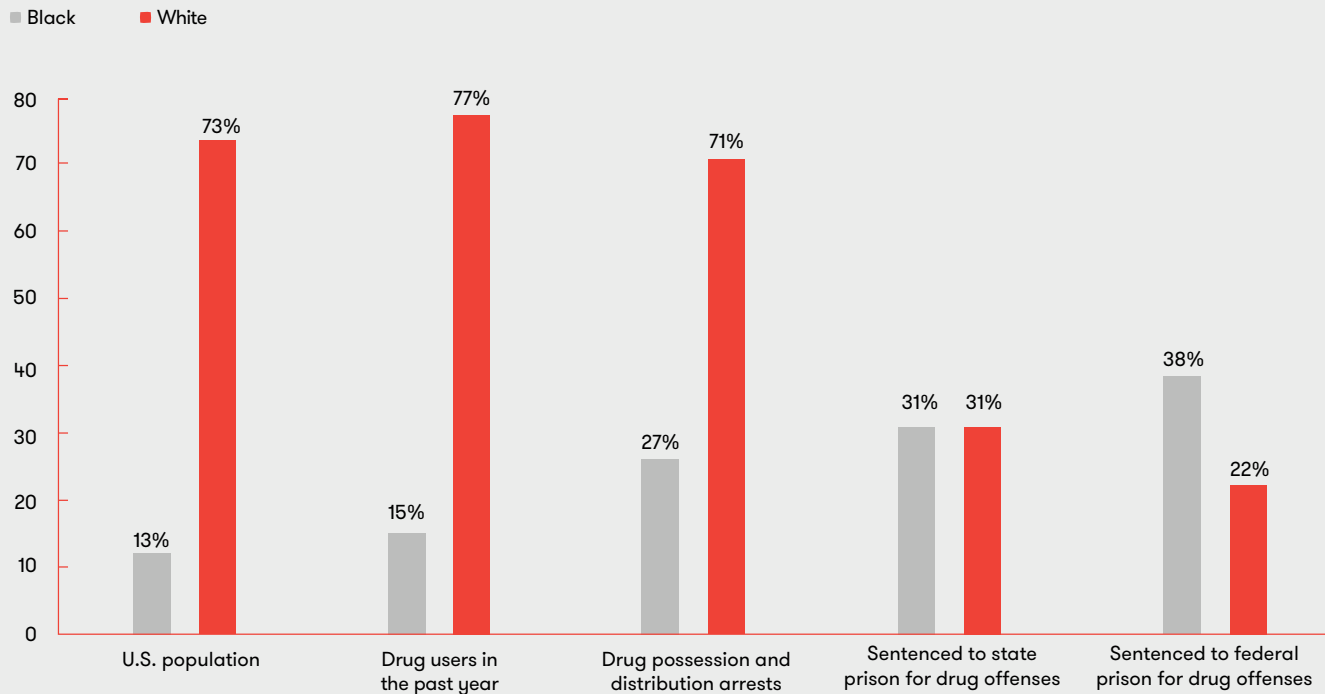
- › The number of people incarcerated for drug offenses in New York State grew from 1,488 to 22,266 between 1973 and 1999—a nearly 15-fold increase—due in part to these laws.<sup>45</sup>
- › That impact did not fall equally on people of all races. In 2001, for every one white male aged 21 to 44 incarcerated under the Rockefeller Laws, 40 black males of similar age were incarcerated for the same offense.<sup>46</sup>
- › A study of 2009 reforms to the Rockefeller drug laws found that removing mandatory minimum sentences and increasing access to treatment reduced racial disparities in prison sentences and decreased rates of re-arrest. However, following the reforms, black people arrested on felony drug charges were still nearly twice as likely to receive a prison sentence compared to similarly situated white people.<sup>47</sup>

## Drug laws: A case study in disparate impact

Drug offending provides an important case study because information from public surveys consistently demonstrates that rates of drug use are fairly consistent across racial and ethnic groups. However, the practices of law enforcement agencies and the courts have led to widely disparate outcomes depending on a person's race. Black people make up about 13 percent of the U.S. population and 15 percent of drug users who are

18 years old or older. Yet 27 percent of those arrested for drug possession and distribution, 38 percent of those federally-sentenced for drug-related crimes, and 33 percent of those sentenced by states for drug-related crimes, are black. (See Figure 1, below.) In other words, the risk of incarceration in the federal system for someone who uses drugs monthly and is black is more than seven times that of his or her white counterpart.

Figure 1  
**Racial disparities in drug arrests and sentencing, 2016**



Sources: Adapted from Lawrence D. Bobo and Victor Thompson, "Racialized Mass Incarceration: Poverty, Prejudice, and Punishment" in *Doing Race: 21 Essays for the 21st Century*, edited by Hazel Rose Markus and Paula M. L. Moya (New York: Norton, 2010), 322-55. U.S. population data from the U.S. Census Bureau, American Community Survey, 2015. Monthly drug users data from the Substance Use and Mental Health Services Administration, *Results from the 2016 National Survey on Drug Use and Health: Detailed Tables*. Drug arrest data from Federal Bureau of Investigation, Uniform Crime Reports, Crime in the United States, 2016. Prison sentences data from E. Ann Carson, *Prisoners in 2016* (Washington, DC: U.S. Bureau of Justice Statistics, 2018).

New York's laws were the first in a wave of similar policies across the country. The federal government—and many states—enacted mandatory minimums that called for longer sentences for crack cocaine offenses—a drug more heavily used among black people—over powder cocaine—a drug more

commonly used among white people.<sup>48</sup> Combined, these drug laws contributed to substantial growth in the number of black people behind bars and the extreme racial disparities that characterize jails and prisons across the United States today.<sup>49</sup> (See "Drug laws: A case study in disparate impact," above.)

## Bias by system actors can lead to disproportionate criminal justice involvement for black people

Beyond laws and policies that disparately impact black people, the bias of individual actors in the criminal justice system—police, prosecutors, judges, and juries—can further disproportionately involve black people, leading to more frequent stops, searches, and arrests, as well as higher rates of pretrial detention, harsher plea bargaining outcomes, and more severe sentences than similarly situated white people. Some of this bias may be the result of overt racism but, more often, it manifests as implicit bias. Implicit bias is the “automatic positive or negative preference for a group, based on one’s subconscious thoughts,” which can produce discriminatory behavior even if individuals are unaware that such biases form the bases of their decisions.<sup>50</sup> Implicit bias affects everyone, but is of particular import when it results in unequal treatment by criminal justice actors.<sup>51</sup> Such biases impact individual stages of the process, like policing, and also accumulate over multiple stages, through case processing, prosecution, and disposition.<sup>52</sup> The cumulative effect of such individual biases contributes to disproportionately negative outcomes for black Americans.

### Studies have found police are more likely to stop, search, and arrest black people

Because police are the gateway to the court and prison systems, understanding how bias affects policing practices is critical to understanding larger racial disparities in American criminal justice. Studies have shown that police officers can hold implicit biases that affect their decisions toward black individuals.<sup>53</sup> For example, a 2004 study found that when police officers were asked “who looks criminal?” and shown a series of pictures, they more often chose black faces than white ones.<sup>54</sup> Likewise, in another 2004 study, researchers primed police officers to think about crimes using words like “violent,” “stop,” and “arrest,” then showed them a series of photographs. The study found that once primed, the officers focused more quickly on black male faces and remembered those faces to have features that have been considered to be stereotypically black—such as a broad nose, thick lips, and dark skin.<sup>55</sup>

The best available evidence suggests that police bias toward black Americans, coupled with strategic decisions to deploy certain law enforcement practices—like hot spots policing—more heavily in black communities, increases the likelihood of encounters with police and negative outcomes like stops, searches, use of force, and arrest.<sup>56</sup>

- › Studies on police use of force reveal that black people are more likely than white people to experience use of force by police. A study of police use of non-fatal force from 2002 to 2011 found that in street stops, 14 percent of black people experienced non-fatal force compared to 6.9 percent of white people stopped by the police.<sup>57</sup>
- › Studies have found that police are more likely to pull over and search black drivers despite lower contraband hit rates. In a study of investigatory traffic stops in Kansas City among drivers under 25 years old, 28 percent of black men and 17 percent of black women were pulled over in 2011 for an investigatory stop, compared to 13 percent of white men and 7 percent of white women.<sup>58</sup> In 2016, a Police Accountability Task Force in Chicago found that police searched black and Latino drivers four times as often as white drivers. However, police found contraband on white drivers twice as often as black and Latino drivers.<sup>59</sup> In a similar study in 2017 at Stanford University, researchers developed a “threshold test” to quantify how officers initiate searches. The study found that police in North Carolina employ a lower search threshold to black and Latino people than they do to white people and Asian people, searching 5.4 percent of black people pulled over compared to 3.1 percent of white people.<sup>60</sup>
- › Studies have shown similar disparities in police pedestrian stops. A study of 125,000 pedestrian stops by police in New York City found black people were stopped more than 23 percent more often than white people—even when controlling for “race-specific estimates of crime”—representing over half of the stops and only 26 percent of the city’s population.<sup>61</sup> Moreover, stops of black people were also less likely to lead to an arrest.<sup>62</sup>
- › Studies have also shown that police are more likely to arrest black people. A meta-analysis of 23 research studies that focused on the relationship between race and the likelihood of an arrest between 1977 and 2004 found that black people were more likely to be arrested than their white counterparts, even when controlling for factors like the seriousness of the offense and the suspect’s prior record.<sup>63</sup> Similarly, a study of the 1997 National Longitudinal Survey of Youth data found that after

controlling for differences in drug offending, non-drug offending, and neighborhood context, racial disparities in drug-related arrests still persist. This finding suggests that just being black significantly raises one's chances of arrest.<sup>64</sup> Moreover, a 2010 ACLU study found that black people were 3.7 times more likely to be arrested for marijuana possession than white people, even though both groups use the drug at similar rates.<sup>65</sup>

## Prosecutor bias can lead to harsher outcomes for black people

Biased decision making by prosecutors also negatively impacts people of color. Prosecutors hold a particularly outsized role in the criminal justice process, with discretionary decision-making power over charging and plea bargains.<sup>66</sup> Their recommendations also can anchor courtroom discussions about pretrial detention, bail amounts, and sentencing.<sup>67</sup> Research shows that bias can affect how prosecutors exercise their discretion in the cases of black people.<sup>68</sup>

- › A 2012 review by the Vera Institute of Justice of 34 studies looked at the effect of prosecutorial decision making on racial disparities in sentencing and at five other discretion points.<sup>69</sup> A greater number of studies found that people of color are more likely to be prosecuted, held in pretrial detention, and to receive other harsh treatment.<sup>70</sup>
- › A 2013 study found that federal prosecutors are more likely to charge black people than similarly situated white people with offenses that carry higher mandatory minimum sentences.<sup>71</sup> A 2006 study found that state prosecutors are more likely to charge black people under habitual offender statutes than similarly-situated white people.<sup>72</sup>
- › Implicit bias can also impact the plea bargaining phase, by which the vast majority of criminal cases are resolved.<sup>73</sup> A 2017 study of more than 48,000 misdemeanor and felony cases in Wisconsin between 2000 and 2006 found that white people were 25 percent more likely to have their top charge dropped or reduced by prosecutors than black people.<sup>74</sup> Disparities were especially glaring when misdemeanor cases only were considered: white people were nearly 75 percent more likely than black people to see all misdemeanor charges carrying a potential sentence of incarceration dropped, dismissed, or amended to lesser charges.<sup>75</sup> The result of these disparities is that black people originally charged with misdemeanors are not only more likely to be convicted, they are more likely to be sentenced to incarceration than white people.

## Judicial bias can lead to worse criminal justice outcomes for black people

Judges too have been found to hold implicit biases that can impact their treatment of the black people whose cases are before them. For example, a 2009 study of judges' implicit biases found that white judges were more motivated to be fair when they were told that the accused was black.<sup>76</sup> When not explicitly told the race of the defendant, but primed with cues that implied the defendant was black, judges imposed moderately harsher sentences.<sup>77</sup> Because judges oversee every stage of the court process, their biases can lead to harsher outcomes at multiple discretion points in a case, from pretrial detention through sentencing.<sup>78</sup>

- › A 2009 study of drug offense convictions in three U.S. district courts found that black people had higher odds of pretrial detention than white people. Moreover, those charged for offenses related to crack cocaine—a charge more common among black people than white people—were more likely to be held pretrial than those charged for offenses involving powder cocaine. Whether a defendant is held pretrial has downstream effects on sentencing: this study found that men who were in custody during their sentencing hearings received sentences about eight months longer on average than those who were released before their hearings.<sup>79</sup>
- › A 2013 review of 50 years of studies on racial disparities in bail practices found that black people are subject to pretrial detention more frequently, and have bail set at higher amounts, than white people who have similar criminal histories and are facing similar charges. Studies documented this disparity in state and federal cases as well as juvenile justice proceedings, and in all regions of the country.<sup>80</sup>
- › In a review of 40 studies into the linkage between race and ethnicity and sentencing severity, researchers found that at both the state and federal levels, black people were more likely to receive more severe sentences than their white counterparts. This finding holds true even when controlling for differences in criminal histories and the effects of policies that have a disparate impact on people of color, like the drug laws and hot spots policing practices discussed above.<sup>81</sup> Moreover, a 2005 analysis of 40 studies on racial disparities in sentencing at the state and federal levels found that 43 percent of studies at the state level and 68 percent at the federal level reported direct racially discriminatory sentencing outcomes, impacting



both the initial decision to incarcerate and the length of any ultimate sentence to incarceration.<sup>82</sup>

- › A study of capital cases in Philadelphia found that when the victim was white and the accused black, defendants who were perceived to have a more “stereotypically Black appearance” were more than twice as likely to receive a death sentence as black people on trial who were perceived as less so. The accused person’s appearance made no difference, however, when both the victim and the accused were black.<sup>83</sup>
- › Multiple studies demonstrate the impact of skin color on sentencing, with lighter-skinned black people often receiving more lenient treatment and darker-skinned black people receiving more punitive sentences. For instance, when controlling for the type of offense, socioeconomic status, and demographic indicators among a subset of incarcerated men in Georgia from 1995 to 2002, dark-skinned black men received prison sentences a year-and-a-half longer—and the lightest-skinned black men about three-and-a-half months longer—than their white counterparts.<sup>84</sup> A 2015 study of men facing first-time felony charges found that darker-skinned black men received sentences that were, on average, 400 days longer than their white counterparts, while medium-skinned black men received sentences about 200 days longer than their white counterparts. On average, black men received a sentence 270 days longer than white men.<sup>85</sup>
- › A study of cases in which men were charged with felony crimes in urban U.S. counties in 2000 found that black defendants were more likely to be detained pretrial; that pretrial detention impacted the likelihood of a guilty plea for black, white, and Latino defendants; and that both detention and guilty pleas affected sentence outcomes. Taken together, the effects of cumulative bias increased the probability that the average black person charged with a felony would go to prison by 26 percent.<sup>86</sup>

## Studies have found evidence of racial bias against black people in jury verdicts and sentencing

The potential racial bias of jurors in criminal cases has been examined in studies using archival analysis of case verdicts, post-trial juror interviews, and mock jury experiments in which researchers can randomly assign subjects to “juries” and control for and isolate variables of interest.<sup>87</sup> Such studies have examined both the impact of the racial composition of juries on sentences, as well as the effect of the defendant’s

race on jurors’ decision making. The results are complex and the scholarship is incomplete, and while some research attributes racial discrimination by jurors to a bias against defendants who belong to a race different than their own, studies do show evidence that implicit bias may influence white jurors in some cases where the accused is black.<sup>88</sup>

- › In a 2003 review of empirical research on race and juries, the authors found complex relationships between implicit juror bias and a defendant’s race depending on the type of case at issue. In studies that used summaries of trials that were more “racially charged,” like a summary of the O.J. Simpson case, white mock jurors appeared less likely to exhibit bias. When studies used trials that were not racially charged, racial biases were found, suggesting that the white mock jurors were motivated to appear less racist the more racially salient the case before them.<sup>89</sup>
- › A 2005 meta-analysis of 34 studies on mock jury verdict decisions and 16 studies on mock juror sentencing decisions found a notable effect of racial bias on mock jurors’ decision making. The study shows that mock jurors are more likely to render both guilty verdicts and longer sentences to defendants whose race differs from their own, suggesting that jurors are more lenient toward members of their own racial groups.<sup>90</sup>
- › A 2010 study found that mock jurors showed racial bias toward darker-skinned individuals, evaluating ambiguous evidence as a greater indication of guilt than they did for lighter-skinned people. Moreover, when asked to rate the defendant’s level of guilt on a scale of 1 to 100, mock jurors perceived the darker-skinned individuals to be more guilty than lighter-skinned individuals. Perhaps most notably, the study found that many mock jurors could not recall whether the defendant was a lighter- or darker-skinned individual, implying that the defendant’s skin tone was not consciously, but rather implicitly, considered in their evaluation of guilt. These findings held true regardless of the race of the mock juror (though none of the jurors were black).<sup>91</sup>

## Communities of color are disproportionately impacted by extreme poverty and its connection to crime

The historical legacy of slavery and racist policymaking and norms in America has had significant and long-lasting effects on racial inequality. Research shows that well after slavery ended, de-industrialization, discriminatory housing practices known as red-lining, and white flight from neighborhoods as black families migrated north pushed large numbers of black people into poverty, perpetuating economic inequalities between white and black people.<sup>92</sup> These neighborhoods are characterized by an extreme concentration of disadvantage where formal employment opportunities and access to quality education are limited, and neighborhood resources are scarce.<sup>93</sup>

While these factors describe the structural realities of extreme poverty, they are also known drivers of criminal conduct, independent of race or ethnicity.<sup>94</sup> Researchers have found higher levels of violent crime in poor urban neighborhoods, regardless of race. Studies demonstrate that when white men are living in an environment characterized by poverty, unemployment, and single-parent households, they are more likely to commit homicide and other violent crimes than black men confronting a similar set of structural impediments.<sup>95</sup>

But the realities of poverty disproportionately affect black people: 22 percent of black people lived in poverty in 2016, compared to approximately 9 percent of white people.<sup>96</sup> Thus, higher rates of poverty and the cumulative effects of structural racism mean black people are exposed to the structural risk factors that make crime more likely at greater rates than their white counterparts. Compounded with justice system laws and practices that have disparate impacts and bias among justice system actors, discussed above, black people are consequently arrested for certain crimes at higher rates.<sup>97</sup> Put differently, racial disparities in the justice system are deeply rooted in historical racism that manifests today in structural inequalities—from the differences in the quality of education to unemployment rates to household wealth.<sup>98</sup>

The criminal justice system does not only punish those accused and convicted of crimes. With such large numbers of black Americans being arrested and incarcerated, it also impacts entire communities. The widening reach of the criminal

justice system in low-income communities of color—including higher rates of arrest and incarceration—further depletes resources and social capital in these places, perpetuating poverty and criminal justice involvement.

- › **Parental incarceration is now commonplace for black children.** One in 25 white children born in 1990 had an incarcerated parent at some point during childhood, compared to one in four black children.<sup>99</sup> The negative impact of having an incarcerated parent can include criminal justice involvement, behavioral health issues, low educational attainment, and lack of economic resources.<sup>100</sup>
- › **Disparities in incarceration of black men impacts women and families.** With such high incarceration rates for black men, women are often left to raise children alone while their partners cycle in and out of jail and prisons, increasing the number of households within communities of color headed by women and single parents or individual family members.<sup>101</sup> Beyond the economic challenges these women face, in 2014 researchers found that having a family member who is incarcerated negatively impacts women's cardiovascular health.<sup>102</sup>
- › **The social and economic consequences of a criminal record impede successful reentry.** People who have been incarcerated experience collateral consequences of conviction that hinder their ability to access employment, housing, education, and other supports following their release from prison, making reentry difficult and increasing the chances of recidivism.<sup>103</sup>

## Conclusion

Highly visible events—from Michael Brown in Ferguson, Missouri, to Eric Garner in Staten Island, New York; from Sandra Bland in Texas and Stephon Clark in California to Philando Castile in Minnesota—in which the lives of black men, women, and boys ended after encounters with law enforcement, have served to elevate public awareness of disproportionate police violence. However, the ways in which the criminal justice system operates to disadvantage people of color are systemic and ingrained, and more often subtle.

Focusing on high profile incidents of violence and abuse, while essential, will only make a small dent in the disparities present in the justice system that undercut the life potential of people who live in communities of color.

The evidence for racial disparities in the criminal justice system is well documented. However, there is no evidence that these widely disproportionate rates of criminal justice contact and incarceration are making us safer. To the contrary, studies have shown that concentrated incarceration in poor communities erodes community resources and may actually increase crime.<sup>104</sup> The disproportionate racial impact of certain laws and policies, as well as biased decision making by justice system actors, leads to higher rates of arrest and incarceration in low-income communities of color which, in turn, increases economic strain, further reduces income, and stifles wealth creation. Consequently, current approaches to criminal justice are extending levels of discrimination that are typically associated in the popular consciousness with a pre-civil rights era, but still exist today.

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### Resources

**Bobo, Lawrence D. and Victor Thompson.** “Racialized Mass Incarceration: Poverty, Prejudice, and Punishment.” In *Doing Race: 21 Essays for the 21st Century*, edited by Hazel Rose Markus and Paula M. L. Moya. New York: Norton, 2010, 322-55.

**Butler, Paul.** *Chokehold: Policing Black Men*. New York: The New Press, 2017.

**Davis, Angela J., ed.** *Policing the Black Man: Arrest, Prosecution, Imprisonment*. New York: Pantheon, 2017.

**Hinton, Elizabeth.** *From the War on Poverty to the War on Crime: The Making of Mass Incarceration in America*. Cambridge, MA: Harvard University Press, 2016.

**Muhammad, Khalil Gibran.** *The Condemnation of Blackness: Race, Crime, and the Making of Modern Urban America*. Cambridge, MA: Harvard University Press, 2011.

**Jeremy Travis, Bruce Western, and Steve Redburn, eds.** *The Growth of Incarceration in the United States: Exploring Causes and Consequences*. Washington, DC: National Academies Press, 2014, <https://perma.cc/3PKW-CDNQ>.

**Western, Bruce.** *Punishment and Inequality in America*. New York: Russell Sage Foundation, 2006.

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## Endnotes

- 1 For disparities in jail populations, see Ram Subramanian, Kristine Riley, and Chris Mai, *Divided Justice: Trends in Black and White Jail Incarceration, 1990-2013* (New York: Vera Institute of Justice, 2017), 21-22 & figure 7 (in 1990, black people were nearly seven times more likely than white people to be held in local jails; in 2013, they remained 3.6 times more likely to be incarcerated in jail than white people), <https://perma.cc/VCK2-DNA2>. For disparities in prison populations, see Eli Hager, “A Mass Incarceration Mystery,” Marshall Project, December 15, 2017 (Marshall Project analysis of yearly reports by the Bureau of Justice Statistics and the FBI’s Uniform Crime Reporting system), <https://perma.cc/R6MB-58BY>.
- 2 Black people are not the only racial and ethnic minorities who experience racial discrimination and overrepresentation in the criminal justice system. Latinos, for instance, are 17 percent of the U.S. population but make up 23 percent of those with a prison sentence of more than one year. E. Ann Carson, *Prisoners in 2016* (Washington, DC: BJS, 2018) [calculated from table 10], <https://perma.cc/T8PE-TVJ2>. The Bureau of Justice Statistics’ 1999 report on Native American incarceration found that Native American people were incarcerated at a rate about 38 percent higher than the national rate of incarceration, with 4 percent of the adult Native American population behind bars on any given day. The Sentencing Project, *Fact Sheet: Trends in U.S. Corrections* (Washington, DC: The Sentencing Project, 2017), viii, <https://perma.cc/ZQV7-AVQ2>. Native Hawaiian people likewise experience significant overrepresentation at each stage of the criminal justice process in Hawaii, comprising 24 percent of the state’s population but 36 percent of those admitted to prison or jail. See Office of Hawaiian Affairs, *The Disparate Treatment of Native Hawaiians in the Criminal Justice System* (Honolulu, HI: Office of Hawaiian Affairs, 2010), 33, <https://perma.cc/5N34-DV9L>. This brief focuses on criminal justice disparities as they impact black Americans due in no small part to the fact that Latino crime patterns are importantly absent from the FBI Uniform Crime Report and prison records, in part because the FBI decided not to measure Latino arrest rates. For a brief period between 1980 and 1987, the FBI began to collect crime data by ethnicity in an attempt to fill that statistical void. Before that window, and until as recently as 2014, the majority of available statistics tabulated arrest data by race, with categories for white, black, Asian or Pacific Islander, and American Indian or Alaska Native. As such, Latinos largely vanished from American crime data in the 20<sup>th</sup> century. Works that have helped bridge the existing statistical gaps by enhancing our view of the criminalization and policing of Latino Americans include Rodolfo F. Acuña, *Occupied America: A History of Chicanos* (New York: Pearson, 2014); Juanita Díaz-Cotto, *Chicana Lives and Criminal Justice: Voices from El Barrio* (Austin, TX: University of Texas Press, 2006); Edward J. Escobar, *Race, Police, and the Making of a Political Identity: Mexican Americans and the Los Angeles Police Department, 1900-1945* (Berkeley, CA: University of California Press, 1999); Kelly Lytle Hernández, *Migra! A History of the U.S. Border Patrol* (Berkeley, CA: University of California Press, 2010); Kelly Lytle Hernández, *City of Inmates: Conquest, Rebellion, and the Rise of Human Caging in Los Angeles, 1771-1965* (Chapel Hill, NC: University of North Carolina Press, 2017); Suzanne Oboler, ed., *Behind Bars: Latino/as and Prison in the United States* (New York: Palgrave Macmillan, 2009); and Victor M. Rios, *Punished: Policing the Lives of Black and Latino Boys* (New York: New York University Press, 2011). Some of the best analysis of Latino crime and incarceration rates can be found in Michael Tonry and Matthew Melewski, “The Malign Effects of Drug and Crime Control on Black Americans,” in *Crime and Justice: A Review of Research—Volume 37*, edited by Michael Tonry (Chicago: University of Chicago Press, 2008); and Jeremy Travis, Bruce Western, and Steve Redburn, eds., *The Growth of Incarceration in the United States: Exploring Causes and Consequences* (Washington, DC: National Academies Press, 2014), 61-64. On white-collar crime, see Max Schanzenbach and Michael L. Yager, “Prison Time, Fines, and Federal White-Collar Criminals: The Anatomy of a Racial Disparity,” *Journal of Criminal Law and Criminology* 96, no. 2 (2005-2006), 757-94, <https://perma.cc/ZWN9-622X>.
- 3 For the percent of black men in the U.S. population, see U.S. Census Bureau, “ACS Demographic and Housing Estimates 2012-2016 American Community Survey 5-Year Estimates,” <https://perma.cc/85BE-KN7Q>. For the percent of black men incarcerated in state and federal prisons, see E. Ann Carson, *Prisoners in 2016* (2018), 15 & table 10.
- 4 The Sentencing Project, *Trends in U.S. Corrections* (Washington, DC: The Sentencing Project, 2017), 5, <https://perma.cc/G3Y4-JE3L>.
- 5 Ashley Nellis, *The Color of Justice: Racial and Ethnic Disparity in State Prisons* (Washington, DC: The Sentencing Project, 2016), 3, <https://perma.cc/9WZB-F93P>.
- 6 The Sentencing Project, *Trends in U.S. Corrections* (2017), at 5.
- 7 For the percentage of women incarcerated, see Elizabeth Swavola, Kristine Riley, and Ram Subramanian, *Overlooked: Women and Jails in an Era of Reform* (New York: Vera Institute of Justice, 2016), 11, <https://perma.cc/YW3D-Y8JF>. For the percentage of black women in the population, see U.S. Census Bureau, “ACS DEMOGRAPHIC AND HOUSING ESTIMATES, 2012-2016 American Community Survey 5-Year Estimates,” <https://perma.cc/PF25-4LKN>.
- 8 Michelle Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness* (New York: The New Press, 2010), 28-29.

- 9 Constitutional Rights Foundation, “The Southern ‘Black Codes’ of 1865-66,” <https://perma.cc/YTH8-3N5Z>.
- 10 On vagrancy laws, see Douglas A. Blackmon, *Slavery by Another Name: The Re-Enslavement of Black Americans from the Civil War to World War II* (New York: Anchor, 2009); Alex Lichtenstein, *Twice the Work of Free Labor: The Political Economy of Convict Labor in the New South* (London: Verso, 1996); and David M. Oshinsky: “Worse than Slavery”: *Parchman Farm and the Ordeal of Jim Crow Justice* (New York: Free Press, 1997).
- 11 On convict leasing, see generally Douglas A. Blackmon, *Slavery by Another Name* (2009). On specific vagrancy laws, see Shaun King, “We Must Fully Unpack the Complicated Evils of our Justice System in Order to Build the Sophisticated Solutions We Need,” Medium, March 9, 2018, <https://perma.cc/TY3W-XTR4>. See also Sarah Haley, *No Mercy Here: Gender, Punishment, and the Making of Jim Crow Modernity* (Chapel Hill, NC: University of North Carolina Press, 2016); and Talitha L. LeFlouria, *Chained in Silence: Black Women and Convict Labor in the New South* (Chapel Hill, NC: University of North Carolina Press, 2015).
- 12 See Blackmon, *Slavery by Another Name* (2009), at 233.
- 13 See Khalil Gibran Muhammad, *The Condemnation of Blackness: Race, Crime, and the Making of Modern Urban America* (Cambridge, MA: Harvard University Press, 2010), 4. See also David J. Rothman, *The Discovery of the Asylum: Social Order and Disorder in the New Republic* (Boston: Little Brown, 1971), which offers the most sustained consideration of these ties.
- 14 Elizabeth Hinton, *From the War on Poverty to the War on Crime* (2016), at 19.
- 15 Muhammad, *The Condemnation of Blackness* (2010), at 3-4.
- 16 See *ibid.* at 4.
- 17 Ted Chiricos, Kelly Welch, and Marc Gertz, “Reconsidering the Relationship Between Perceived Neighborhood Racial Composition and Whites’ Perceptions of Victimization Risk: Do Racial Stereotypes Matter?,” *Criminology* 50, no. 1 (2012), 145-86, 155-56 & 160.
- 18 Hinton, *From the War on Poverty to the War on Crime* (2016), at 1-3.
- 19 *Ibid.* at 6. Also see Jeremy Travis, Bruce Western, and Steve Redburn, eds., *The Growth of Incarceration in the United States* (2014), 110 (discussing establishment of Office of Law Enforcement Assistance to award grants aimed at improving and expanding law enforcement), <https://perma.cc/KZY6-RUGF>; and David Weisburd and Malay K. Majmudar, eds., *Proactive Policing: Effects on Crime and Communities* (Washington, DC: National Academies Press, 2018), 268 (discussing the federal Justice Assistance Grant program for local law enforcement, which “increased the level of policing in areas that recorded more violent crimes, which in many areas has led to greater policing of poorer and/or more predominantly [b]lack communities”). For example, the number of recorded robberies and burglaries in New York City grew threefold from 48,000 in 1965 to 143,000 in 1966. One thing that had changed in the interim: crime reporting reforms were implemented by Mayor John Lindsay in 1966. Hinton, *From the War on Poverty to the War on Crime* (2016), at 6.
- 20 See Hinton, *From the War on Poverty to the War on Crime* (2016), at 6.
- 21 See generally Muhammad, *The Condemnation of Blackness* (2010) (chronicling the link between the misinterpretation of crime statistics and notions of black criminality in American history).
- 22 The UCR collects information on the following “crimes reported to law enforcement agencies:” murder and non-negligent manslaughter, forcible rape, robbery, aggravated assault, burglary, larceny-theft, motor vehicle theft, and arson. Federal Bureau of Investigation, “Uniform Crime Reporting Statistics: The Nation’s Two Crime Measures,” <https://perma.cc/YF7M-D7SM>.
- 23 Gwynne Pierson, “Institutional Racism and Crime Clearance,” in *Black Perspectives on Crime and the Criminal Justice System*, edited by Robert L. Woodson (Boston: G. K. Hall, 1977), 110.
- 24 On the relationship between social science research and its direct impact on federal policy, see Hinton, *From the War on Poverty to the War on Crime* (2016), especially chapters 2, 3, and 6.
- 25 *Ibid.* at 83-86.
- 26 Salma S. Safiedine, Jihad J. Komis, and Christine M. Kulumani, “Policy Reform at the Forefront of Racial Justice: The Racial Justice Improvement Project,” *Criminal Justice* 31, no. 3 (2016), 25-30, 25 (“a policy can be race-neutral or socioeconomically neutral on its face, and still have unintended negative racial and socioeconomic impacts on the individual and, based on large concentrations, the local community at large”).
- 27 Judith Greene, Kevin Pranis, and Jason Ziedenberg, *Disparity by Design: How Drug-Free Zone Laws Impact Racial Disparity—and Fail to Protect Youth* (Washington, DC: Justice Policy Institute, 2006), 5, <https://perma.cc/D247-ZSF5>.
- 28 Nicole D. Porter and Tyler Clemons, *Drug-Free Zone Laws: An Overview of State Policies* (Washington, DC: The Sentencing Project, 2013), 2-3, <https://perma.cc/KU23-JZF4>.
- 29 Greene, Pranis, and Ziedenberg, *Disparity by Design* (2006), <https://perma.cc/R86F-UFY2>. In New Jersey, for example, the

- states' dense urban areas are predominantly populated by black and Latino people, while its suburbs are primarily populated by white people. As a 2005 state commission on the state's drug-free zone laws noted, "[T]he more densely populated the area, the greater number of schools. The more schools per square mile, the greater number of drug-free zones. The greater number of zones in a municipality, the more zones intersect with one another, creating oddly shaped, overlapping entities that leave little else unencumbered." *Ibid.* at 26. As a result, drug-free zones cover great swaths of the state's majority black and Latino cities: 76 percent of Newark, and over half of the cities of Camden and Jersey City. *Ibid.*
- 30 Greene, Pranis, and Ziedenberg, *Disparity by Design* (2006), at 15-17. As shown by this study and several others in this brief, black people are not the only group to be affected disproportionately by either the racially neutral laws discussed in this section or the implicit bias of criminal justice system actors discussed in the following section. More research is needed to isolate the impacts of these laws, policies, and practices on other racial and ethnic groups.
- 31 Three-strikes laws were enacted beginning in 1993 by about half the states and the federal government to mandate enhanced sentences on the third "strike"—up to life without the possibility of parole—for people charged with certain repeat offenses. See Elsa Y. Chen, "Impacts of 'Three Strikes and You're Out' on Crime Trends in California and Throughout the United States," *Journal of Contemporary Criminal Justice*, 24, no. 4 (2008), 345-70, <https://perma.cc/V5SE-J5PN>.
- 32 James Austin, John Clark, Patricia Hardyman, and D. Alan Henry, "Three Strikes and You're Out": *The Implementation and Impact of Strike Laws* (unpublished research paper), <https://perma.cc/5DAA-VR3K>.
- 33 Marc Mauer, "Racial Impact Statements as a Means of Reducing Unwarranted Sentencing Disparities," *Ohio State Journal of Criminal Law* 5 no. 1 (2007), 19-46, 29-30, <https://perma.cc/9AGE-LCUQ>. Black people are more likely to come into contact with police simply because they tend to live in cities with populations over 250,000, which, because of federal funding programs, have more police officers per capita. See David Weisburd and Malay K. Majmundar, eds., *Proactive Policing: Effects on Crime and Communities* (Washington, DC: National Academies Press, 2018), 269-70.
- 34 Weisburd and Majmundar, *Proactive Policing* (2018), 46-47 & 122-29. Perhaps the most well-known hot spots policing model is New York City's Compstat system, a data-driven program developed in the 1990s to map and respond to concentrations of crime in the city, which later became the norm for departments across the country. See generally Bureau of Justice Assistance (BJA) and Police Executive Research Forum (PERF), *Compstat: Its Origins, Evolution, and Future in Law Enforcement Agencies* (Washington, DC: BJA & PERF, 2013), 3-7, <https://perma.cc/TJJ9-KTQ>.
- 35 On the rise of proactive policing strategies, see Weisburd and Majmundar, *Proactive Policing* (2018), at 1; and Prisoner Reentry Institute (PRI), *Pretrial Practice: Rethinking the Front End of the Criminal Justice System* (New York: PRI, 2016), 4-5, <https://perma.cc/6GTx-GU8V>. On broken windows policing, see Weisburd and Majmundar, *Proactive Policing* (2018), at 70-73 & 163. The authors found that broken windows policing has little impact on public safety. *Ibid.* at 8 ("available program evaluations suggest that aggressive, misdemeanor arrest-based approaches to control disorder generate small to null impacts on crime").
- 36 Katherine Beckett, Kris Nyrop, Lori Pfingst, and Melissa Bowen, "Drug Use, Drug Possession Arrests, and the Question of Race: Lessons from Seattle," *Social Problems* 52, no. 3 (2005), 419-41, 434, <https://perma.cc/8SU6-744M>.
- 37 *Ibid.* at 435.
- 38 Katherine Beckett, Kris Nyrop, and Lori Pfingst, "Race, Drugs, and Policing: Understanding Disparities in Drug Delivery Arrests" *Criminology* 44, no. 1 (2006), 105-37, 118, <https://perma.cc/N5PR-HTU3>.
- 39 Weisburd and Majmundar, *Proactive Policing* (2018), 301, conclusion 7-1.
- 40 PRI, *Pretrial Practice* (2016), at 5.
- 41 Mark G. Peters and Philip K. Eure, *An Analysis of Quality-of-Life Summonses, Quality-of-Life Misdemeanor Arrests, and Felony Crime in New York City, 2010-2015* (New York: NYPD Office of the Inspector General), 5, <https://perma.cc/6CDG-LCGC>.
- 42 Brian Mann, "The Drug Laws that Changed How We Punish," NPR, February 14, 2013, <https://perma.cc/P6GG-KMNS>.
- 43 The 1973 drug law was enacted as Chapters 276, 277, 278, 676, and 1051 of the 1973 Penal Laws of New York State. Significant subsequent amendments were contained in Chapters 785 and 832. For a summary of the major provisions of the 1973 law, see National Institute of Law Enforcement and Criminal Justice, U.S. Department of Justice, *The Nation's Toughest Drug Law: Evaluating the New York Experience—Final Report of the Joint Committee on New York Drug Law Evaluation* (Washington, DC: 1978), 33 & appendix, <https://perma.cc/WM5W-WFRN>.
- 44 Jim Parsons, Qing Wei, Christian Henrichson, Ernest Drucker, and Jennifer Trone, *End of an Era? The Impact of Drug Law Reform in New York City* (New York: Vera Institute of Justice, 2015), 5, <https://perma.cc/PQ3L-YBD7>.

- 45 New York State Division of Criminal Justice Services (DCJS), *Felony Drug Arrest, Indictment and Commitment Trends 1973-2008* (Albany, NY: DCJS, 2010), 6, <https://perma.cc/33S2-JEXM>.
- 46 Ernest Drucker, *A Plague of Prisons: The Epidemiology of Mass Incarceration in America* (New York: The New Press, 2011), 58-61 & table 5.5.
- 47 Parsons, et al., *End of an Era?* (2015), at 17.
- 48 Anti-Drug Abuse Act of 1986, P.L. 99-570. 100 Stat. 3207, October 27, 1986, <https://www.gpo.gov/fdsys/pkg/STATUTE-100/pdf/STATUTE-100-Pg3207.pdf>. On the federal crack cocaine law and its impacts, see generally Deborah J. Vagins and Jesselyn McCurdy, *Cracks in the System: Twenty Years of the Unjust Federal Crack Cocaine Law* (Washington, DC: ACLU, 2006), <https://perma.cc/43RP-M8JK>; and Families Against Mandatory Minimums (FAMM), *A Brief History of Crack Cocaine Sentencing Laws* (Washington, DC: FAMM, 2013), <https://perma.cc/5LNK-3QGU>. The law, which contained a 100-to-one ratio between sentences for crack versus powder cocaine, was repealed in 2010. The Fair Sentencing Act of 2010, SB 1789 (2010), <https://perma.cc/6P89-KEP4>. For an overview of state-level crack cocaine sentencing disparities, see Nicole D. Porter and Valerie Wright, *Cracked Justice* (Washington, DC: The Sentencing Project, 2011), 3, <https://perma.cc/FZ8D-ZDPT>.
- 49 See Alexander, *The New Jim Crow* (2010).
- 50 U.S. Department of Justice, *Understanding Bias: A Resource Guide* (Washington, DC: U.S. Department of Justice, 2015), 2, <https://perma.cc/XE84-7ME8>.
- 51 On the prevalence of implicit bias generally, see Justin D. Levinson, “Forgotten Racial Equality: Implicit Bias, Decisionmaking, and Misremembering,” *Duke Law Journal* 57, no. 2 (2007), 345-424, 351-52 (a number of studies have shown that “racially biased implicit attitudes and stereotypes” are “real, pervasive, and difficult to change”), <https://perma.cc/LY78-5GLA>.
- 52 Disparate treatment can emerge from any one decision point in the process or at multiple points, interacting in complex ways. Subramanian, Riley, and Mai, *Divided Justice* (2017), 24 & n.16. While in many instances disparities increase at each cumulative step of the criminal justice process, some research shows that this is not always the case. Sometimes, initial disparities can “correct” themselves later in the justice process. A study looking at “corrections” for bias in law enforcement in Driving While Intoxicated (DWI) cases in North Carolina found that Latino men were almost two-thirds more likely to have the DWI charges against them dropped than similarly situated whites. For those who were charged, moreover, Latino men were sent to jail for less time than their white counterparts. See Christopher L. Griffin, Jr., Frank A. Sloan, and Lindsey M. Eldred, “Corrections for Racial Disparities in Law Enforcement,” *William & Mary Law Review* 55, no. 4 (2014), 1365-1427, 1388-89 and table 3, <https://perma.cc/2468-MY86>. Also see Besiki Kutateladze, Whitney Tymas, and Mary Crowley, *Race and Prosecution in Manhattan* (New York: Vera Institute of Justice, 2014), 3 (researchers found that people of color were more likely than similarly-situated white people to have their cases dismissed. Researchers speculated that this could have been because of leniency or because prosecutors believed that the arrest charges in these cases were not viable), <https://perma.cc/V5F3-EJU9>; and Vera Institute of Justice, *A Prosecutor’s Guide for Advancing Racial Equity* (New York: Vera Institute of Justice, 2014), 15 (in Mecklenburg County, North Carolina [Charlotte], black people “were more likely to have more arrest charges and more serious arrest charges than whites,” but also were “more likely to have their top arrest charge rejected”), <https://perma.cc/3Y9C-7R2E>.
- 53 Implicit bias (as opposed to explicit bias) refers to attitudes and beliefs that individuals hold about people without their conscious knowledge. Thus, it is possible for individuals to act in biased ways toward certain groups of people without making a conscious decision to do so. Because most actions occur without conscious thought, implicit biases have a significant influence over people’s behavior. For more information about implicit bias and how it can lead to discrimination, see The Perception Institute, <https://perma.cc/2PNS-7X4G>. See also Katheryn Russell-Brown, “Making Implicit Bias Explicit: Black Men and the Police,” in *Policing the Black Man: Arrest, Prosecution, and Imprisonment*, edited by Angela J. Davis (New York: Pantheon, 2017), 135-60.
- 54 Jennifer L. Eberhardt, Phillip Atiba Goff, Valerie J. Purdie, and Paul G. Davies, “Seeing Black: Race, Crime, and Visual Processing,” *Journal of Personality and Social Psychology* 87, no. 6 (2004), 876-93, at 878, <https://perma.cc/XS7F-3B48>.
- 55 *Ibid.* at 885-86.
- 56 On overpolicing communities of color, see Paul Butler, *Chokehold: Policing Black Men* (New York: The New Press, 2017), chapters 2 and 3; Marc Mauer, “The Endurance of Racial Disparity in the Criminal Justice System,” in *Policing the Black Man: Arrest, Prosecution, and Imprisonment*, edited by Angela J. Davis (New York: Pantheon, 2017), 40-46; Alice Goffman, “On the Run: Wanted Men in a Philadelphia Ghetto,” *American Sociological Review* 74, no. 3 (2009), 339-57, <http://journals.sagepub.com/doi/abs/10.1177/000312240907400301>; and Hinton, *From the War on Poverty to the War on Crime* (2016). Modern policing has direct roots in practices that explicitly targeted people based on their race: the modern police force in the United States evolved out of slave patrols and night watches, which

- sought to control the movement and behavior of black people and Native Americans. See Philip S. Foner, *History of Black Americans: From Africa to the Emergence of the Cotton Kingdom* (Westport, CT: Greenwood, 1975), 206.
- 57 Shelley Hyland, Lynn Langton, and Elizabeth Davis, *Police Use of Nonfatal Force, 2002-11* (Washington, DC: Bureau of Justice Statistics, 2015), 4, <https://perma.cc/GX75-PQND>.
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- 67 See M. Marit Rehavi and Sonja B. Starr, “Racial Disparity in Federal Criminal Sentences,” *Journal of Political Economy* 122, no. 6 (2014), 1320-54, 1326 (“Legal scholars, judges and practitioners broadly agree that prosecutorial decisions play a dominant role in determining sentences”), <https://perma.cc/365A-NM73>; Birte Englisch, “Blind or Biased? Justitia’s Susceptibility to Anchoring Effects in the Courtroom Based on Given Numerical Representations,” *Law and Policy* 28, no. 4 (2006), 497-514; and Birte Englisch and Thomas Mussweiler, “Sentencing Under Uncertainty: Anchoring Effects in the Courtroom,” *Journal of Applied Social Psychology* 31, no. 7 (2001), 1535-51. Also see Colin Miller, “Anchors Away: Why the Anchoring Effect Suggests that Judges Should Be Able to Participate in Plea Discussions,” *Boston College Law Review* 54, no. 4 (2013), 1667-1725, <https://perma.cc/ED2L-427M>; and Joshua A. Haby and Eve M. Brank, “The Role of Anchoring in Plea Bargains,” *Monitor on Psychology* 44, no. 4 (2013), 30, <https://perma.cc/KF2U-BYRX>.
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Intersection of Defendants' Race, Gender, and Age in Prosecutorial Decision Making," *Journal of Criminal Justice* 38, no. 2 (2010), 185-92 (discussing the ways in which age and gender modify racially charged decision making); and Tina L. Freiburger and Kareem L. Jordan. "A Multilevel Analysis of Race on the Decision to Petition a Case in the Juvenile Court," *Race and Justice* 1, no. 2 (2011), 185-201, 188 ("Not all research examining race and juvenile court processing has found minority disadvantage. In fact, several studies have produced contradicting results at different decision points").

- 71 Sonja B. Starr and M. Marit Rehavi, "Mandatory Sentencing and Racial Disparity: Assessing the Role of Prosecutors and the Effects of Booker," *Yale Law Journal* 123, no. 1 (2013), 1-265, <https://perma.cc/29KP-EB5G>. Ethnicity can also impact the severity of a sentence. A study in Pennsylvania found that while prosecutors choose to apply mandatory minimum sentences in a minority of cases (about 18 percent), Latino men were almost twice as likely to receive a mandatory sentence as their white counterparts. Jeffery T. Ulmer, Megan C. Kurlychek, and John H. Kramer, "Prosecutorial Discretion and the Imposition of Mandatory Minimum Sentences," *Journal of Research in Crime and Delinquency* 44, no. 4 (2007), 427-58, 442.
- 72 Charles Crawford, Ted Chiricos, and Gary Kleck, "Race, Racial Threat, and Sentencing of Habitual Offenders," *Criminology* 36, no. 3 (2006), 481-512, 503.
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- 76 Jeffrey J. Rachlinski, Sheri Johnson, Andrew J. Wistrich, and Chris Guthrie, "Does Unconscious Racial Bias Affect Trial Judges?" *Notre Dame Law Review*, 84, no. 3 (2008-2009), 1195-1246, 1223, <https://perma.cc/2GRH-97X4>.
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- 91 Joshua D. Levinson and Danielle Young, “Different Shades of Bias: Skin Tone, Implicit Racial Bias, and Judgments of Ambiguous Evidence,” *West Virginia Law Review* 112 (2010), 307-50, 310-11. In this study, researchers showed mock jurors security camera footage of either a light-skinned or dark-skinned perpetrator, then presented trial evidence and asked them to evaluate just “how much each piece of evidence tended to indicate whether the defendant was guilty or not guilty.” They found that mock jurors who viewed the photo of the dark-skinned perpetrator adjudged the evidence as more indicative of guilt compared to those who viewed the photo of the light-skinned perpetrator.
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- 97 Black people are arrested at higher rates for violent and property crimes. In 2015, they accounted for 36 percent of violent crime arrests, 28 percent of property crime arrests, and 51 percent of murder and

- non-negligent manslaughter arrests. Nazgol Ghandnoosh, *Race and Punishment: Racial Perceptions of Crime and Support for Punitive Policies* (Washington, DC: The Sentencing Project, 2014), 20 (citing Federal Bureau of Investigation, “Crime in the United States 2015,” table 43A (arrests by race and ethnicity, 2015), <https://perma.cc/AKG8-EYNV>, <https://perma.cc/TA8F-SFEH>). Arrest rates are an imperfect measure of actual rates of offending, however, given the history of overpolicing primarily black communities. When comparing arrest rates to imprisonment rates for different offenses, Alfred Blumstein found that in 1991 “[d]ifferential arrest rates accounted for the over-representation of blacks in prison by 89 percent for robbery, 75 percent for burglary, and 50 percent for drug crimes.” Ghandnoosh, *Race and Punishment* (2014), at 21 (citing Alfred Blumstein, “Racial Disproportionality of U.S. Prison Populations Revisited,” *University of Colorado Law Review* 64, no. 3 (1993), 743-60).
- 98 On education: While 5 percent of white children grow up with a parent who did not graduate from high school, 12 percent of black and 40 percent of Latino children grow up with a parent who did not graduate from high school. American Psychological Association Presidential Task Force on Educational Disparities, *Ethnic and Racial Disparities in Education: Psychology’s Contributions to Understanding and Reducing Disparities* (Washington, DC: American Psychological Association, 2012), 17, <https://perma.cc/G87C-X8GB>. The quality of education sometimes differs based on the racial composition of a school. A 2007 study showed that white students on average attend schools where 77 percent of the children are white, while black or Latino students typically attend schools where at approximately two-thirds of the students are also black or Latino. Gary Orfield and Chungmei Lee, *Historic Reversals, Accelerating Resegregation, and the Need for New Integration Strategies* (Los Angeles: The Civil Rights Project/ Proyecto Derechos Civiles, UCLA, 2007), 24-26, <https://perma.cc/7ZQH-TS2Y>. Approximately two-thirds of teachers in predominantly white schools are certified to teach in their subject areas, while only about half of teachers in predominantly black or Latino schools are so certified. APA Task Force, *Ethnic and Racial Disparities*, (2012), at 17. On unemployment: The unemployment rate for black people in 2016 averaged 8.4 percent, compared to 4.3 percent for white people and 5.8 percent for Latino people. Bureau of Labor Statistics, “Unemployment Rate and Employment-Population Ratio Vary by Race and Ethnicity,” January 13, 2017, <https://perma.cc/CD29-ZLTE>. Unemployment in particular has been linked to a greater likelihood of incarceration, particularly for unemployed black men. Theodore G. Chiricos and William D. Bales, “Unemployment and Punishment: An Empirical Assessment” *Criminology* 29, no. 4 (1991), 701-24. On household wealth: The median household income for black families in 2016 was just \$39,490, compared to \$65,041 for white, non-Latino families. Semega, Fontenot, and Kollar, *Income and Poverty 2016* (2017), at 5.
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104 Don Stemen, *The Prison Paradox: More Incarceration Will Not Make Us Safer* (New York: Vera Institute of Justice, 2017), 2 (citing Todd R. Clear, “The Effects of High Imprisonment Rates on Communities,” *Crime and Justice* 37, no. 1 (2008)), <https://perma.cc/5TBR-WSDC>.

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