

# RACE, DRUGS, AND LAW ENFORCEMENT IN THE UNITED STATES

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Since the mid-1980s, the United States has pursued aggressive law enforcement strategies to curtail the use and distribution of illegal drugs. The costs and benefits of this national “war on drugs” remain fiercely debated.<sup>1</sup> What is not debatable, however, is that this ostensibly race-neutral effort has been waged primarily against black Americans. Relative to their numbers in the general population and among drug offenders, black Americans are disproportionately arrested, convicted, and incarcerated on drug charges.

Public officials have been relatively untroubled by the disproportionate arrest and incarceration of blacks for drug offenses. Their relative indifference—and that of the public at large—no doubt reflects, to varying degrees, partisan politics, “tough on crime” punitive philosophies, misinformation about drugs, an uncritical embrace of drug war logic, and misguided notions about the needs of poor urban communities. But to some extent it also reflects conscious and unconscious views about race. Indeed, those views have been woven into the very fabric of American anti-drug efforts, influencing the definition of the “drug problem” and the nature of the response to it.

Although whites are relatively untouched by anti-drug efforts compared to blacks,<sup>2</sup> supporters of the drug war may not see a problem of race discrimination because they do not believe the purpose of drug law enforcement is to harm blacks—if anything, drug law enforcement is seen as protecting minority communities from addiction, harassment, and violence. Perhaps without realizing it, they have accepted the same definition of discrimination that the courts use in constitutional equal protection cases—absent ill-intent, there is no discrimination.

The requirements of a malign intent as well as a racially disparate effect for

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1. For succinct summaries of the opposing views, see Ethan Nadelmann, Op-Ed., *Let’s End Drug Prohibition*, WALL ST. J., December 5, 2008, and John P. Walters, Op-Ed., *Our Drug Policy Is a Success*, WALL ST. J., December 5, 2008.

2. See *infra* Part II.

a finding of racial discrimination in United States constitutional jurisprudence differ from those in the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), which the United States has ratified.<sup>3</sup> In defining discrimination, the treaty decouples intent from impact. Prohibited discrimination occurs where there is an unjustifiable disparate impact on a racial or ethnic group, regardless of whether there is any intent to discriminate against that group. Where official policies or practices are racially discriminatory, the State party to the treaty must act affirmatively to prevent or end them. Indeed, full compliance requires elimination of racial inequalities resulting from structural racism.<sup>4</sup>

As a party to ICERD, the United States is bound by its provisions and obligated to ensure its fulfillment.<sup>5</sup> It must “condemn racial discrimination and undertake to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms.”<sup>6</sup> It must not engage in any act or practice “of racial discrimination against person, groups of persons or institutions and . . . [it must] ensure that all public authorities and public institutions, national and local, shall act in conformity with this obligation.”<sup>7</sup> In addition, it must “review governmental, national and local policies, and . . . amend, rescind or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination wherever it exists.”<sup>8</sup>

The United States has claimed that “the framework of legal prohibitions and enforcement mechanisms [existing in the United States] not only satisfies the requirements of [ICERD], but serves as an example to the world, of which

3. International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), G.A. Res. 20/2106 Annex, U.N. GAOR Supp. No. 14, at 47, U.N. Doc A/6014 (Dec. 21, 1965), 660 U.N.T.S. 195, *ratified by the United States* November 20, 1994 [hereinafter ICERD].

4. Structural racism has been defined as “a system in which public policies, institutional practices, cultural representations and other norms work in various, often reinforcing ways to perpetuate racial group inequity. It identifies dimensions of our history and culture that have allowed privileges associated with ‘whiteness’ and disadvantages associated with ‘color’ to endure and adapt over time.” LAWRENCE, ET AL., THE ASPEN INSTITUTE ROUNDTABLE ON COMMUNITY CHANGE, STRUCTURAL RACISM AND COMMUNITY BUILDING 11 (2004).

5. *Medellin v. Texas*, 170 L. Ed. 2d 190, 210 (2008); see David Sloss, *The Domestication of International Human Rights: Non-Self Executing Declarations and Human Rights Treaties*, 24 YALE J. INT’L L. 129, 174-74 (1999).

6. ICERD, *supra* note 3, at Art. 2(1).

7. *Id.* at Art. 2(1)(a).

8. *Id.* at Art. 2(1)(c). The obligation to review and eliminate racial discrimination is not contingent on lawsuits by aggrieved individuals or groups or, indeed, on any petition to the congressional or legislative branches. ICERD does, however, require State parties to ensure that “competent national tribunals and other State institutions” offer effective protection and remedies against racial discrimination and to ensure that everyone has the right to seek reparation in court for damages suffered because of the discrimination. *Id.* at Art. 6.

the United States should be very proud.”<sup>9</sup> It is true that many of the provisions of ICERD are similar to those already contained in federal and state constitutions and legislation. But ICERD is more protective than those laws. If it is to satisfy its treaty obligations, the United States must “take greater responsibility for the role it plays—and has played—in creating and perpetuating racial discrimination and inequality.”<sup>10</sup> Unfortunately, the United States has failed to identify and eliminate public policies and practices that have an unjustifiable racially disparate impact, regardless of whether they are accompanied by racist intent. Racial disparities in the war on drugs may be one of the most striking examples of this country’s failure to satisfy ICERD.

Direct enforcement mechanisms of ICERD are lacking. The United States ratified the treaty with a number of reservations, understandings and declarations (RUDs) designed to ensure that becoming a party to ICERD would not require any changes in United States law.<sup>11</sup> Perhaps most significantly, a declaration rendered ICERD non-self-executing, that is, private causes of action could not be based on any treaty provision.<sup>12</sup> As critics have noted, “the endorsement of the most important treaty for the protection of civil rights yielded not a single additional enforceable right to citizens and residents of the United States.”<sup>13</sup> Nor are there international mechanisms under which the United States can be compelled to satisfy its treaty obligations. The Committee on the Elimination of Racial Discrimination created by the treaty reviews States Par-

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9. *International Convention on the Elimination of All Forms of Racial Discrimination: Hearings on S.103-659 Before the S. Comm. on Foreign Relations*, 103d Cong. (1994) (Statement of Deval Patrick, Assistant Att’y Gen., Civil Rights Division, Dep’t of Justice).

10. Michael B. de Leeuw et al., *The Current State of Residential Segregation and Housing Discrimination: The United States’ Obligations under the International Convention on the Elimination of All Forms of Racial Discrimination*, 13 MICH. J. RACE & L. 337, 340 (2008). See HUMAN RIGHTS WATCH, SUBMISSION TO THE COMMITTEE ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION 5-6 (2008) (stating that because ratified treaties are the “supreme law of the land” pursuant to Article VI of the U.S. Constitution, the federal government is obligated to assume responsibility for U.S. compliance with ICERD and to ensure federal, state, and local authorities act in conformity with it); see Michael B. de Leeuw et al., *The Current State of Residential Segregation and Housing Discrimination: The United States’ Obligations under the International Convention on the Elimination of All Forms of Racial Discrimination*, 13 MICH. J. RACE & L. 337, 340 (2008).

11. The Senate ratification of ICERD contained fourteen RUDs. S. Res. 4783-84, 102d Cong. (1992). A thorough discussion of the RUDs is in Connie de la Vega, *Civil Rights During the 1990s: New Treaty Law Could Help Immensely*, 65 U. CIN. L. REV. 423 (1997).

12. See de la Vega, *supra* note 11, for a discussion of the non-self-executing declaration and its validity.

13. Nkechi Taifa, *Codification or Castration? The Applicability of the International Convention to Eliminate All Forms of Racial Discrimination to the U.S. Criminal Justice System*, 40 HOW. L.J. 641, 643 (1997). The non-self-executing status of ICERD could nonetheless be challenged in court on various grounds. See Terry D. Johnson, *Unbridled Discretion and Color Consciousness: Violating International Human Rights in the United States Criminal Justice System*, 56 RUTGERS L. REV. 231 (2003).

ties' policies and practices and makes recommendations, but has no power to compel compliance with those recommendations.<sup>14</sup>

ICERD is extremely important nonetheless. Even if it does not provide a basis for a cause of action, plaintiffs in civil rights litigation can argue that United States laws should be interpreted in accordance with the treaty. Wholly apart from litigation, the Convention reflects an international consensus on the importance of eliminating racial discrimination, including that which is indirect and hidden behind ostensibly race neutral laws. As a country which prides itself as a leader in promoting racial equality, the United States does not want to be seen as violating or ignoring its treaty obligations. ICERD thus offers a powerful rights-based framework for individuals and organizations seeking to call attention to and develop support for measures to eliminate racial injustice in the United States' war on drugs, as well as in so many other dimensions of American life. At the moment, many public officials are unaware of ICERD.<sup>15</sup> Vigorous and persistent advocacy could change that and help give life to the values and promises the Convention embodies.

In this Article, I briefly recap the role of race in the concerns that prompted and continue to animate the war on drugs, document the racial disparities in the arrest and incarceration of drug offenders, and argue that racial discrimination in the war on drugs violates U.S. obligations under ICERD. There have been numerous detailed, cogent, and, in my judgment, appropriately damning as-

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14. Article 8 of ICERD creates a Committee on the Elimination of Racial Discrimination (CERD) consisting of eighteen individuals elected by secret ballot. The Committee monitors States parties' compliance with the treaty by reviewing the periodic reports that States parties are required to submit every four years under Article 9. It also has a role if one State party brings a complaint against another for failure to comply with ICERD's Article 12, and it may receive complaints from individuals or groups against a State party if that party has formally recognized the competence of the Committee to do so. ICERD, *supra* note 3, at Art. 14. The United States has not recognized that competence of the Committee. The United States has twice submitted periodic reports to the Committee and has appeared twice in Geneva before the Committee. The written reports by the United States government to the Committee are prepared by the U.S. Department of State with extensive assistance from other federal agencies. When the Committee has reviewed the report, a delegation of officials organized, again by the Department of State and drawn primarily from federal agencies, has gone to Geneva to participate in the Committee's review.

15. In 2007, Human Rights Watch contacted the attorneys general of each state; not one of them was aware of ICERD and their obligations under it. HUMAN RIGHTS WATCH, *supra* note 10, at 7-9; *see also* CERD, CONSIDERATION OF REPORTS SUBMITTED BY STATE PARTIES UNDER ARTICLE 9 OF THE CONVENTION: CONCLUDING OBSERVATIONS, UNITED STATES OF AMERICA, CERD/C/USA/CO/6, at ¶ 36 (2008) [hereinafter CERD, CONSIDERATION OF REPORTS] (recommending that the United States "organize public awareness and education programmes on the Convention and its provisions, and step up its efforts to make government officials, the judiciary, federal and state law enforcement officials, teachers, social workers and the public in general aware about the responsibilities of the State party under the convention, as well as the mechanisms and procedures provided for by the Convention in the field of racial discrimination and intolerance").

assessments of the war on drugs, including the ways in which it has violated the rights of black Americans. I make no effort here to do justice to that literature. My more limited goals are twofold: First, to remind readers that the war on drugs has always been and continues to be targeted primarily at black drug offenders. And second, to encourage readers who care about racial discrimination in the United States criminal justice system in general, or in drug control efforts in particular, to include ICERD in their arsenal of weapons for justice.

#### PART I: RACE DEFINES THE PROBLEM

Race has been and remains inextricably involved in drug law enforcement, shaping the public perception of and response to the drug problem.<sup>16</sup> A recent study in Seattle is illustrative. Although the majority of those who shared, sold, or transferred serious drugs<sup>17</sup> in Seattle are white (indeed seventy percent of the general Seattle population is white), almost two-thirds (64.2%) of drug arrestees are black. The racially disproportionate drug arrests result from the police department's emphasis on the outdoor drug market in the racially diverse downtown area of the city, its lack of attention to other outdoor markets that are predominantly white, and its emphasis on crack. Three-quarters of the drug arrests were crack-related even though only an estimated one-third of the city's drug transactions involved crack.<sup>18</sup> Whites constitute the majority of those who deliver methamphetamine, ecstasy, powder cocaine, and heroin in Seattle; blacks are the majority of those who deliver crack. Not surprisingly then, seventy-nine percent of those arrested on crack charges were black.<sup>19</sup> The researchers could not find a "racially neutral" explanation for the police prioritization of the downtown drug markets and crack. The focus on crack offenders, for example, did not appear to be a function of the frequency of crack transactions compared to other drugs, public safety or public health concerns, crime rates, or citizen complaints. The researchers ultimately concluded that the Seattle Police Department's drug law enforcement efforts

reflect implicit racial bias: the unconscious impact of race on official percep-

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16. Katherine Beckett, Kris Nyrop & Lori Pfingst, *Race, Drugs, and Policing: Understanding Disparities in Drug Delivery Arrests*, 44 CRIMINOLOGY 1, 105 (2006); see KATHERINE BECKETT, DEFENDER ASS'N'S RACIAL DISPARITY PROJECT, RACE AND DRUG LAW ENFORCEMENT IN SEATTLE (2004), available at <http://www.soc.washington.edu/users/kbeckett/Enforcement.pdf>.

17. The drugs studied were heroin, powder cocaine, crack cocaine, methamphetamine, and ecstasy. Beckett, et al., *supra* note 16, at 110.

18. In contrast, powder cocaine was involved in an estimated 22.7% of outdoor transactions, but accounted for only 3.8% of drug arrests; methamphetamine was involved in 10.7% of outdoor transactions yet only 1.1% of drug arrests; and heroin was involved in 33% of transactions but in only 16.4% of arrests. *Id.* at 124.

19. *Id.* at 118.

tions of who and what constitutes Seattle's drug problem . . . . Indeed, the widespread racial typification of drug offenders as racialized "others" has deep historical roots and was intensified by the diffusion of potent cultural images of dangerous black crack offenders. These images appear to have had a powerful impact on popular perceptions of potential drug offenders, and, as a result, law enforcement practices in Seattle.<sup>20</sup>

The racial dynamics reflected in Seattle's current drug law enforcement priorities are long-standing and can be found across the country. Indeed, they provided the impetus for the "war on drugs" that began in the mid-1980s.<sup>21</sup> Spearheaded by federal drug policy initiatives that significantly increased federal penalties for drug offenses and markedly increased federal funds for state anti-drug efforts, the drug war reflected the popularity of "tough on crime" policies emphasizing harsh punishments as the key to curbing drugs and restoring law and order in America.<sup>22</sup> The drug of principal concern was crack cocaine, erroneously believed to be a drug used primarily by black Americans. The use of cocaine, primarily powder cocaine, had increased in the late 1970s and early 1980s, particularly among whites, but powder cocaine use did not provoke the "orgy of media and political attention"<sup>23</sup> that occurred in the mid-1980s when a cheaper,<sup>24</sup> smokable cocaine in the form of crack appeared.<sup>25</sup>

20. Beckett et al., *supra* note 16, at 130.

21. There is an extensive literature on the origins and impact of the war on drugs. *E.g.*, EVA BERTRAM ET AL., *DRUG WAR POLITICS: THE PRICE OF DENIAL* (1996); *CRACK IN AMERICA: DEMON DRUGS AND SOCIAL JUSTICE* (Craig Reinerman & Harry G. Levine, eds., 1997); STEVEN B. DUKE & ALBERT C. GROSS, *AMERICA'S LONGEST WAR: RETHINKING OUR TRAGIC CRUSADE AGAINST DRUGS* (1994); MARC MAUER, *THE SENT'G PROJECT, RACE TO INCARCERATE* (1999); MICHAEL TONRY, *MALIGN NEGLECT: RACE, CRIME AND PUNISHMENT IN AMERICA* (1995).

22. *See generally* HUMAN RIGHTS WATCH, *PUNISHMENT AND PREJUDICE: RACIAL DISPARITIES IN THE WAR ON DRUGS* (2000).

23. Craig Reinerman & Harry G. Levine, *The Crack Attack, Politics and Media in the Crack Scare*, in *CRACK IN AMERICA* 18 (Craig Reinerman & Harry G. Levine eds., 1997).

24. Crack can be sold in single dose "rocks," which makes it more accessible to lower income people. Powder cocaine is sold in larger, more expensive quantities.

25. All forms of cocaine (e.g., powder, freebase, crack) are powerful stimulants. Powder cocaine is the most commonly used form of cocaine and is typically snorted, injected, or ingested. Crack cocaine, which is made by dissolving powder cocaine in a solution of sodium bicarbonate and water, is smoked. Cocaine in any form produces the same type of physiological and psychotropic effects, although the onset, intensity, and duration of the effects are related to the method of use. "It is this difference in *typical* methods of administration, not differences in the inherent properties of the two forms of the drugs, that makes crack cocaine more potentially addictive to *typical* users. Smoking crack cocaine produces quicker onset of, shorter-lasting, and more intense effects than snorting powder cocaine. These factors in turn result in a greater likelihood that the user will administer the drug more frequently to sustain these shorter 'highs' and develop an addiction." U.S. SENT'G COMM'N, *REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY* 19 (2002), available at [http://www.ussc.gov/r\\_congress/02crack/2002crackrpt.pdf](http://www.ussc.gov/r_congress/02crack/2002crackrpt.pdf) (emphasis in original).

Crack was the latest in a series of drugs that since the late nineteenth century have preoccupied policy makers in the United States.<sup>26</sup> In each case, “the drug of primary concern was strongly associated in the white public mind with a particular racial minority.”<sup>27</sup> Race was the lens through which drug problems in the United States were viewed, coloring both the definition of the problem and the proposed solutions.<sup>28</sup> As the case of Seattle exemplifies, race continues today to influence the perceptions of the danger posed by those who use and sell illicit drugs, the choice of drugs that warrant the most public attention,<sup>29</sup> and the choice of communities in which to concentrate drug law enforcement resources.<sup>30</sup>

Although the use of crack was by no means limited to low-income, urban, minority neighborhoods,<sup>31</sup> it was those neighborhoods which more visibly suf-

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26. Although crack became a principal target of drug control efforts, powder cocaine has always been far more prevalent. The 1993 federal National Household Survey on Drug Abuse (NHSDA), for example, found that 11.3% of the population had used cocaine in their lifetime, but only 1.8% had used crack cocaine. U.S. DEP’T OF HEALTH & HUMAN SERVS., NAT’L INST. ON DRUG ABUSE, *DRUG USE AMONG RACIAL/ETHNIC MINORITIES* 13-14 (1995). The 2006 national survey found that an estimated 8,554,000 persons twelve years or older had used crack cocaine at least once in their lifetime while an estimated 35,298,000 persons has used powder cocaine. U.S. DEP’T OF HEALTH & HUMAN SERVICES, SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN. (SAMHSA), *RESULTS FROM THE 2006 NATIONAL SURVEY ON DRUG USE AND HEALTH: NATIONAL FINDINGS*, at tbl.G.1 (2007), available at <http://www.oas.samhsa.gov/NSDUH/2K6NSDUH/AppG.htm>. SAMHSA’s prevalence estimates are based on a survey of representative households and non-institutional group quarters nationwide.

27. DAVID MUSTO, *THE AMERICAN DISEASE: ORIGINS OF NARCOTIC CONTROL* (1973).

28. David Sklansky, *Cocaine, Race, and Equal Protection*, 47 *STAN. L. REV.* 1283, 1284 (1995).

29. Methamphetamine is something of an exception. It is a drug that has recently garnered public concern and law enforcement attention, although it is used primarily by whites. Among state and federal prisoners, whites were twenty times more likely than blacks to report recent methamphetamine use. CHRISTOPHER J. MUMOLA & JENNIFER C. KARBERG, BUREAU OF JUSTICE STATS., *DRUG USE AND DEPENDENCE, STATE AND FEDERAL PRISONERS*, 2004 (2006).

30. Kenneth B. Nunn, *Crime and the Pool of Surplus Criminality: Or Why the “War On Drugs” Was a “War on Blacks,”* 6 *J. GENDER RACE & JUSTICE* 381, 390 (2002) (“In the minds of the criminal justice system’s managers, planners and workers, drugs are frequently associated with African-American citizens and their communities. The criminal justice system shapes its policies and practices according to this perception.”).

31. Although crack is associated in the public mind with black Americans, the number of whites using crack has always exceeded the number of blacks. In 1991, for example, of those reporting they had ever used crack, 65% were white, 26% were black, and 9% were Hispanic. U.S. SENT’G COMM’N, *SPECIAL REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY* 35 (1995). In 2006, 5,553,000 whites (3.3%) reported ever using crack in their lifetime, compared to 1,537,000 blacks (5.3%). U.S. DEP’T OF HEALTH & HUMAN SERVICES, SUBSTANCE ABUSE & MENTAL HEALTH SERVICES ADMIN. (SAMHSA), *RESULTS FROM THE 2006 NATIONAL SURVEY ON DRUG USE AND HEALTH: NATIONAL FINDINGS*, at tbls. 1.34A, B (2006). A study in Miami found few differences in level of crack use in a street-

ferred from crack addiction, and the nuisance and violence that accompanied the struggle of different drug-dealing groups to establish control over its distribution in the 1980s and 1990s.<sup>32</sup> The dismay of local residents, however, was exceeded by the censure and outrage from outsiders fanned by sensationalist media stories and by politicians eager to seek electoral advantage.<sup>33</sup> With politicians and the media focused on the putative effects of crack in inner-city neighborhoods—although many of those effects were subsequently proven to have been greatly exaggerated or just plain wrong<sup>34</sup>—those neighborhoods became and remain the principal “fronts” in the war on drugs.

Crack in black neighborhoods was a lightning rod for a complicated and deep-rooted set of racial, class, political, social, and moral dynamics. Politicians were able to woo a white electorate anxious about its declining status through the race-coded language of “drugs” and “crime.”<sup>35</sup>

Public discourse focused on addiction and violence but the subtext was understood as that of race. Crack cocaine was perceived as a drug of the Black inner-city urban poor, while powder cocaine, with its higher costs, was a drug of wealthy whites . . . . This framing of the drug in class and race-based terms

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based sample of cocaine users aged thirteen to twenty-nine based on race and that more than 90% of participants reported that crack was primary form of cocaine they used, regardless of race. Among older cocaine users, whites were more likely than blacks to report crack as the primary form of cocaine used. Dorothy Lockwood, Anne Pottieger, & James Inciardi, *Crack Use, Crime by Crack Users, and Ethnicity*, in *ETHNICITY, RACE AND CRIME* (Darnell F. Hawkins eds., 1994). Research also suggested that “crack cocaine smoking did not depend strongly on the race of the individual, but instead on social conditions. . . . [I]f factors such as drug availability and social conditions are held constant, the odds of crack cocaine use within a population do not differ significantly by race/ethnicity.” U.S. SENT’G COMM’N, SPECIAL REPORT TO THE CONGRESS 1995, at 35 (1995) (citing M. Lillie-Blanton et al., *Probing the Meaning of Racial/Ethnic Group Comparisons in Crack Cocaine Smoking*, 269 J. AM. MED. ASS’N 993 (1993)).

32. The history of crack’s development and use, public responses to it, the eventual development of a more scientific understanding of its chemical properties and its physical and psychological impact, and recognition of the profound racially disproportionate impact of targeting crack for harsher federal sentences are presented dispassionately and thoroughly in several reports to Congress by the United States Sentencing Commission on federal crack cocaine. U.S. SENT’G COMM’N, *supra* note 31; U.S. SENT’G COMM’N, REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY (2002); U.S. SENT’G COMM’N, REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY (2007). The deleterious social impact of crack markets faded markedly by the late 1990s even though crack use remained relatively constant. A recent analysis concludes that the greatest social costs of crack have been associated with prohibition-related violence, rather than drug use per se. As the crack market matured, distribution methods became established and the profitability of crack distribution declined, crack related violence declined. Roland G. Fryer, Jr. et al., *Measuring the Impact of Crack Cocaine* (Nat’l Bureau of Econ. Research Working Paper No. 11318, 2005).

33. See, e.g., Reinerman & Levine, *supra* note 23.

34. See sources *supra* note 32.

35. KATHERINE BECKETT, MAKING CRIME PAY: LAW AND ORDER IN CONTEMPORARY AMERICAN POLITICS (1999).



provides important context when evaluating the legislative response.<sup>36</sup> That response, most notoriously, included the federal Anti-Drug Abuse Act of 1986 and the Anti-Drug Abuse Act of 1988, which imposed far higher penalties for possession or sale of crack cocaine than powder cocaine, as well as state laws that required prison sentences even for low level drug offenses.<sup>37</sup>

The legislative and law enforcement responses to crack “cannot be attributed solely to objective levels of criminal danger, but [also reflect] the way in which minority behaviors are symbolically constructed and subjected to official social control.”<sup>38</sup> Law enforcement efforts against crack in poor minority neighborhoods reinforced control of the urban “underclass,” a group deemed by the political and white majority to be particularly “dangerous, offensive and undesirable.”<sup>39</sup> The conflation of the underclass with crack offenders meant the perceived dangerousness of one increased the perceived threat of the other. Urban blacks, the population most burdened by concentrated socio-economic disadvantage, became the population at which the war on drugs was targeted.<sup>40</sup>

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36. THE SENT'G PROJECT, RACIAL DISPARITY IN CRIMINAL COURT PROCESSING IN THE UNITED STATES, SUBMITTED BY THE SENTENCING PROJECT TO UNITED NATIONS COMMITTEE ON THE ELIMINATION OF RACIAL DISCRIMINATION 20 (2007), *available at* <http://www.sentencingproject.org/Admin/Documents/publications/CERD%20December%202007.pdf>.

37. Sklansky, *supra* note 28, at 1284. Crack became the only drug with a five-year mandatory federal sentence for simple possession. Under the infamous one-hundred-to-one ratio, five grams of crack cocaine garners a five-year mandatory sentence; it takes five-hundred grams of powder cocaine to get the same sentence. Similarly, fifty grams of crack cocaine versus five-thousand grams of powder cocaine triggers a ten-year mandatory sentence. The sentencing laws of ten states also distinguish between powder and crack cocaine. For many observers, the federal crack/powder cocaine sentencing differential is the paradigmatic expression of the racially discriminatory nature of the national anti-drug effort. Because blacks are disproportionately arrested and convicted on crack charges (blacks constitute the great preponderance of federal crack defendants), they bear the burden of the crack sentences which are on average 43.5% longer than those for powder cocaine. U.S. SENT'G COMM'N, 2006 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS fig.J (2006), *available at* <http://www.ussc.gov/ANNRPT/2006/figj.pdf> at (2006). For comprehensive data on racial disparities in crack versus powder arrests and incarceration under federal law, see the United States Sentencing Commission, <http://www.ussc.gov>. The testimony of witnesses at Sentencing Commission hearings on the federal crack/powder sentencing differential, including critics and supporters, is summarized in Sentencing Committee reports, which are available on the Commission's website.

38. Robert J. Sampson & Janet L. Lauritsen, *Racial and Ethnic Disparities in Crime and Criminal Justice in the United States*, in *ETHNICITY, CRIME AND IMMIGRATION: COMPARATIVE AND CROSS-NATIONAL PERSPECTIVES* 364 (Michael Tonry ed., 1997); *see also* BECKETT, *supra* note 35 (arguing that wars on crime and drugs reflected efforts by politicians to mobilize a white electorate anxious over its declining status through the race-coded language of crime).

39. Sampson & Lauritsen, *supra* note 38, at 358.

40. *Id.* at 361.

## PART II: WHO ENGAGES IN DRUG OFFENSES?

When asked to close their eyes and envision a drug offender, Americans did not picture a white middle class man snorting powder cocaine or college students smoking marijuana. They pictured unkempt African-American men and women slouched in alleyways or young blacks hanging around urban street corners.<sup>41</sup> At least for the last twenty years, however, whites have engaged in drug offenses at rates higher than blacks.

According to the 2006 surveys conducted by the federal Substance Abuse and Mental Health Services Administration (SAMHSA), an estimated 49% of whites and 42.9% of blacks age twelve or older have used illicit drugs in their lifetimes; 14.5% of whites and 16% of blacks have used them in the past year; and 8.5% of whites and 9.8% of blacks have used them in the past month.<sup>42</sup> Because the white population is more than six times greater than the black population, the absolute number of white drug offenders is far greater than that of black drug offenders.<sup>43</sup> SAMHSA estimates that 111,774,000 people in the United States age twelve or older have used illicit drugs during their lifetime, of whom 82,587,000 are white and 12,477,000 are black.<sup>44</sup> Even among powder and crack cocaine users—which remain a principal focus of law enforcement—there are more whites than blacks.<sup>45</sup> According to SAMHSA’s calculations, there are 27,083,000 whites who have used cocaine during their lifetime, compared to 2,618,000 blacks and, indeed, 5,553,000 whites who have used crack cocaine, compared to 1,537,000 blacks.<sup>46</sup>

According to the most recent SAMHSA survey, if black and white drug

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41. Leonard Saxce et al., *The Visibility of Illicit Drugs: Implications for Community-Based Drug Control Strategies*, 91 AM. J. OF PUB. HEALTH 1987, 1987-94 (2001), available at <http://www.pubmedcentral.nih.gov/articlerender.fcgi?artid=1446920>.

42. SAMHSA, *supra* note 31, at tbl.1.19B. These surveys are a reasonably reliable indicator of drug use. Because they are “household” surveys, however, they undercount the homeless, people in jail and prison, and others without permanent homes.

43. There are 241,167,000 whites and 38,756,000 blacks living in the United States. U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES tbl.6 (2008). Blacks constitute about 12.8% of the U.S. population and whites constitute 80%.

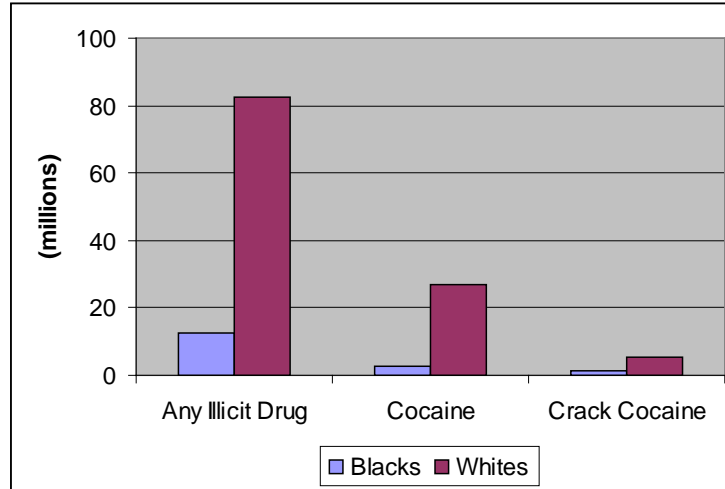
44. SAMHSA, *supra* note 31, at tbl.1.19A.

45. Although other illegal drugs receive law enforcement attention, cocaine remains the single most important target. For example, in 2006, 44.4% of all federal drug cases involved cocaine (crack and powder). U.S. SENT’G COMM’N, *supra* note 37, at fig.K.

46. SAMHSA, *supra* note 31, at tbl.1.33A (cocaine use), tbl.1.34A (crack use). In recent surveys of youth ages twelve through seventeen, whites report higher illicit drug use than blacks. The proportion of white youths who reported using cocaine in the year prior to the survey (5.4) was five times higher than the proportion of blacks (1.0); for crack, the white proportion (2.2) was nearly double that of blacks (1.2); and a significantly higher proportion of whites reported marijuana use (37.9) than blacks (26.3). HOWARD N. SNYDER & MELISSA SICKMUND, U.S. DEP’T OF JUSTICE, OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, JUVENILE OFFENDERS AND VICTIMS: 2006 NATIONAL REPORT 76 (2006).

users are combined, blacks account for 13% of the total who have ever used an illicit drug, 8% of those who have ever used cocaine, and 21% of those who have ever used crack cocaine. They represent a comparably small proportion of those who engage in non-possession drug offenses as well.

FIGURE 1: Lifetime Drug Use by Race, Ages 12 and Older<sup>47</sup>



By definition, drug users violate laws against drug possession. They also frequently engage in illegal drug distribution activities—e.g., selling drugs for cash or providing them to friends.<sup>48</sup> If, as Figure 1 indicates, blacks constitute a relatively small proportion of those who use drugs (between 13% and 20% de-

47. Estimates for drug use by persons age twelve and older from SAMHSA, *supra* note 31.

48. There is considerable research indicating that “many frequent drug users participate in some aspect of the drug distribution system in order to support their drug habit and/or generate income.” BECKETT, *supra* note 16, at 32; *see* U.S. DEP’T OF JUSTICE, DRUGS, CRIME AND THE JUSTICE SYSTEM: A NATIONAL REPORT FROM THE BUREAU OF JUSTICE STATISTICS 59 (1992) (explaining that one of “the major reasons for being a [drug] distributor is to support one’s own use and to assure access to a drug supply”); PETER REUTER, ROBERT MACCOUN & PATRICK MURPHY, RAND CORP., MONEY FROM CRIME: A STUDY OF THE ECONOMICS OF DRUG DEALING IN WASHINGTON, D.C. (1990) (stating that dealers are heavy users who use proceeds from drug sales to finance drugs for own use). Sociologist Pamela E. Oliver points out that “most users of illegal drugs meet the legal definition of delivering illegal drugs because of the way an illegal market works, where people make buys and redistribute to their friends.” PAMELA E. OLIVER, RACIAL DISPARITY IN THE DRUG WAR AND OTHER CRIMES: ARRESTS, PRISON SENTENCES, PROBATION AND PROBATION REVOCATIONS AS SOURCES OF PRISON ADMISSIONS DISPARITIES, *in* COMM’N ON REDUCING RACIAL DISPARITIES IN THE WISC. JUSTICE SYSTEM, FINAL REPORT, at App. (2008), <http://doaftp04.doa.state.wi.us/doadocs/web.pdf>.

pending on the drug), they likely constitute a comparable proportion of those who engage in other illegal drug-related activities. Although there is little direct research on the race of drug sellers, for example, that which exists suggests a racial breakdown among sellers similar to that among users. National surveys of drug abuse conducted by the federal Substance Abuse and Mental Health Services Administration have sometimes included questions on drug selling. In 1991, 0.7% of adult whites and 1.4% of adult blacks reported selling drugs in the past twelve months. Although the proportion of sellers was twice that among blacks than among whites, in absolute numbers far more whites (939,345) reported drug selling than blacks (268,170).<sup>49</sup> Black sellers constituted 12% of the combined number of self-reported black and white sellers. Fifteen years later, 1.6% of whites and 2.8% of blacks surveyed in 2006 reported they had sold drugs in the past twelve months, or an estimated 2,461,797 whites, and 712,044 blacks. Blacks thus represented 14% of the combined black and white sellers.<sup>50</sup>

Evidence regarding the race of drug sellers also emerges from research in specific urban drug markets. For example, the study of Seattle's drug market, discussed above, indicates that the majority of the drug sellers are white (as are a majority of the users).<sup>51</sup> In fact, research suggests that drug users tend to obtain their drugs from people of the same race as themselves.<sup>52</sup> As one researcher addressing racial congruity in drug activities concluded, "[D]ealers with di-

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49. Author's analysis using Substance Abuse and Mental Health Data Archives, <http://www.icpsr.umich.edu/SAMHDA/>. Analysis run August 26, 2008. Data from the 1991 National Household Survey on Drug Abuse were used. Survey respondents were aged twelve or older. Hispanics and other races were reported separately from whites and blacks. Major changes in the survey methodology in 1994, between 1998 and 1999, and between 2001 and 2002, create discontinuities in the time series that make it impossible to generate comparable trends. An estimate from one period cannot be compared to another because it is not possible to tell whether any differences are due to actual, real-world differences or simply to differences in survey methods.

50. *Id.* Data from the 2006 National Survey on Drug Use and Health were used. Figures for whites and blacks do not include Hispanics. White youths apparently also are more likely to sell drugs than black youths. Surveys of a representative sampling of youths ages twelve to seventeen between 1997 and 2001 found that 17% of whites reported ever selling drugs by age seventeen, compared to 13% of blacks. Given the respective sizes of white and black youth populations, these rates would also translate into markedly greater numbers of young white than young black drug sellers. SNYDER & SICKMUND, *supra* note 46.

51. BECKETT, *supra* note 16. A large study conducted in the Miami metropolitan area revealed that over 96% of the powder and crack cocaine users in each ethnic/racial category were involved in street level drug dealing, suggesting that the racial profile of street level sellers is comparable to that of users. Lockwood et al., *supra* note 31.

52. For example, drug users in six major cities reported to researchers that their main drug sources were sellers of the same racial or ethnic background as themselves. K. JACK RILEY, NAT'L INST. OF JUSTICE & THE OFFICE OF NAT'L DRUG CONTROL POLICY, CRACK, POWDER COCAINE, AND HEROIN: DRUG PURCHASE AND USE PATTERNS IN SIX U.S. CITIES (1997).

rect contact with their customers . . . are likely to look like the customers . . .”<sup>53</sup>

Some might question whether blacks constitute a higher percentage than whites of persons occupying higher ranks in the drug business, e.g. major traffickers. Empirical research addressing this question is not available, but experts suggest that higher positions in the drug trade are not likely to be held by black individuals. The race of persons in the upper echelons of the drug trade is also not particularly relevant, because the overwhelming preponderance of drug offenders entering the criminal justice system are low-level non-violent offenders. For example, between 1980 and the present, arrests for drug sales, possession with intent to sell, manufacturing, transportation, or importing have never constituted more than 36% of all drug arrests.<sup>54</sup> Drug offenders who are incarcerated are mostly street-level dealers, couriers, and other bit players in the drug trade.<sup>55</sup>

#### A. Arrests and Incarceration of Drug Offenders

All other things being equal, if blacks constitute an estimated 13% to 20% of the total of black and white drug offenders, they should constitute a roughly similar proportion of the total number of blacks and whites who are arrested, convicted, and sent to prison for drug law violations. But all other things are not equal. The data demonstrate clearly and consistently that blacks have been

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53. Dana E. Hunt, *Drugs and Consensual Crimes: Drug Dealing and Prostitution*, in *DRUGS AND CRIME* 172 (Michael Tonry & James Q. Wilson, eds., 1990)

54. In each of the last nine years, 80% or more of all drug arrests have been for possession. HUMAN RIGHTS WATCH, *DECADES OF DISPARITY: DRUG ARRESTS AND RACE IN THE UNITED STATES* (2009).

55. For example, 61.5% of federal crack cocaine offenders and 53.1% of federal powder cocaine offenders are street-level dealers, couriers, lookouts, or perform other low-level functions. U.S. SENT’G COMM’N, *REPORT TO CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY* 19, figs. 2-4 (2007), [http://www.ussc.gov/r\\_congress/cocaine2007.pdf](http://www.ussc.gov/r_congress/cocaine2007.pdf); see also HUMAN RIGHTS WATCH, *WHO GOES TO PRISON FOR DRUG OFFENSES? A REBUTTAL TO THE NEW YORK STATE DISTRICT ATTORNEY’S ASSOCIATION* (1999), <http://www.hrw.org/campaigns/drugs/ny-drugs.htm>; News Release, Human Rights Watch, *Official Data Reveal Most New York Drug Offenders are Nonviolent* (January 7, 1999), <http://hrw.org/english/docs/1999/01/07/usdom793.htm> (showing that 63% of the men and women sent to New York prisons for drug offenses in 1998 had been convicted of the lowest level of drug offense; one in four were convicted of simple possession). A survey of state prisoners nationwide revealed that among drug offenders, 58% had no history of violence or high-level drug activity; 43% were convicted of drug possession; half reported their drug activity consisted of selling drugs to others for their personal use, i.e., street-level drug dealing. These figures were developed by The Sentencing Project from data in the 1997 Survey of Inmates conducted by the Bureau of Justice Statistics (BJS). RYAN S. KING & MARC MAUER, *THE SENT’G PROJECT, DISTORTED PRIORITIES: DRUG OFFENDERS IN STATE PRISONS* 2, 4, 7 (2002), [http://www.sentencingproject.org/Admin%5CDocuments%5Cpublications%5Cdp\\_distortedpriorities.pdf](http://www.sentencingproject.org/Admin%5CDocuments%5Cpublications%5Cdp_distortedpriorities.pdf).

and remain more likely to be arrested for drug offending behavior relative to their percentage among drug offenders than whites who engage in the same behavior. There are many reasons for the racial disparities in drug arrests, including demographics,<sup>56</sup> the extent of community complaints, police allocation of resources,<sup>57</sup> racial profiling,<sup>58</sup> and the relative ease of making drug arrests in minority urban areas compared to white areas.<sup>59</sup> One analyst has observed that

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56. Fifty-one and a half percent of blacks in the U.S. live in metropolitan areas, compared to 21.1% of whites. U.S. CENSUS BUREAU, *THE BLACK POPULATION IN THE UNITED STATES: MARCH 2002*, 2 fig.2 (2003), available at <http://www.census.gov/prod/2003pubs/p20-541.pdf>. Cities have more law enforcement resources per capita and higher arrests rates, which increases the likelihood of arrest for drug offending behavior. HUMAN RIGHTS WATCH, *TARGETING BLACKS* 45-46 (2008).

57. "The allocative question for police departments is whether to send officers to places where drug crime is both plentiful and public, or where it is both scarcer and more private. The question answers itself." William J. Stuntz, *Race, Class and Drugs*, 98 COLUM. L. REV. 1795, 1820 (1998). Stuntz also points out that the law of search and seizure disfavors drug law enforcement operations in upscale (and hence predominantly white) neighborhoods: serious cause is required to get a warrant to search a house, whereas it takes very little for police to initiate street encounters, indeed, "no more than the sorts of information they can obtain through quick observation." *Id.* at 1823.

58. Racial profiling refers to the police practice of stopping, questioning, and searching potential suspects on the street or in vehicles based solely on their racial appearance. There is considerable documentation of the practice of disproportionately stopping black drivers for minor traffic offenses as a pretext to search for drugs. Similarly, blacks have been disproportionately targeted in "stop and frisk" operations in which police temporarily detain, question and pat down pedestrians. See ACLU, *RACE AND ETHNICITY IN AMERICA: TURNING A BLIND EYE TO INJUSTICE* (2007), available at [http://www.aclu.org/pdfs/humanrights/cerd\\_full\\_report.pdf](http://www.aclu.org/pdfs/humanrights/cerd_full_report.pdf) (documenting U.S. violations of the Convention on the Elimination of All Forms of Racial Discrimination); DAVID HARRIS, ACLU, *DRIVING WHILE BLACK: RACIAL PROFILING ON OUR NATION'S HIGHWAYS*, AN AMERICAN CIVIL LIBERTIES UNION SPECIAL REPORT (1999); RONALD H. WEICH & CARLOS T. ANGULO, *JUSTICE ON TRIAL: RACIAL DISPARITIES IN THE AMERICAN CRIMINAL JUSTICE SYSTEM* (2000). In recent years, a number of states and localities have taken action against racial profiling. See CENTER FOR POLICY ALTERNATIVES, *POLICY BRIEF: RACIAL PROFILING*, available at [www.cfpa.org/issues/issue.cfm/issue/RacialProfiling.xml](http://www.cfpa.org/issues/issue.cfm/issue/RacialProfiling.xml). For a different perspective on whether the stark racial disparities in "stop and frisks" in New York City reflect racial profiling, see OFFICE OF THE ATT'Y GEN., *THE NEW YORK CITY POLICE DEPARTMENT'S "STOP AND FRISK" PRACTICES: A REPORT TO THE PEOPLE OF THE STATE OF NEW YORK* (1999); GREG RIDGEWAY, RAND CORPORATION, *ANALYSIS OF RACIAL DISPARITIES IN THE NEW YORK POLICE DEPARTMENT'S STOP, QUESTION AND FRISK PRACTICES* (2007).

59. Because drug purchases and use are consensual, police have to look for the crimes; investigations are police-initiated rather than, as with most crimes, victim initiated. Police must rely on surveillance and tactics such as "buy and bust" operations to make drug arrests. The circumstances of life and the public nature of drug transactions in poor urban neighborhoods make arrests there less difficult and less expensive than in other neighborhoods. Drug transactions in poor minority neighborhoods are more likely to be conducted on the streets, in public spaces, and between strangers, whereas in white neighborhoods, drugs are more likely to be sold indoors, in bars, clubs, and private homes. "[I]n poor urban minority neighborhoods, it is easier for undercover narcotics officers to penetrate networks of

in the war on drugs:

Racial profiling is almost inevitable. Race becomes one of the readily observable visual clues to help identify drug suspects, along with age, gender and location. There is a certain rationality to this—if you are in poor black neighborhoods, drug dealers are more likely to be black. Local distribution networks are often monoracial; downscale markets are often neighborhood-based; and downscale urban neighborhoods are often segregated . . . . The law and practice of drug enforcement is market-specific, and the markets are divided by race and class.<sup>60</sup>

Former New York Police Commissioner Lee Brown explained the police concentration in certain neighborhoods and the consequent racial impact as follows:

In most large cities, the police focus their attention on where they see conspicuous drug use—street-corner drug sales—and where they get the most complaints. Conspicuous drug use is generally in your low-income neighborhoods that generally turn out to be your minority neighborhoods . . . . It's easier for police to make an arrest when you have people selling drugs on the street corner than those who are [selling or buying drugs] in the suburbs or in office buildings. The end result is that more blacks are arrested than whites because of the relative ease in making those arrests.<sup>61</sup>

Between 1980 and 2007, there were more than twenty-five million adult drug arrests in the United States.<sup>62</sup> The percentage of arrests that involved black men and women increased from 27% in 1980 to a high ranging from 40% to 42% between 1989 and 1993, and then declined more or less steadily to the current percentage of 35%. Relative to population, blacks have been arrested on drug charges at consistently higher rates than whites. In 1980 blacks were arrested at rates almost three (2.9) times the rate of whites. In the years with the worst disparities, between 1988 and 1993, blacks were arrested at rates more

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friends and acquaintances than in more stable and closely knit working-class and middle-class neighborhoods. The stranger buying drugs on the urban street corner or in an alley, or overcoming local suspicions by hanging around for a few days and then buying drugs, was commonplace. Police undercover operations can succeed [in working and middle class neighborhoods] but they take longer, cost more, and are less likely to succeed." TONRY, *supra* note 21, at 106; see also Alfred Blumstein, *Racial Disproportionality of U.S. Prison Populations Revisited*, 64 U. OF COLO. L. REV. 751 (1993); Carole Wolff Barnes & Rodney Kingsworth, *Race, Drug, and Criminal Sentencing: Hidden Effects of the Criminal Law*, 24 J. OF CRIM. JUSTICE 39 (1996).

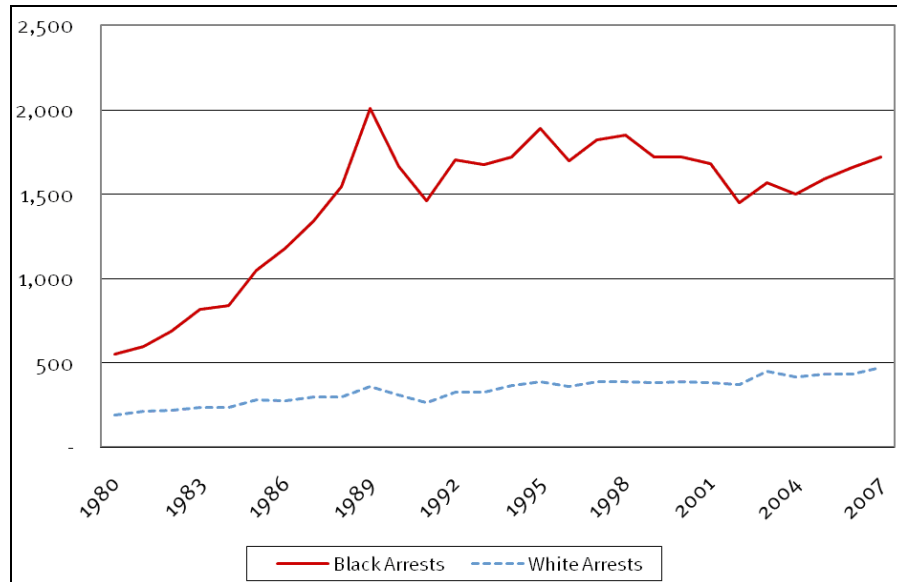
60. STUNTZ, *supra* note 57, at 1829.

61. EVA E. BERTRAM ET AL., *DRUG WAR POLITICS* 41 (1996).

62. The data on the number of adult drug arrests and the race of the drug arrestees were provided to Human Rights Watch by the FBI's Uniform Crime Reporting Program. The total number of reported arrests, 25,426,250, is less than the actual number because the arrest data only include those arrests reported by law enforcement agencies to the UCR Program and some agencies do not participate and others do not provide complete arrest data. Unless otherwise specified, information on drug arrests included here comes from HUMAN RIGHTS WATCH, *DECADES OF DISPARITY*, *supra* note 54.

than five times the rate of whites. In the last six years, the ratio of black to white drug arrest rates has ranged between 3.5 and 3.9.<sup>63</sup>

FIGURE 2: Rates of Adult Drug Arrest by Race, 1980-2007  
(arrests per 100,000 adult residents of each race)



Although the ratio of black to white arrests has decreased somewhat since the mid 1990s when it was at its highest, racial disparity in drug arrests has continued despite changes in drug use and law enforcement priorities. As the crack cocaine market began to constrict in urban areas and the use of cocaine stabilized, “[L]aw enforcement shifted its emphasis toward marijuana.”<sup>64</sup> Me-

63. Within individual states, the racial disparity in drug arrests is even more marked. In 2006, for example, the black-to-white ratio of drug arrest rates among the states ranges from a low of 2 to a high of 11.3. In nine states, blacks were arrested on drug charges at rates more than seven times greater than whites.

64. Between 1990 and 2002, marijuana arrests increased by 113% and non-marijuana arrests increased by 10%. Of the increased 450,000 arrests for drugs during this period, 82.4% were solely from marijuana arrests, almost all of them for possession. RYAN S. KING & MARC MAUER, *THE SENTENCING PROJECT, THE WAR ON MARIJUANA: THE TRANSFORMATION OF THE WAR ON DRUGS IN THE 1990s*, 3 (2005), available at [http://www.sentencingproject.org/Admin/Documents/publications/dp\\_waronmarijuana.pdf](http://www.sentencingproject.org/Admin/Documents/publications/dp_waronmarijuana.pdf). In the years 2000 through 2007, marijuana possession arrests accounted for between 37.7 and 42.1% of all drug arrests. HUMAN RIGHTS WATCH, *DECADES OF DISPARITY*, *supra* note 54, at 12. After marijuana, the drugs involved in the greatest number of arrests (39.4%) are cocaine and heroin. FED. BUREAU OF INVESTIGATION, *CRIME IN THE UNITED STATES 2007*,



thamphetamine manufacture and use emerged as law enforcement concerns in the late 1990s. Yet although marijuana use is prevalent across races,<sup>65</sup> and methamphetamine is used primarily by whites,<sup>66</sup> blacks continue to be disproportionately arrested.<sup>67</sup>

The difference between the black proportion of drug offenders and the black proportion of drug arrests reflects the ongoing salience of urban drug law enforcement, or, more specifically, drug law enforcement in black urban neighborhoods. In 2007, for example, 77% of drug arrests occurred in cities.<sup>68</sup> Although urban blacks account for approximately 6% of the national population, they constituted 29.8% of all drug arrests in 2007.<sup>69</sup> A longitudinal analysis of

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ARRESTS FOR DRUG ABUSE VIOLATIONS (2007), available at <http://www.fbi.gov/ucr/cius2007/arrests/index.html>.

65. While blacks constitute approximately 14% of marijuana users in the general population, they are 30% of those arrested for marijuana violations. KING & MAUER, *supra* note 64, at 9.

66. Regarding the race of methamphetamine users, see, e.g., U.S. SENT'G COMM'N, 2007 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, at tbl.34 (2007) (finding that 52% of those sentenced for methamphetamine use were white, 40% were Hispanic and just 2.5% were black); CHRISTOPHER J. MUMOLA & JENNIFER C. KARBERG, BUREAU OF JUSTICE STATISTICS, DRUG USE AND DEPENDENCE, STATE AND FEDERAL PRISONERS, 2004 (2006) (among state and federal prisoners, whites were twenty times more likely than blacks to report recent methamphetamine use); Note, *Cooking Up Solutions to a Cooked up Menace: Responses to Methamphetamine in a Federal System*, 119 HARV. L. REV. 2508, 2510 (2006) (“[R]esearchers have found that the dominant methamphetamine user is an employed white male between the ages of 19 and 40.”) (internal citations omitted); Avi Brisman, *Meth Chic and the Tyranny of the Immediate: Reflections on the Culture-Drug/Drug-Crime Relationships*, 82 N.D. L. REV. 1273, 1309 & n.132 (2006) (“Despite the emergence of meth in East coast metro areas, meth still appears to be far more prevalent among Caucasians than African-Americans and Hispanics or Latinos.”); cf. Nancy Rodriguez et. al., *Examining the Impact of Individual, Community, and Market Factors on Methamphetamine Use: A Tale of Two Cities*, 35 J. DRUG ISSUES 665 (2005) (explaining that some studies have found whites use methamphetamine at much higher rates than non-Whites). Although most of the meth consumed in the U.S. is manufactured in outside the country, roughly one-third of U.S. consumption comes from domestic sources. See INTERAGENCY WORKING GROUP ON SYNTHETIC DRUGS, INTERIM REPORT 3 (2005), available at [http://www.ncjrs.gov/ondcppubs/publications/pdf/interim\\_rpt.pdf](http://www.ncjrs.gov/ondcppubs/publications/pdf/interim_rpt.pdf). Some evidence has suggested that whites are more likely to be involved in domestic meth production than Hispanics or blacks. See Laurence A. Benner, *Racial Disparity in Narcotics Search Warrants*, 6 J. GENDER, RACE & JUSTICE 183, 195 (2002)

67. HUMAN RIGHTS WATCH, TARGETING BLACKS, *supra* note 56.

68. Percentage calculated on basis of 2007 arrest information provided by the FBI. FBI, CRIME IN THE UNITED STATES 2007, ARRESTS BY RACE Table 43 (2008), available at [http://www.fbi.gov/ucr/cius2007/data/table\\_43.html](http://www.fbi.gov/ucr/cius2007/data/table_43.html); FBI, CRIME IN THE UNITED STATES 2007, ARRESTS CITY BY RACE Table 49 (2008), available at [http://www.fbi.gov/ucr/cius2007/data/table\\_49.html](http://www.fbi.gov/ucr/cius2007/data/table_49.html).

69. Fifty-one and a half percent (51.5%) of blacks in the U.S. live in a metropolitan area, compared to 21.1% of whites. U.S. CENSUS BUREAU, THE BLACK POPULATION IN THE UNITED STATES: MARCH 2002, at 2 fig. 2 (2003), available at <http://www.census.gov/prod/2003pubs/p20-541.pdf>. Approximately nineteen million blacks

urban drug arrests by race shows that in the largest American cities, drug arrests for African Americans rose at three times the rate for whites between 1980 and 2003, 225% compared to 70%. In eleven cities, black drug arrests rose by more than 500%.<sup>70</sup> In the seventy-five largest counties in the United States, blacks in 2002 accounted for 46% of drug offense arrests, even though they represented only 15.6% of the population.<sup>71</sup> New York State provides a particularly striking example: blacks in New York City represent 10.7% of the state population, yet accounted for 42.1% of drug arrests statewide.<sup>72</sup>

### B. Incarceration

The racial disparities evident in drug arrests grow larger as cases wind their way through the criminal justice system.<sup>73</sup> Blacks constitute 43% and whites 55% of persons convicted of drug felonies in state courts,<sup>74</sup> and blacks account for 53.5% and whites for 33.3% of persons admitted to state prison with new convictions for drug offenses.<sup>75</sup> In 2007, blacks accounted for 33.2% of people

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thus live in cities, or 6% of the U.S. population. U.S. CENSUS BUREAU, AMERICAN FACT FINDER tbl.DP-1 (2000), [http://factfinder.census.gov/servlet/QTTable?\\_bm=n&\\_lang=en&q\\_r\\_name=DEC\\_2000\\_SF1\\_U\\_DP1&ds\\_name=DEC\\_2000\\_SF1\\_U&geo\\_id=01000US](http://factfinder.census.gov/servlet/QTTable?_bm=n&_lang=en&q_r_name=DEC_2000_SF1_U_DP1&ds_name=DEC_2000_SF1_U&geo_id=01000US). If the geographic region is extended to metropolitan areas, the black proportion declines slightly to 25.7% of all drug arrests. FED. BUREAU OF INVESTIGATION, CRIME IN THE UNITED STATES 2007, at tbl.55 (2008), [http://www.fbi.gov/ucr/cius2007/data/table\\_55.html](http://www.fbi.gov/ucr/cius2007/data/table_55.html).

70. RYAN S. KING, THE SENT'G PROJECT, DISPARITY BY GEOGRAPHY: THE WAR ON DRUGS IN AMERICA'S CITIES 16 (2008).

71. Arrest data are for non-Hispanic blacks and non-Hispanic whites. THOMAS H. COHEN & BRIAN A. REAVES, BUREAU OF JUSTICE STATISTICS, FELONY DEFENDANTS IN LARGE URBAN COUNTIES, 2002, at 4, tbl.3 (2006), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/fdluc02.pdf>. Percentage of black population calculated from data provided by 2000 Census data.

72. HUMAN RIGHTS WATCH, TARGETING BLACKS, *supra* note 56, at 50. Examples exist from other states as well. In Georgia, for example, blacks comprised 22% of cocaine users but 79% of arrests for cocaine possession. HUMAN RIGHTS WATCH, RACE AND DRUG LAW ENFORCEMENT IN THE STATE OF GEORGIA (1996), available at <http://www.hrw.org/en/reports/1996/07/01/race-and-drug-law-enforcement-state-georgia>.

73. Racial disparities in drug arrests account for the preponderance, but not all, of the racial disproportionality among incarcerated drug offenders. *See* BLUMSTEIN, *supra* note 59, at 751 (stating that increased racial disparity between arrest and sentencing include the type of drug offense (possession or sale), the type of drug and the existence of a prior record.) Prosecutorial discretion and quality of defense counsel also play a role. HUMAN RIGHTS WATCH, TARGETING BLACKS, *supra* note 56, at 48.

74. MATTHEW R. DUROSE & PATRICK A. LANGAN, BUREAU OF JUSTICE STATISTICS, FELONY SENTENCES IN STATE COURTS, 2002, at 6 & tbl.5 (2004). Blacks constituted 27% of offenders sentenced in federal court in 2006 for powder cocaine offenses and 81.8% of offenders sentenced for crack cocaine offenses. U.S. SENT'G COMM'N, COCAINE AND FEDERAL SENTENCING POLICY 16, tbl.2-1 (2007).

75. HUMAN RIGHTS WATCH, TARGETING BLACKS, *supra* note 56, at 16.

entering federal prison for drug offenses.<sup>76</sup>

A comparison of the rates, relative to population, at which blacks and whites are sent to state prison for drug offenses offers what may be the most compelling evidence of the disparate racial impact of drug control policies: the black rate (256.2 per 100,000 black adults) is ten times greater than the white rate (25.3 per 100,000 white adults).<sup>77</sup> Disaggregating these rates by gender reveals that black men were sent to prison on drug charges at 11.8 times the rate of white men and black women are sent to prison on drug charges at 4.8 times the rate of white women. As Table 1 reveals, blacks are sent to prison on drug charges at greater rates than whites in every state for which the data are available.

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76. Out of a total of 27,210 offenders entering federal prison for violation of federal drug law, 17,391 were white and 9,041 were black. The remainder was Native American, Asian/Pacific islander, or unknown. The numbers do not include commitments from the District of Columbia Superior Court are excluded. Data compiled using the Bureau of Justice Statistics Federal Justice Statistics Program website, <http://fjsrc.urban.org>.

77. HUMAN RIGHTS WATCH, *TARGETING BLACKS*, *supra* note 56, at 16. The black rate of state prison admission on drug charges has grown much faster than the white rate: between 1986 and 2003 the rate of admission to prison for drug offenses for blacks quintupled; the white rate did not quite triple. *Id.*; *see also* HUMAN RIGHTS WATCH, *PUNISHMENT AND PREJUDICE*, *supra* note 22, at tbl.14 (2000) (showing that in 1996, blacks admitted to prison on drug charges at thirteen times the rate of whites).

TABLE 1: Rates of State Prison Admissions for Drug Offenses, by Gender and Race, 2003<sup>78</sup> (calculated per 100,000 adult residents of each race and gender)

State	White Male	White Female	White All	Black Male	Black Female	Black All
Alabama	83.5	19.9	50.6	363.6	26.1	177.2
California	43.8	9.2	26.5	515.1	62.5	280.8
Colorado	31.9	8.9	20.4	456.5	117.2	294.8
Florida	44.9	11.2	27.5	628.2	50.7	321.5
Georgia	55.5	12.7	33.9	345.3	21.8	169.9
Hawaii	20.0	7.7	14.2	122.0	25.3	82.5
Illinois	44.2	8.5	26.0	1,227.6	109.4	613.8
Iowa	53.7	6.4	29.3	402.7	28.8	224.3
Kentucky	102.6	26.4	63.1	725.8	88.5	392.3
Louisiana	47.7	9.1	27.8	414.0	27.4	202.9
Maryland	39.7	4.1	21.3	760.5	50.1	370.5
Michigan	16.3	2.1	9.0	218.8	11.0	106.3
Minnesota	40.8	6.1	23.1	412.1	38.5	233.6
Mississippi	132.4	29.0	79.2	477.7	41.1	239.4
Missouri	60.9	11.6	35.4	129.8	14.3	95.4
Nebraska	62.3	10.6	35.9	277.3	60.7	166.2
Nevada	26.6	8.2	17.6	211.5	19.4	115.5
New Hampshire	24.2	3.1	13.3	167.0	0.0	95.2
New Jersey	34.7	6.2	19.9	822.1	59.5	409.4
New York	19.5	3.7	11.3	333.9	24.1	161.8
North Carolina	36.7	12.2	24.2	519.5	50.7	264.2
North Dakota	90.1	19.2	54.4	281.7	91.5	209.2
Oklahoma	143.7	35.9	88.3	684.0	119.5	392.4
Oregon	19.4	3.8	11.4	66.8	24.7	47.5
Pennsylvania	27.6	3.1	14.8	407.7	13.0	193.7
South Carolina	47.3	9.7	28.0	537.2	30.8	260.0
South Dakota	99.5	19.3	58.8	597.6	387.6	526.3
Tennessee	33.8	10.9	22.0	371.9	28.9	184.7
Texas	31.1	8.6	19.7	430.6	51.4	230.2
Utah	70.7	15.2	42.8	468.6	117.7	322.4
Virginia	28.4	6.9	17.4	435.2	49.5	229.4
Washington	74.4	15.6	44.7	719.8	133.5	449.7
West Virginia	14.3	3.3	8.6	245.9	32.4	140.0
Wisconsin	14.4	1.9	8.0	664.8	51.5	340.3
Total	42.1	9.1	25.3	495.5	44.0	256.2

78. Human Rights Watch compiled prison admission rates for drug offenses using prison admission data from the National Corrections Reporting Program (NCRP). See HUMAN RIGHTS WATCH, TARGETING BLACKS, *supra* note 56, at 15.

### C. *Race, Crime, and Punishment*

Just as conscious and unconscious racial notions helped define the drug problem, they have also helped shape political and policy responses to that problem. The legislative history of federal crack sentencing laws, for example, provides reason “to suspect that regardless of the objectives Congress was pursuing, it would have shown more restraint in fashioning the crack penalties or more interest in amending them in ensuing years, if the penalties did not apply almost exclusively to blacks.”<sup>79</sup> To the extent that the white majority in the United States identified both crime and drugs with racialized “others,” it has no doubt been easier to endorse or at least acquiesce to punitive penal policies that might have been rejected if applied at equivalent rates to members of their own families and communities. Politicians have been able to reap the electoral rewards of endorsing harsh drug policies because the group that suffered most from those policies—black Americans—lacked the numbers to use the political process to secure a different strategy.<sup>80</sup>

Throughout the modern war on drugs, measures to battle the use and sale of drugs have emphasized arrest and incarceration rather than prevention and treatment.<sup>81</sup> The emphasis on harsh penal sanctions cannot be divorced from the widespread and deeply rooted public association of racial minorities with crime and drugs, just as the choice of crack as an ongoing priority for law enforcement cannot be divorced from public association of crack with blacks.<sup>82</sup>

Faced with concerns about crack, the United States could have emphasized a public health and harm reduction approach prioritizing drug education, substance abuse treatment, and increased access to medical assistance.<sup>83</sup> It could

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79. Sklansky, *supra* note 28, at 1308. Blacks have consistently accounted for the preponderance of federal offenders arrested and incarcerated for crack offenses. In 2004, for example, 81% of the crack cocaine offenders arrested by the federal Drug Enforcement Agency were black. U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, COMPENDIUM OF FEDERAL JUSTICE STATISTICS 2004, at 20 & tbl.1.4 (2006).

80. Civil rights leaders took a long time to appreciate the damage done to the black communities by the war on drugs—as opposed to by drug addiction and dealing. A Leadership Conference report in 2000 was the first major statement by the leading coalition of civil rights organizations about the harm to blacks and the goal of racial equality caused by drug law enforcement. RONALD H. WEICH & CARLOS T. ANGULO, JUSTICE ON TRIAL: RACIAL DISPARITIES IN THE AMERICAN CRIMINAL JUSTICE SYSTEM (2000).

81. In the late 1960s and early 1970s, the national response to drug abuse was primarily one of treatment. Since then, the focus has been primarily on law enforcement. About two-thirds of the federal drug budget is allocated to interdiction, law enforcement and supply reduction efforts; one-third is allocated for prevention, treatment and other demand reduction strategies.

82. DAVID COLE, NO EQUAL JUSTICE (1999); DAVID MUSTO, THE AMERICAN DISEASE: ORIGINS OF NARCOTIC CONTROL (1973); MICHAEL TONRY, *supra* note 21; Beckett et al., *supra* note 16.

83. See DRUG POLICY ALLIANCE NETWORK, REDUCING HARM: TREATMENT AND

have sought to stem the spread of drug use and the temptations of the drug trade in deteriorating inner cities by making investments to reduce poverty, build social infrastructure, improve education, increase medical and mental health treatment, combat homelessness, increase employment, and provide more support to vulnerable families. It could have restricted prison to only the most serious drug offenders (e.g., major traffickers).

Instead, federal and state governments embraced harsh penal sanctions to battle the use of drugs and their sale to consumers.<sup>84</sup> They adopted policies that increased the arrest rates of low-level drug offenders, the likelihood of a prison sentence upon conviction of a drug offense, and the length of such prison sentences.<sup>85</sup>

Defenders of anti-drug efforts claim they want to protect poor minority neighborhoods from addiction and violence. But the choice of arrest and imprisonment as the primary anti-drug strategy evokes the infamous phrase from the Vietnam War: "It became necessary to destroy the town in order to save it."<sup>86</sup> Noted criminologist Michael Tonry has pointed out that unless and until drug control policies are less destructive, the life prospects for many disadvantaged blacks and their communities will remain bleak.<sup>87</sup>

### PART III: A HUMAN RIGHTS FRAMEWORK FOR THE WAR ON DRUGS

In a fair, equitable, and non-discriminatory criminal justice system, sanctions should be imposed equally on offending populations. Yet the racial pat-

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BEYOND (2009), available at <http://www.dpf.org/reducingharm/> (describing components of a harm reduction approach).

84. In the late 1960s and early 1970s, the national response to drug abuse was primarily one of treatment. Since then the focus has been primarily on law enforcement. About two-thirds of the federal drug budget is allocated to interdiction, law enforcement, and supply reduction efforts; one-third is allocated for prevention, treatment, and other demand reduction strategies. These proportions have not varied significantly in recent years. THE WHITE HOUSE, NATIONAL DRUG CONTROL STRATEGY 13 (2008), available at <http://www.whitehousedrugpolicy.gov/publications/policy/09budget/fy09budget.pdf>.

85. HUMAN RIGHTS WATCH, PUNISHMENT AND PREJUDICE, *supra* note 22.

86. Attributed to an unnamed U.S. military officer by Associated Press reporter Peter Arnett, on February 7, 1968. See HUMAN RIGHTS WATCH, TARGETING BLACKS, *supra* note 56, at 2, 59-60 (summarizing the impact of incarceration on drug offenders, their families and their communities).

87. Tonry's recent summary of the problems with Minnesota's drug policies applies with equal force nationally. "Current Minnesota drug policies damage minority communities and help assure that many minority group members remain locked in multi-generational cycles of disadvantage and social exclusion. Current policies cause much more harm than they prevent, and require tens of millions of dollars of annual expenditures on law enforcement and corrections that could be much more constructively committed to improving people's lives." Michael Tonry, *Minnesota Drug Policy and its Disastrous Effects on Racial and Ethnic Minorities*, in COUNCIL ON CRIME AND JUSTICE, JUSTICE, WHERE ART THOU?: A FRAMEWORK FOR THE FUTURE 62 (2007). See also TONRY, *supra* note 21.

terns of persons arrested and incarcerated on drug charges are distantly related, at best, to racial patterns of drug offending. There may be explanations for the disparate impact, but can it be reconciled with principles of equal protection and non-discrimination?

A. *United States Law*

Drug laws are race-neutral on their face. Their enforcement is also ostensibly race-neutral, with law enforcement officials insisting they enforce the law without bias and in response to community concerns. Under longstanding constitutional jurisprudence in the United States, facially race-neutral governmental policies do not violate the guarantee of equal protection unless there is both discriminatory impact and discriminatory purpose. As Professor Lawrence Tribe has noted, the U.S. Supreme Court has decided that

every lawsuit involving claims of racial discrimination directed at facially race-neutral rules would be conducted as a search for a “bigoted-decision-maker” . . . . If such actors cannot be found—and the standards for finding them are tough indeed—then there has been no violation of the equal protection clause.<sup>88</sup>

The requirement of proof of intent has been a formidable barrier for victims of discrimination in the criminal justice system seeking judicial relief.<sup>89</sup> Equal protection challenges to drug law policies and practices have almost always foundered on the shoals of this requirement.<sup>90</sup> Absent evidence of discrimi-

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88. See LAWRENCE TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1509 (1999) (analyzing the importance of *Washington v. Davis*, 426 U.S. 229 (1976)).

89. *Developments in the Law: Race and the Criminal Process*, 101 HARV. L. REV. 1471, 1520 (1988).

90. For example, the crack/powder sentencing disparity has consistently withstood constitutional equal protection challenges in federal court because of plaintiffs' inability to establish discriminatory intent. See, e.g., *United States v. Watts*, 553 F.3d 603 (8th Cir. 2009); *United States v. Ayala*, 290 Fed. Appx. 366, 367-68 (1st Cir. 2008); *United States v. Capehart*, 2008 WL 5102969 (2d Cir. 2008); *United States v. Beard*, 293 Fed. Appx. 386, 388-89 (6th Cir. 2008); *United States v. Williams*, 211 Fed.Appx. 513, 515-16 (7th Cir. 2007); *abrogated on other grounds*, *Kimbrough v. United States*, 128 S.Ct. 558 (2007); *United States v. Wideman*, 187 Fed. Appx. 758, 760 (9th Cir. 2006); *United States v. Williams*, 456 F.3d 1353 (11th Cir. 2006), *abrogated on other grounds*, *Kimbrough v. United States*, 128 S.Ct. 558 (2007); *Dennis v. Poppel*, 222 F.3d 1245, 1261 (10th Cir. 2000); *United States v. Hunter*, 166 F.3d 1211 (4th Cir. 1998); *United States v. Brandon*, 106 F.3d 442, 442 (D.C.Cir. 1997); *United States v. Martin*, 85 F.3d 621, 621 (5th Cir. 1996); cf. *United States v. Gunter*, 462 F.3d 237, 244 (3d Cir. 2006) (noting that although the court had “routinely upheld” the 100:1 crack/powder sentencing differential, it has not revisited an equal protection challenge to the issue since the Supreme Court made the once-mandatory U.S. Sentencing Commission Guidelines advisory in *United States v. Booker*, 543 U.S. 220 (2005)). *But see State v. Russell*, 477 N.W. 2d 886 (Minn. 1991).

minatory intent, i.e., an affirmative desire to harm blacks as such,<sup>91</sup> courts have applied the undemanding “rational basis” test to drug laws or practices that do not discriminate expressly on the basis of race. Harsher sentences for crack cocaine offenses compared to powder have repeatedly passed that test, with the courts easily deciding that legislators were pursuing a legitimate goal in trying to curtail drug abuse and that more severe sentences for crack were rationally related to that goal.<sup>92</sup> Even victims of racial profiling have found it difficult to convince the courts that the police engaged in unconstitutionally discriminatory conduct.<sup>93</sup>

With its focus on individuals and their motives, U.S. constitutional jurisprudence offers little help to the black victims of contemporary inequality. As law professor David Cole has observed, racial inequalities in the criminal justice system “do not step from explicit and intentional race or class discrimina-

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91. “A facially neutral statute receives heightened scrutiny only if it was enacted or maintained . . . because of an anticipated racially discriminatory effect.” *McCleskey v. Kemp*, 481 U.S. 279, 298 (1987).

92. *E.g.*, *Schweiker v. Wilson*, 450 U.S. 221, 230 (1981); *see cases cited supra* note 90. The U.S. Sentencing Commission Guidelines previously mandated a one-hundred-to-one ratio between crack and powder cocaine sentences, following the ratio established in federal mandatory minimum legislation, in the wake of two recent Supreme Court decisions, federal courts have begun to apply much lower ratios. *See BRIAN T. YEH & CHARLES DOYLE, CONG. RESEARCH SERV., SENTENCING LEVELS FOR CRACK AND POWDER COCAINE: KIMBROUGH V. UNITED STATES AND THE IMPACT OF UNITED STATES V. BOOKER* 8 (2009). In *United States v. Booker*, 543 U.S. 220, 245 (2000), the Supreme Court rendered the once-mandatory Sentencing Commission Guidelines merely advisory, and in *Kimbrough v. United States*, 128 S.Ct. 558, 563 (2007), the Supreme Court held that federal courts may impose sentences for crack offenses below the range recommended by the Guidelines, on the grounds that the Guidelines’ range would be greater than necessary to achieve the statutory purpose and might lead to unwarranted disparities with powder sentences. The Commission responded in 2007 by eliminating the one-hundred-to-one ratio (except where mandatory minimums are triggered) and recommended that Congress adjust the statutory ratio. *See Yeh & Doyle, supra*.

93. Although equal protection challenges generally do not require a showing that the challenged action rested *solely* on racially discriminatory purposes, *see Arlington Heights v. Metro Housing Dev. Corp.*, 429 U.S. 252, 265-66 (1977), this has been the rule in racial profiling cases, where courts require the petitioner to show he was singled out only because of his race. *See William M. Carter, A Thirteenth Amendment Framework for Combating Racial Profiling*, 39 HARV. C.R. L. REV. 17, 37 (2004); *see also United States v. Avery*, 137 F.3d 343 (6th Cir. 1997); *Ford v. Wilson*, 90 F.3d 245, 248-49 (7th Cir. 1996); *United States v. Weaver*, 966 F.2d 391, 392 n.2 (8th Cir. 1992); *Brown v. City of Oneonta*, 221 F.3d 329 (2d Cir. 2000), *cert. denied* 122 S.Ct. 44 (2001) (dismissing equal protection claim where police interviewed over 200 African American men based on victim’s description of assailant as “young black man with a cut on his hand” but petitioners failed to show that they had been apprehended solely based on race and had not shown some other evidence of “discriminatory racial animus”). Courts have declined to apply strict scrutiny even when the petitioner has established that race was clearly the overriding motive. *See Carter, supra*, at 36-37.



tion, but they are problems of inequality nonetheless.”<sup>94</sup> The problem is not explicit and intentional considerations of race, but racial “disparities built into the very structure and doctrine of our criminal justice system.”<sup>95</sup> The Constitution is mute before the persistence of racial inequalities not only in society at large, i.e., the substantial allocation along racial lines of such resources as wealth, political power, education and social status, but also within the criminal justice system more narrowly. It offers no relief from high rates of black incarceration that have been produced by “racial politics, not by a crime wave,”<sup>96</sup> and that reflect as well as contribute to the perpetuation of white dominance.<sup>97</sup> Drug laws, in particular, exemplify the impact of structural racism: as discussed above, they are embedded in racial dynamics prejudicial to black Americans and their enforcement perpetuates those dynamics. Tied to the anachronistic requirement of intent, equal protection jurisprudence has not been able to provide relief to victims of ostensibly color-blind practices that so deeply prejudice black Americans. It has thus failed to achieve one of its central purposes: to “correct for a certain marginal deficiency of majoritarian democracy: the danger that the majority, because it cares less about a minority’s welfare than about its own, will award members of the minority fewer benefits, or impose on them disproportionate burdens.”<sup>98</sup>

#### B. *Racial Discrimination Under International Human Rights Law*

Equality among all people, including among persons of different races, has been deemed “the most important principle imbuing and inspiring the concept of human rights.”<sup>99</sup> The charter document of contemporary human rights, the Universal Declaration of Human Rights, affirms that all human beings are born free and equal in dignity and rights and that everyone is entitled to all rights and freedoms without distinction of any kind, including without distinction based on race. The equality inherent in all human beings regardless of race and the concomitant right of all human beings to be protected against racial discrimination is affirmed in the core human rights treaties that have followed the Universal Declaration of Human Rights. The International Convention on the Elimination of All Forms of Racial Discrimination is the most complete ex-

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94. COLE, *supra* note 82, at 9.

95. *Id.*

96. Ian Haney Lopez, Structural Racism and Crime Control (January 30, 2009) (Draft, on file with author).

97. Of course, hostility to blacks may affect the judgments and actions of individual police, prosecutors, judges, and other participants in drug law enforcement.

98. Sklansky, *supra* note 28, at 1308.

99. MANFRED NOWAK, UN COVENANT ON CIVIL AND POLITICAL RIGHTS: CCPR COMMENTARY 458 (1993).

pression of the international community's commitment to the principle of racial equality and the right to be free of racial discrimination.<sup>100</sup> It has been described as "the international community's only tool for combating racial discrimination which is at one and the same time universal in reach, comprehensive in scope, legally binding in character, and equipped with built-in measures of implementation."<sup>101</sup> It is "the most comprehensive and unambiguous codification in treaty form of the idea of the equality of races."<sup>102</sup>

States who are parties to ICERD are required to report periodically on the measures they have taken to give effect to the treaty.<sup>103</sup> The Committee on the Elimination of Racial Discrimination ("Committee") reviews those reports, other information provided in writing or orally by the States Parties as well as information provided to it by non-governmental organizations,<sup>104</sup> and makes observations and recommendations concerning the State's compliance with the treaty. Although the Committee "merely observes and comments on States Parties' practices, the comments should be acted on accordingly."<sup>105</sup> The Committee also from time to time issues "general comments," not tied to particular countries, that illuminate its understanding of the treaty. The Committee's country-specific observations and general comments may be considered the official "jurisprudence" of ICERD. The Committee does not have any power to compel a State to accept and act on its recommendations and there is no system of sanctions for States who refuse to do so.

The Committee has reviewed two United States periodic reports,<sup>106</sup> but has

100. ICERD, *supra* note 3. As of April, 2008, 173 countries have ratified the treaty. Office of the High Commissioner for Human Rights, <http://www2.ohchr.org/english/bodies/cerd/>.

101. U.N. GAOR Supp. No. 18 at 108, 109, U.N. Doc. A/33/18 (1978) (statement by the Committee on the Elimination of Racial Discrimination at the World Conference to Combat Racism and Racial Discrimination).

102. Egon Schwelb, *The International Convention on the Elimination of All Forms of Racial Discrimination*, 15 INT'L & COMP. L. Q. 996, 997 (1966).

103. ICERD, *supra* note 3, at Art. 9(1). The United States has submitted two reports. In addition, in 2008 it submitted written answers to questions from the Committee with regard to its 2007 submission prior to its meeting with the Committee in Geneva.

104. For example, N.G.O. reports submitted in connection with the Committee's review of the United States report at its seventy-second session included HUMAN RIGHTS WATCH, SUBMISSION TO THE COMMITTEE ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION, *supra* note 10; U.S. HUMAN RIGHTS NETWORK, INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION (ICERD) SHADOW REPORT 2008 (2007).

105. de la Vega, *supra* note 11, at 438.

106. The United States submitted its initial, second, and third periodic reports as a single document to the CERD in September 2000, CERD/C/351/Add.1, Oct. 2000, *available at* <http://www.state.gov/documents/organization/100306.pdf>. The fourth, fifth and sixth periodic reports of the United States were submitted to the Committee as a single document in April, 2007. GOV'T OF THE U.S., PERIODIC REPORT OF THE UNITED STATES OF AMERICA TO

never directly addressed racial discrimination in the U.S. war on drugs.<sup>107</sup> Nevertheless, the treaty language itself, the Committee's interpretation of it as applied to the United States, and the Committee's general comments about racial discrimination and criminal justice suffice as a framework against which to consider whether the United States is complying with its treaty obligations.

ICERD requires States Parties to prohibit racial discrimination and to take steps (discussed below) to eliminate it. It defines the prohibited discrimination as:

[A]ny distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.<sup>108</sup>

The explicit disjunction in the definition—"purpose or effect"—makes clear that discrimination can exist in the absence of culpable actors who intentionally seek to harm members of a particular race. The Committee has explained that "the definition of racial discrimination in Article 1 expressly extends beyond measures which are explicitly discriminatory to encompass measures which are discriminatory in fact and effect."<sup>109</sup> ICERD's definition is consistent with the widespread recognition of international human rights experts<sup>110</sup> that laws and practices that are race neutral on their face, and even in intent, may nonetheless have an impact equivalent to intentional acts of discrimination, and hence should be prohibited. By not requiring proof of intent, ICERD avoids the limitations of U.S. constitutional jurisprudence and offers a vehicle for critiquing racial inequalities that are the result of ostensibly color-blind policies.

Compliance with ICERD requires ensuring that domestic legislation prohibits all forms of racial discrimination as defined by the treaty.<sup>111</sup> The Committee has twice reminded the United States that ICERD prohibits discrimina-

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THE U.N. COMMITTEE ON THE ELIMINATION OF RACIAL DISCRIMINATION CONCERNING THE CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION (2007), *available at* <http://www.state.gov/documents/organization/83517.pdf>.

107. CERD, CONCLUDING OBSERVATIONS OF THE COMMITTEE ON THE ELIMINATION OF RACIAL DISCRIMINATION: UNITED STATES OF AMERICA, CERD/C/59/Misc.17/Rev 3 (Aug. 14, 2001); CERD, CONSIDERATION OF REPORTS, *supra* note 15.

108. States party to ICERD are required to submit biennial reports to the CERD about the current status of rights in the country their efforts to comply with their obligations under the treaty. Non-governmental organizations may submit "shadow reports" to supplement the party's official report. ICERD, *supra* note 3, at Part I, Art. 1(1).

109. UN Doc. CERD/C/66/D/31/2003, Communication NO.31/3003, LR. V. Slovakia, para 10.4 (2003).

110. ZERROUGUI, *infra* note 124, at 7.

111. *See, e.g.,* VANDENHOLE, *infra* note 118, at 190 (referencing numerous Committee findings on the necessity of incorporating ICERD comprehensively into domestic law).

tion in all its forms, including practices with unintentional discriminatory effect. In 2001, the Committee recommended that the United States take the appropriate measures to review legislation and policies to “ensure effective protections against any form of racial discrimination and any unjustifiably disparate impact.”<sup>112</sup> In 2008 the Committee again pointed out to the United States that its laws did not meet the requirements of ICERD because they did not fully protect against discrimination unaccompanied by a discriminatory purpose. The Committee noted that

the definition of racial discrimination used in [U.S.] federal and state legislation and in court practice is not always in line with that contained in article 1, paragraph 1, of the Convention, which requires States parties to prohibit and eliminate racial discrimination in all its forms, including practices and legislation that may not be discriminatory in purpose, but in effect. In this regard, the Committee notes that indirect—or *de facto*—discrimination occurs where an apparently neutral provision, criterion or practice would put persons of a particular racial, ethnic or national origin at a disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary. (Article 1(1)).<sup>113</sup>

The Committee again recommended the United States ensure that it “prohibits racial discrimination in all its forms, including practices and legislation that may not be discriminatory in purpose, but in effect.”<sup>114</sup>

Laws that on their face target particular racial groups in ways that harm them obviously fall afoul of the treaty, but countless race-neutral laws or prac-

112. OFFICE OF THE HIGH COMM’R FOR HUMAN RIGHTS, UNITED NATIONS, CONCLUDING OBSERVATION OF THE COMMITTEE ON THE ELIMINATION OF RACIAL DISCRIMINATION: UNITED STATES OF AMERICA, CERD/C/Misc. /56/18, paras. 380-407, August, 2001, ¶14. The Committee made the observations after considering the initial, second and third periodic reports of the United States which were combined into one report.

113. CERD, CONSIDERATION OF REPORTS, *supra* note 15, at 2 ¶10.

114. The United States has insisted that its laws are consistent with ICERD’s requirement of prohibiting unintentional discrimination. In addition to pointing out that various civil rights laws do not require proof of discriminatory intent, it has maintained that the requirement of intent required for claims under the Due Process Clause of the Fifth Amendment and the Equal Protection Clause of the Fourteenth Amendment is not be an obstacle to relief when circumstantial evidence which may include statistics, suffices as proof that the racial disparity was intentional. PERIODIC REPORT OF THE UNITED STATES OF AMERICA ¶ 1318 (2007). *See also*, UNITED STATES, RESPONSES TO QUESTIONS PUT BY THE RAPPORTEUR IN CONNECTION WITH THE CONSIDERATION OF THE COMBINED FOURTH, FIFTH AND SIXTH PERIODIC REPORTS OF THE UNITED STATES 13-15, U.N. Doc. CERD/c/USA/6/2008 (“U.S. law does not invariably require proof of discriminatory intent.”). Independent observers of U.S. law have directly contested this assertion. *See, e.g.*, Amelia Parker, *Racial Disparities in U.S. Public Education and International Human Rights Standards: Holding the U.S. Accountable to CERD*, 14 HUMAN RIGHTS BRIEF 27 (2007) (“Supreme Court decisions . . . have severely limited” access to a judicial remedy for racial discrimination under both equal protection claims and claims of individuals under Title VI of the 1964 Civil Rights Act.).

tices may adversely affect one racial group more than another. Under ICERD, an adverse racially disparate impact becomes prohibited discrimination when the impact is unjustifiable.<sup>115</sup>

The justifiability of a measure that yields racial disparities is determined by consideration of its goals and how closely the measure is tailored to their achievement. The Committee has explained that differential treatment of racial groups “would constitute discrimination if the criteria for such differentiation, judged in the light of the objectives and purposes of the Convention, are not applied pursuant to a legitimate aim, and are not proportional to the achievement of that aim.”<sup>116</sup> In its Concluding Observations about the United States, in 2008, the Committee insisted that the means of achieving a legitimate aim must be “appropriate and necessary.”<sup>117</sup> The test of prohibited discrimination under ICERD is not so strict that few policies with a disparate impact would ever pass muster, nor is it so toothless as to permit any policy that is plausibly rational.<sup>118</sup>

Compliance with ICERD requires more than formal equality, e.g., the presence of laws prohibiting racial discrimination or guaranteeing equal protection. It requires an examination of whether the non-discrimination and equality guaranteed by law are actually enjoyed in practice.<sup>119</sup>

The requirement that the relationship between means and ends be considered closely in assessing the justification for a measure that yields racial disparities also reflects this emphasis on reality.

The Committee has recognized that race discrimination infects criminal justice systems around the world.<sup>120</sup> Such discrimination “constitutes a particu-

115. CERD, General Recommendation 14(2) on Article 1, para. 1, of the Convention, U.N. GAOR, 48th Sess., Supp. No. 18, at 176, U.N. Doc. A/48/18(1993); *see also* Theodor Meron, *The Meaning and Reach of the International Convention on the Elimination of All Forms of Racial Discrimination*, 79 AM. J. INT'L L. 283 (1985).

116. U.N. Doc. CERD/AUS/CO/14, ¶ 24 (Australia).

117. *See supra* note 113.

118. Although other treaty bodies at times use slightly different definitions of discrimination, there is fairly consistent recognition that when policies are challenged as racially discriminatory, they must pass muster under something closer to “strict scrutiny” or an intermediate scrutiny test, rather than a rational basis test as used by U.S. courts when there is no racist intent. *See generally* WOUTER VANENDHOLE, NON-DISCRIMINATION AND EQUALITY IN THE VIEW OF THE UN HUMAN RIGHTS TREATY BODIES (2005).

119. *See Meron, supra* note 115, at 288 (review of history and text of treaty reveals centrality of goal of *de facto* equality); *see also* Statement by the Committee on the Elimination of Racial Discrimination at the World Conference to Combat Racism and Racial Discrimination, 33 U.N. GAOR Supp. No. 18 at 100, 108, U.N. Doc. A/33/18 (1978).

120. According to the Committee, “no country is free from racial discrimination in the administration and functioning of the criminal justice system.” CERD, GENERAL RECOMMENDATION XXXI ON THE PREVENTION OF RACIAL DISCRIMINATION IN THE ADMINISTRATION AND FUNCTIONING OF THE CRIMINAL JUSTICE SYSTEM 2, 98-109, CERD/A/60/18 (2005). The Committee referred to the declaration adopted by the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance,

larly serious violation of the rule of law, the principle of equality before the law, the principle of fair trial and the right to an independent and impartial tribunal, through its direct effect on persons belonging to groups which it is the very role of justice to protect.”<sup>121</sup>

The Committee has been well aware that criminal justice systems may operate in discriminatory ways even in the absence of racist police, prosecutors or judges or overtly discriminatory laws.<sup>122</sup> It has also recognized that the discriminatory operation of criminal justice systems can be a particularly vivid example of structural racism.<sup>123</sup> That is, criminal justice systems may reflect and perpetuate the dominance of a racial group and the marginalization or exclusion of others, regardless of evidence of overt racism. Because of its recognition of the racialized role of criminal systems, the Committee considers “the number and percentage of persons belonging to [racial and other such groups] who are held in prison” to be significant indicators of racial discrimination in a criminal justice system.<sup>124</sup> Another indicator is “the proportionately higher crime rates attributed to persons belong to [racial] groups, particularly as regards to petty street crime and offences related to drugs and prostitution, as indicators of the exclusion or the non-integration of such persons into society.”<sup>125</sup>

The Committee has noted the particularly high rate of incarceration of African Americans and Hispanics in the United States as well as their socio-economic marginalization. In 2001 it recommended that the United States ensure that the high incarceration rate of these minorities was not a result of the “economically, socially and educationally disadvantaged position of these groups.”<sup>126</sup> In its most recent periodic report to the Committee, submitted in

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held in Durban, South Africa in 2001, which acknowledged and repudiated the persistence of racism “in some States in the functioning of the penal system and in the application of the law, as well as in the actions and attitudes of institutions and individuals responsible for law enforcement, especially where this has contributed to certain groups being overrepresented among persons under detention or imprisoned.”

121. *Id.* at 2, 98-108.

122. ZERROUGUI, *infra* note 124.

123. In its General Comment XXXI, the Committee referred to the reports of the Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance. CERD, *supra* note 120. The Special Rapporteur has observed that racial discrimination in criminal justice systems is “not only “behavioural or incidental but also institutional and structural.” That is, the greater prevalence of certain racial groups among arrestees and in prison cannot simply be ascribed to the nature or quantity of their offenses or the motives of particular actors, e.g. police or prosecutors, but is more accurately understood as a reflection of the institutionalization of discrimination against those groups in the criminal justice system. LEILA ZERROUGUI, SPECIAL RAPPORTEUR, ADMINISTRATION OF JUSTICE, RULE OF LAW AND DEMOCRACY: DISCRIMINATION IN THE CRIMINAL JUSTICE SYSTEM, INTERIM REPORT TO THE COMMISSION ON HUMAN RIGHTS, E/CN.4/Sub.2/2005/7, ¶ 18-20, 28 (citations omitted).

124. CERD, *supra* note 120, at ¶ 1(e).

125. *Id.* at ¶ 1(d).

126. CERD, *supra* note 107, at ¶ 16. It also instructed the United States to “take firm

April 2007, the United States failed to address concerns that disproportionately high rates of incarceration for blacks compared to whites might be rooted in a broader context of social, political, and economic marginalization, much less structural racism. Looking narrowly at the problem of racially disparate incarceration rates, it insisted that the disparity reflected “differential involvement in crime by the various groups . . . rather than . . . differential handling of persons in the criminal justice system.”<sup>127</sup> Rather strikingly, it did, almost as an aside, acknowledge there were “some unexplained disparities particularly related to drug use and enforcement.” But labeling the disparities “unexplained,” it ignored the many cogent and convincing explanations that in fact exist. It also ignored whether the disparities in drug law enforcement might be the result of racial discrimination as broadly defined by ICERD and interpreted by the Committee.

The Committee was not reassured. In 2008 it reiterated its concern with regard to the persistent racial disparities in the U.S. criminal justice system including the disproportionate number of persons belonging to racial, ethnic and national minorities in the prison population, allegedly due to the harsher treatment that defendants belonging to these minorities, especially African-American persons, receive at various stages of criminal proceedings.<sup>128</sup>

The Committee pointed out that stark racial disparities in the administration and functioning of the criminal justice system, particularly in the prison population, “may be regarded as factual indicators of racial discrimination . . . .”<sup>129</sup> It recommended that the United States “take all necessary steps to guarantee the right of everyone to equal treatment before tribunals and all other organs

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action to guarantee the right of everyone . . . to equal treatment before the courts.” *Id.*

127. GOV'T OF THE U.S., *supra* note 106, at ¶ 165, 327. In supplemental information provided in response to Committee questions about racial disparities in the criminal justice system, the United States reiterated the view that “scholarly research indicates that disparities are related primarily to differential involvement in crime by the various groups, rather than to differential handling of persons in the criminal justice system.” UNITED STATES, *supra* note 114, at 51-52. With regard to the possible role of socio-economic factors in the disproportionately high rates of minority incarceration, the United States simply stated that it would “continue to work to eliminate the impact of such factors,” without specifying more. *Id.* at 52. The United States did voice concern “as a matter of public policy . . . [about the] differential rates of criminality and consequential punishment of individuals in the criminal justice system,” but suggested that “the operation of its democratic processes . . . [was] working to determine the nature and scope of the problem and to explore ways of addressing it.” *Id.* at 51. It professed its commitment to continue to work to “stamp out” any racially discriminatory practices that cause any racial disparities in the criminal justice system and to working to eliminate the impact of socio-economic factors on incarceration rates. *Id.* at 52. No specifics were offered.

128. CERD, *supra* note 107, at ¶ 20.

129. CERD, CONSIDERATION OF REPORTS SUBMITTED BY STATE PARTIES UNDER ARTICLE 9 OF THE CONVENTION: CONCLUDING OBSERVATIONS, UNITED STATES OF AMERICA 2 CERD/C/USA/CO/6 (2008), available at <http://www2.ohchr.org/english/bodies/cerd/docs/co/CERD-C-USA-CO-6.pdf>.

administering justice, including further studies to determine the nature and scope of the problem, and the implementation of national strategies or plans of action aimed at the elimination of structural racial discrimination.”<sup>130</sup>

There were other aspects of the U.S. criminal justice system that troubled the Committee in 2008. Racial profiling did not go unnoticed: the Committee noted with concern that “despite the measures adopted at the federal and state levels to combat racial profiling . . . such practice continues to be widespread.”<sup>131</sup> The Committee also addressed the “disproportionate impact that persistent systemic inadequacies in [legal defense programs for indigent persons] have on indigent defendants belonging to racial, ethnic and national minorities,”<sup>132</sup> persistent and significant racial disparities with regard to the death penalty,<sup>133</sup> disproportionate representation of minority youth among those sentenced to life without parole,<sup>134</sup> allegations of brutality and excessive use of force by law enforcement officials against minorities,<sup>135</sup> and the racially dispa-

130. *Id.* This recommendation by the Committee reflects its view, enunciated in General Comment XXXI, of the importance of the creation and implementation of “national strategies or plans of action aimed at the elimination of structural racial discrimination. CERD, *supra* note 120, at ¶ 5(i).

131. CERD, *supra* note 107, at ¶ 14. It recommended adoption of the End Racial Profiling Act or similar legislation; *see also* CERD, *supra* note 120, at ¶ 20 (“States parties should . . . prevent questioning, arrests and searches which are in reality based solely on the physical appearance of a person, that person’s colour or features or membership of a racial or ethnic group, or any profiling which exposes him or her to greater suspicion.”). Other international bodies have addressed racial profiling, a problem by no means limited to the United States. The Special Rapporteur on contemporary forms of racism and racial discrimination noted that

[i]n a number of countries certain racial or ethnic minorities are associated in the minds of the authorities with certain types of crimes and antisocial acts, such as drug trafficking . . . . In other words, by targeting specific social groups, or the members of selected communities, the law enforcement agencies, often echoed and supported by the media, literally undertake to criminalize and stigmatize the members of these groups and communities and even whole areas where they live. Most of the time, the only profiling criterion, apart from skin colour, is external cultural or religious signs.

DOUDOU DIENE, RACISM, RACIAL DISCRIMINATION, XENOPHOBIA AND ALL FORMS OF DISCRIMINATION, REPORT BY THE SPECIAL RAPPORTEUR ON CONTEMPORARY FORMS OF RACISM, RACIAL DISCRIMINATION, XENOPHOBIA AND RELATED INTOLERANCE, *submitted to UN Commission on Human Rights*, 7 U.N. Doc. E/CN.4/2004/18 (2004). The Special Rapporteur conducted a fact-finding mission to the United States in mid-2008. As of April 29, 2009, findings from that report have not been published.

132. CERD, *supra* note 107, at ¶ 22.

133. *Id.* at ¶ 23. The Committee urged the United States to undertake studies to identify the underlying factors for this discrimination so that it could then develop strategies to eliminate them.

134. *Id.* at ¶ 21. The Committee recommended the elimination of life without parole sentences for persons under age eighteen at the time of the offense.

135. *Id.* at ¶ 25.



rate impact of felony disenfranchisement laws.<sup>136</sup>

#### CONCLUSION

The significantly higher rates at which blacks are arrested and incarcerated on drug charges relative to the rates of whites raise a strong inference of prohibited discrimination that could be countered only if the disproportion were justified. It is hard to conceive of a plausible justification. The rates bear no relationship to rates of offending; to the contrary, the evidence is clear that whites engage in drug offenses with relative impunity compared to blacks. The underlying motivation of the war on drugs was infused with racial views and concerns adverse to blacks.<sup>137</sup> But even if the goal of combating drug abuse were untainted by racialized concerns, the means chosen to achieve that goal—heavy law enforcement in minority neighborhoods—is hardly a proportionate or necessary response, much less one consistent with the values of ICERD.

Michael Tonry has pointed out that the policies adopted by the architects of the drug war “were foreordained disproportionately to affect disadvantaged black Americans.”<sup>138</sup> Some observers argue that the net effect of the war on drugs has been to perpetuate white supremacy and the concomitant subordination of blacks to whites. The war on drugs “has become a replacement system for segregation [by] . . . separating out, subjugating, imprisoning and destroying substantial portions of a population based on skin color.”<sup>139</sup> Tonry has also noted that “at a time when civil rights and welfare policies aimed at improving opportunities and living standards for black Americans, drug and crime policies worsened them. . . [M]odern wars on drugs and crime have operated in the same ways as slavery and ‘Jim Crow’ legalized discrimination did in earlier periods to de-stabilize black communities and disadvantage black Americans, especially black American men.”<sup>140</sup>

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136. *Id.* at ¶ 27. The Committee recommended that the denial of voting rights occur only when defendants have been convicted of the “most serious crimes” and that the right to vote be automatically restored at the end of the criminal sentence.

137. The Committee has noted that causes of discrimination can include the indirect discriminatory effects of legislation “that has the effect of penalizing without legitimate grounds certain groups . . . States should seek to eliminate the discriminatory effects of such legislation and in any case to respect the principle of proportionality in its application to persons belong to such groups.” CERD, *supra* note 120, at ¶ 4(b).

138. Michael Tonry, *Race and the War on Drugs*, 1994 U. CHI. LEGAL F. 25, 27 (1994).

139. Ira Glasser, *American Drug Laws: The New Jim Crow, the 1999 Edward C. Sobota Lecture*, 63 ALB. L. REV. 703, 723 (2000); Graham Boyd, *Collateral Damage in the War on Drugs*, 47 VILL. L. REV. 839, 845 (2002) (“Just as Jim Crow responded to emancipation by rolling back many of the newly gained rights of African-Americans, the drug war is again replicating the institutions and repressions of the plantation . . .”).

140. Tonry, *supra* note 87, at 63 (citing research by University of California at Berkeley sociologist Loic Wacquant).

The Leadership Conference on Civil Rights concluded in a study of civil rights and the criminal justice system, "Our criminal laws, while facially neutral, are enforced in a manner that is massively and pervasively biased. The injustices of the criminal justice system threaten to render irrelevant fifty years of hard-fought civil rights progress."<sup>141</sup>

Compliance with ICERD demands an acknowledgement of and genuine effort to address the way the United States criminal justice system operates to the consistent detriment of black drug offenders compared to white drug offenders. If the United States were to take its treaty obligations seriously, it would have to look long and hard at the way race has influenced the choice of drugs to target and the response to their use. It would have to question why the country has been willing to impose the burden of incarceration for drug offenses primarily on those who by virtue of race and poverty are already among the most marginalized in society. It would have to undertake an unblinking assessment of the costs and benefits of the war on drugs as currently waged, an assessment that political leaders have been avoiding for decades.

It makes little sense to reduce racial disparities in drug control efforts by increasing the number of arrests and rate of incarceration of white drug dealers. Many independent experts believe that because U.S. drug control efforts aim to curtail supply rather than demand, they cannot help but be futile as well as unfair.<sup>142</sup> They have proposed alternative measures, e.g. increased substance abuse treatment, drug education, and positive social investments in low income neighborhoods, to respond to public concerns about drug dealing and drug abuse.<sup>143</sup>

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141. RONALD H. WEICH & CARLOS T. ANGULO, LEADERSHIP CONFERENCE ON CIVIL RIGHTS, JUSTICE ON TRIAL: RACIAL DISPARITIES IN THE AMERICAN CRIMINAL JUSTICE SYSTEM (2000), Exec. Summary, available at <http://www.civilrights.org/publications/reports/cj/>

142. More than two decades of incarcerating drug offenders has apparently had little impact on the use of illicit drugs. In surveys carried out during the years 1991-1993, an average of 5.8% of persons reported using an illicit drug during the previous month. In the 2006 survey, 8.3% of persons said they had used an illicit drug in the previous month. SAMHSA, SUBSTANCE ABUSE IN STATES AND METROPOLITAN AREAS: MODEL BASED ESTIMATES FROM THE 1991-1993 NATIONAL HOUSEHOLD SURVEYS ON DRUG ABUSE, Exhibits 3.1-3.4 (1996), available at <http://www.oas.samhsa.gov/96state/ch3.htm#Ch3.2>; SAMHSA, RESULTS FROM THE 2006 NATIONAL SURVEY, *supra* note 26, at tbl.G.6. The persons surveyed were age twelve or older.

During 2002-2006, an estimated 500,000 men and women entered prison on drug charges. HUMAN RIGHTS WATCH, TARGETING BLACKS, *supra* note 56, at 12. Yet during that period, the proportion of persons age twelve and older who used illicit drugs remained essentially unchanged. SAMHSA, *supra* note 26, at tbl.G.2 (lifetime), G.4 (past year), G.6 (prior month). Even the use of crack continues: in 2002 there were an estimated 567,000 users in 2002 and in 2006 that number had risen to an estimated 702,000. *Id.* at tbl.G.5.

143. Some states have begun to take steps in the right direction, diverting drug offenders from prison into community-based treatment programs, modifying their sentencing laws, and commissioning studies of racial disparities in their criminal justice systems. *See, e.g.*,

Complying with the letter and spirit of ICERD requires the United States to untangle the twisted dynamics of race, poverty, drugs and law enforcement that have determined the course of the war on drugs to date. This may be an extraordinarily difficult undertaking, but it is imperative.<sup>144</sup> Racial discrimination in the war on drugs is intolerable because of the direct and irremediable harm to individual offenders, their families, and their communities. But the racial discrimination is not just devastating to black Americans. It contradicts the principles of justice and equal protection of the law that should be the nation's bedrock. It undermines faith among all races and ethnic groups in the fairness and efficacy of the U.S. criminal justice system.<sup>145</sup> In drug control policy as in many other aspects of American life, it is time for the United States to fulfill the promise it made to Americans and the world when it ratified ICERD.

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GOVERNOR'S COMM'N ON REDUCING RACIAL DISPARITIES IN THE WISCONSIN JUSTICE SYSTEM, FINAL REPORT (2008), *available at* <ftp://doafp04.doa.state.wi.us/doadocs/web.pdf>; JUSTICE POL'Y INST., SUBSTANCE ABUSE TREATMENT AND PUBLIC SAFETY (2008), *available at* [http://www.justicepolicy.org/images/upload/08\\_01\\_REP\\_DrugTx\\_AC-PS.pdf](http://www.justicepolicy.org/images/upload/08_01_REP_DrugTx_AC-PS.pdf); RYAN S. KING, THE SENT'G PROJECT, THE STATE OF SENTENCING 2007 (2008), *available at* [http://www.sentencingproject.org/Admin/Documents/publications/sl\\_statesentencingreport2007.pdf](http://www.sentencingproject.org/Admin/Documents/publications/sl_statesentencingreport2007.pdf); DENNIS SCHRANTZ & JERRY MCELROY, THE SENT'G PROJECT, REDUCING RACIAL DISPARITY IN THE CRIMINAL JUSTICE SYSTEM: A MANUAL FOR PRACTITIONERS AND POLICYMAKERS (2000).

144. The obligations that ICERD imposes on the United States are of enormous scope and complexity, but the United States cannot shy away from them simply because they are difficult. As Theodor Meron has pointed out, "[T]he Convention does not indicate that states can invoke a range of considerations to justify failure to take immediate steps towards implementing the equal achievement goal and can balance that goal with other desired community goals." Meron, *supra* note 115, at 289; *see also* Conclusions and Recommendations of the Committee on the Elimination of Racial Discrimination, Madagascar, UN Doc. CERD/C/65/CO/4, ¶16 (2004) (explaining that limited resources are not an excuse for non-compliance); VANDENHOLE, *supra* note 118, at 40, and sources cited therein.

145. HUMAN RIGHTS WATCH, PUNISHMENT AND PREJUDICE, *supra* note 22, at 5. Minnesota's Council on Crime and Justice recently concluded that the "disparity between how different races have been treated in the war on drugs undermines the integrity of the criminal justice system, causing people to lose confidence that the system is even-handed and works equally for the benefit of all citizens." COUNCIL ON CRIME & JUSTICE, *supra* note 87, at 16.

