

Race and Drugs

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Subject: Criminology and Criminal Justice, Race, Ethnicity, and Crime, Drugs and Crime
DOI: 10.1093/oxfordhb/9780199859016.013.007**[-] Abstract and Keywords**

Blacks are arrested on drug charges at more than three times the rate of whites and are sent to prison for drug convictions at ten times the white rate. These disparities cannot be explained by racial patterns of drug crime. They reflect law enforcement decisions to concentrate resources in low income minority neighborhoods. They also reflect deep-rooted racialized concerns, beliefs, and attitudes that shape the nation's understanding of the "drug problem" and skew the policies chosen to respond to it. Even absent conscious racism in anti-drug policies and practices, "race matters." The persistence of a war on drugs that disproportionately burdens black Americans testifies to the persistence of structural racism; drug policies are inextricably connected to white efforts to maintain their dominant position in the country's social hierarchy. Without proof of racist intent, however, US courts can do little. International human rights law, in contrast, call for the elimination of all racial discrimination, even if unaccompanied by racist intent.

Keywords: race, drugs, discrimination, arrests, incarceration, structural racism

Millions of people have been arrested and incarcerated on drug charges in the past 30 years as part of America's "war on drugs." There are reasons to question the benefits—or even rationality—of that effort: the expenditure of hundreds of billions of dollars has done little to prevent illegal drugs from reaching those who want them, has had scant impact on consumer demand, has led to the undermining of many constitutional rights, and has helped produce a large, counterproductive, and expensive prison system. But perhaps the single most powerful indictment is that war has, been waged overwhelmingly against black Americans who have been disproportionately arrested and incarcerated on drug charges as a result.

Racial disparities generated or deepened by public policies should always be cause for concern. But such disparities in the criminal justice system are particularly troubling. The choice of arrest and imprisonment as the primary antidrug strategy has thwarted efforts to improve the opportunities and living standards of black Americans, deepened the disadvantages of poverty and social marginalization, and threatened hard-fought civil rights progress. In addition to losing their liberty, prisoners endure the rigors of living in harsh, tense, overcrowded, barren, and often dangerous facilities. Maintaining contact with their families is extremely difficult; family stability and well-being are jeopardized when a breadwinner or parent is taken away. The consequences of a criminal conviction last far longer than the time spent in jail or prison. People with criminal records experience what can be a lifetime of stigma and legal discrimination in employment, housing, education, public benefits, jury service, and the right to vote. Families and communities are injured by these policies as well (Mauer and Chesney-Lind 2003; Western 2006; Clear 2007). A number of conclusions leap from readily available data:

- Black Americans are much more likely than white Americans to be arrested and incarcerated for drug crimes.
- Depending on the substance, the differences between black and white rates of self-reported drug use are small.
- In absolute numbers, many more whites than blacks use illicit drugs.
- The best available evidence indicates that blacks are no more likely than whites to sell drugs. In absolute numbers, there are many more white than black drug dealers.

In short, racial disparities in arrest and imprisonment for drug crimes cannot be explained by racial patterns of drug crime. There are operational reasons for the disparities; most importantly, drug law enforcement activities are concentrated in inner city areas with high minority populations. But law enforcement's strategic choices in turn reflect the longstanding influence of race on how the United States has defined the drug problem.

Section I of this article discusses and documents the role of race in the development of drug control efforts in the United States and presents statistics revealing that black Americans have been and continue to be arrested, convicted, and incarcerated on drug charges at rates far higher than those for whites.¹ Blacks are arrested on drug charges at three times the rate for whites and are sent to state prison on drug charges at 10 times the rate for whites. The net result is that more black than white Americans are doing time for drug offenses in a country in which only 12.6 percent of the population is black. The arrest and incarceration disparities cannot be explained by racial differences in drug offending because there are far more white than black drug offenders. Section II discusses research findings on racial and ethnic patterns in drug use and sales. Overall, slightly larger percentages of black people have used illegal drugs in the past year or month, although a higher percentage of white people have used drugs in their lifetime. In absolute numbers, however, the numbers of white users of illicit drugs—even crack—dwarf black numbers because there are five to six times as many white as black Americans. Evidence of racial patterns in drug trafficking is less strong than concerning use, but what there is suggests that black drug-selling rates are little or no higher than white rates and, accordingly, that there are many more white than black sellers.

Section III discusses racial patterns of drug arrests. Arrest rates are much higher for blacks than whites largely because police focus drug law enforcement on places, principally inner-cities, with high minority populations and target their resources where drug arrests are easiest—on the streets, rather than in private home or office buildings. Section IV discusses racial disparities in imprisonment for drug crimes and the reasons for them. Imprisonment disparities are even worse than arrest disparities with blacks more likely to be sentenced to prison for drug offenses and to receive longer sentences than whites. To some extent, longer sentences for black drug offenders reflect federal and some state drug laws that mandate especially severe penalties for crack offenses for which blacks are disproportionately arrested. They also reflect the fact that black drug arrestees are more likely to have prior convictions that lead to sentence enhancements.

Section V discusses the war on drugs from a human rights perspective. Racial disparities in drug law enforcement result from the combined effects of many social, geographic, and political factors operating at federal, state, and local levels, but they also reflect the influence of racialized considerations and concerns in the decisions of legislators, police, prosecutors, and judges. Overt racial prejudice may not be at work, but extensive research and analysis over the past few decades leave little doubt that antidrug efforts are rooted in and reflect the unconscious racial bias of whites against blacks as well as race relation dynamics that benefit whites to the detriment of blacks. In the war on drugs, race matters.

Under human rights law, in contrast to U.S. constitutional law, unwarranted racial disparities even in the absence of racist intent violate the rights to equal protection of the law and freedom from discrimination. The United States has a human rights obligation to end such disparities, but it cannot do so until it acknowledges how deeply racial discrimination has permeated its antidrug efforts.

I. Race and Drug Laws

Crimes are social constructs, reflecting historically evolving and culturally specific sets of moral views and social and political imperatives. The wrongfulness of certain behavior, for example, murder, is intuitively understood by most people to warrant criminalization. Whether and why the possession and sale of certain substances used for recreation should be criminalized is far less easy to understand (Husak 1992, 2008). The history of U.S. drug laws reflects diverse and sometimes conflicting perspectives on morality, health, medical practice, community well-being, and the role of government. It is also a story about race and ethnicity: group antagonisms, fears, and tensions have played powerful roles in shaping U.S. drug control efforts (Provine 2007; Tonry 2011). Criminalization of drugs was historically one way that dominant, white social groups sought to maintain control over racial and ethnic minorities who troubled, angered, or scared them (Musto 1999). Advocates of criminalization have consistently painted drug users as morally weak (if not depraved), dangerous, and a threat to community standards and upstanding people. Advocates of criminalization have also tended to be most concerned about drugs associated with racial and ethnic groups that, in various ways, they thought threatened white America.² Overt and virulent racism was pervasive in alcohol and drug control debates from the 1870s through the 1960s, giving social and political heft to public health messages and the efforts of prohibitionist “moral entrepreneurs.” Proponents of criminalization insisted the stern hand of the law was necessary to protect white communities from Negro cocaine fiends, Chinese opium addicts, Mexican marijuana smokers—and later, from black crackheads (Musto 1999; Provine 2007).

Although overt racism disappeared from drug policy debates after the civil rights movement took hold, racial concerns nonetheless helped propel the modern “war on drugs” launched during the Reagan administration (Reinarman and Levine 1997; Tonry 1995, 2011). The use of cocaine, primarily powder cocaine, increased in the late 1970s and early 1980s, particularly among whites, but did not provoke the “orgy of media and political attention” that occurred in the mid-1980s when a cheaper, smokable form of cocaine, in the form of crack, appeared. Although the use of crack was by no means limited to low-income, minority neighborhoods, it was those neighborhoods that more visibly suffered from addiction to crack and the violence that accompanied competition among drug-dealing groups to establish control over its distribution. Sensationalist media stories portrayed African Americans as the paradigmatic users and sellers of crack. Although many of crack’s putative effects (e.g., “crack babies”) were subsequently proven to have been greatly exaggerated or just plain wrong (U.S. Sentencing Commission 1995), poor urban minority neighborhoods have remained the principal “fronts” in the war on drugs.

The emergence of crack cocaine offered American policy makers an important opportunity to think carefully about the best way to address addictive and dangerous drugs. They could have emphasized a public health and harm-reduction response, giving priority to drug education, substance abuse treatment, and increased access to medical assistance. They could have sought to stem the spread of drug use and the temptations of the drug trade in crumbling inner cities by making the investments needed to build social infrastructure, improve education, increase medical and mental health treatment, combat homelessness, increase employment, and provide more support to vulnerable families. They could have restricted the use of imprisonment to only the most serious drug offenders (e.g., major traffickers).

Unfortunately, crack emerged when the country was in no mood to consider anything but a punitive response. The momentum for “tough on crime” policies was growing nationwide. The belief that severe sentences were needed to restore law and order to America reflected a “perfect storm” (Austin et al. 2007) of factors, including the white majority’s concerns about the deterioration of inner cities, fear of crime, unwillingness to tackle social inequalities, politicians’ willingness to use crime as a partisan issue, and the anxiety and resentments triggered by disruptions to long-standing economic and social structures. As Reinarman and Levine have noted, crack was a “godsend to the Right,” as it offered the opportunity to reinvigorate a conservative moral and political agenda (Reinarman and Levine 1997, p. 38). A punitive response to crack was in perfect harmony with a politically vigorous assertion of “traditional family values”—individual moral discipline and abstinence—and with the demand for serious consequences for those who failed to conform to them, including hippies, war protesters, and restive black youth.

Concern about drugs and those who used them figured prominently in the Republican “southern strategy” to woo white southern

Race and Drugs

Democrats who were anxious and angry about their declining status in the post civil rights era. Avoiding explicit racial appeals to resentful whites, the strategy relied on racially coded messages about drugs, crime, and welfare (Beckett 1999; Tonry 2011). A “seemingly race-neutral concern over crime” became a vehicle to continue to fight racial battles (Loury 2008, p. 13). Not to be outdone by the Republicans, the Democrats became equally fervent apostles of tough-on-crime policies.

With little debate or reflection, the federal and state governments responded to crack specifically and drug use more generally with soaring law enforcement budgets and ever more punitive laws and policies that increased arrests of low-level drug offenders, the likelihood of a prison sentence upon conviction of a drug offense, and the lengths of prison sentences. The federal Anti-Drug Abuse Act of 1986 and the Anti-Drug Abuse Act of 1988 imposed far higher penalties for the sale of crack cocaine than for powder cocaine. Under the notorious federal 100-1 law governing powder and crack sentences, federal defendants with 5 grams of crack cocaine received the same mandatory minimum 5-year sentence imposed on defendants with 500 grams of powder cocaine. Fourteen states also imposed harsher sentences for crack compared to powder cocaine offenses (Porter and Wright 2011), and all states ratcheted up sentences for drug law violations regardless of the drug involved (Human Rights Watch 2000, 2008; Mauer 2006).

Harsh penalties for crack were easily enacted because that drug was uniquely linked in the mainstream’s collective consciousness with dangerous, poor, minority inner-city dwellers who supposedly threatened white suburban America. Federal District Judge Clyde Cahill described the racial underpinnings of federal crack sentencing legislation:

The fear of increased crime as a result of crack cocaine fed white society’s fear of the black male as a crack user and as a source of social disruption. The prospect of black crack migrating to the white suburbs led the legislators to reflexively punish crack violators more harshly than their white, suburban, powder cocaine dealing counterparts.” (*United States v. Clary* 1994)

When public officials, legislators, and the media talked about crack in terms of addiction and violence, the subtext was understood to be race:

[C]rack 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 provides important context when evaluating the legislative response.

(Sentencing Project and National Association of Criminal Defense Lawyers 2007, p. 20)

Crack no longer dominates legislative and policy crime debates, and most drug arrests today are for marijuana, not “hard” drugs. Even so, the racial underpinnings of the war on drugs have changed little (Loury 2008). As Loury observed, “the racial subtext of our law and order political discourse over the last three decades has been palpable” (Loury 2007, p. 2). When Americans are asked to envision a drug offender, they see black men in urban alleyways, not white college kids in their dorms (Tonry 2011). Heightened media and political attention to substance abuse and the drug trade in urban minority neighborhoods has promoted the erroneous public perception that illegal drugs are more prevalent there than in more affluent white neighborhoods. Katherine Beckett’s Seattle research suggests that current racial disparities in drug arrests and case outcomes reflect images and concerns embedded in the national psyche during the “crack epidemic” in the 1980s (Beckett et al. 2005; Beckett, Nyrop, and Pfingst 2006). Michelle Alexander insists the conflation of blackness with drug crime continues to provide “a legitimate outlet to the expression of antiblack resentment and animus—a convenient release valve now that explicit forms of racial bias are strictly condemned” (Alexander 2010, pp. 193–94).

A. Arrests and Imprisonment

The modern war on drugs has resulted in a steep rise in the number of Americans arrested and locked up on drug charges. Although the total number of arrests nationwide increased by only 31 percent from 1980 to 2009, the number of drug arrests grew by 186 percent and the drug arrest rate increased from 256 per 100,000 persons to 542 (Snyder and Mulako-Wangota 2012b). In every year since 1995, more than 1.5 million people have been arrested for drug law violations, as shown in Table 1. The prison population serving time for drug offenses has also soared. Between 1980 and 2003, the number of drug offenders in state prisons grew twelvefold. In 2009, nearly one-quarter of a million persons (242,200) were serving time under state jurisdiction for drug offenses, making up 17.8 percent of all state prisoners (Guerino, Harrison, and Sabol 2011).

Table 1 Black Arrests for Drug Abuse Violations, 1980–2009

	Total Arrests	White Arrests	Black Arrests	Other* Arrests	Percent White	Percent Black	Percent Other*
1980	580,900	440,692	135,157	5051	76	23	1
1981	559,900	414,158	140,416	5326	74	25	1
1982	676,000	492,614	176,959	6427	73	26	1
1983	661,400	464,296	190,336	6768	70	29	1
1984	708,400	491,971	209,725	6704	69	30	1

Race and Drugs

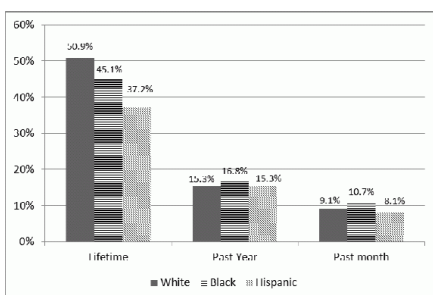
1985	811,400	557,696	245,149	8555	69	30	1
1986	824,100	543,521	273,377	7203	66	33	1
1987	937,400	604,032	325,381	7988	64	35	1
1988	1,155,200	696,399	448,623	10,178	60	39	1
1989	1,361,700	797,072	556,579	8049	59	41	1
1990	1,089,500	641,096	439,981	8423	59	40	1
1991	1,010,000	582,731	418,598	8670	58	41	1
1992	1,066,400	625,326	431,249	9825	59	40	1
1993	1,126,300	674,756	440,899	10,644	60	39	1
1994	1,351,400	834,472	503,576	13,352	62	37	1
1995	1,476,100	910,293	550,247	15,559	62	37	1
1996	1,506,200	933,390	555,580	17,230	62	37	1
1997	1,583,600	988,840	575,274	19,485	62	36	1
1998	1,559,100	965,556	575,331	18,213	62	37	1
1999	1,557,100	982,494	555,636	18,971	63	36	1
2000	1,579,566	1,005,853	553,905	19,808	64	35	1
2001	1,586,902	1,014,107	552,382	20,413	64	35	1
2002	1,538,813	997,637	519,875	21,301	65	34	1
2003	1,678,192	1,097,610	557,171	23,411	65	33	1
2004	1,746,570	1,141,852	581,464	23,254	65	33	1
2005	1,846,351	1,202,924	617,744	25,683	65	33	1
2006	1,889,810	1,208,364	656,229	25,217	64	35	1
2007	1,841,182	1,179,813	636,337	25,032	64	35	1
2008	1,702,537	1,093,965	585,118	23,454	64	34	1
2009	1,663,582	1,086,003	554,105	23,475	65	33	1

Source: Snyder and Mulako-Wangota 2012a.

Includes juvenile and adult arrestees.

B. Arrests

In 2010, the most recent year for which national drug arrest data are available, almost one in three drug arrestees was black (Federal Bureau of Investigation 2010). At no point since 1985 have blacks accounted for less than 30 percent of all drug arrests.



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Figure 1 Rates of Drug Arrests, by Race, 1980 to 2009

Note: National Estimated

Source: Snyder and Mulako-Wangota 2012b.

African Americans are arrested for drug offenses at much higher rates than whites, as Figure 1 shows. As of 2009, the ratio of black to white drug arrest rates was three to one (see Table 2). Between 1980 and 2009, the arrest rate for black Americans for drug law violations increased from 505 per 100,000 black population to 1,351.5. The white rate increased from 225.8 to 439.7 per 100,000 white residents, ending at a level below the black starting point.

Table 2 U.S. Drug Arrests by Race, 1980–2009 (Rates calculated per 100,000 residents of each race)

	Black rate	White Rate	Ratio of Black to White
1980	505	226	2.24
1981	518	211	2.46
1982	643	249	2.59
1983	683	233	2.93
1984	743	245	3.03
1985	858	276	3.11
1986	945	267	3.54
1987	1,110	295	3.76
1988	1,509	338	4.47
1989	1,846	384	4.81
1990	1,436	306	4.69
1991	1,338	275	4.86
1992	1,349	292	4.61
1993	1,351	312	4.33
1994	1,514	382	3.96
1995	1,626	413	3.94
1996	1,614	420	3.85
1997	1,643	440	3.73
1998	1,616	426	3.79
1999	1,536	430	3.58
2000	1,509	436	3.46

Race and Drugs

2001	1,485	436	3.41
2002	1,382	426	3.25
2003	1,465	465	3.15
2004	1,511	480	3.15
2005	1,586	502	3.16
2006	1,663	500	3.32
2007	1,591	485	3.28
2008	1,444	446	3.24
2009	1,352	440	3.07

Source: Snyder and Mulako-Wangota 2012b. Includes juvenile and adult arrestees.

The preponderance of annual drug arrests since 1980 have been for drug possession, not sales (Human Rights Watch 2009).³ Blacks are arrested at higher rates for both types of drug offense. Black arrest rates for possession began at twice the white rate in 1980, and after rising and falling, were three times the white rate in 2009 (Snyder 2011). In 2009, blacks constituted almost one-third (31.5 percent) of all arrests for drug possession. Blacks constituted 41.1 percent of sales arrests in 2009 (Snyder and Mulako-Wangota 2012b). In 2009, the black arrest rate for sales was four times greater than the white rate (Snyder 2011).

Racial disparities in drug arrests are also evident at state and local levels. According to Human Rights Watch (2009), there was not a single state in the country in 2006 in which white arrest rates for drug charges equaled those for blacks. The black-to-white ratio ranged from a low of 2 in Hawaii to a high of 11.3 in Minnesota and Iowa. In nine states, blacks were arrested on drug charges at rates more than seven times white rates.

Stark disparities in drug arrests can also be observed at the city level. In each of 43 cities examined by the Sentencing Project, blacks in 2003 were arrested at higher rates than whites, ranging from a high of 8.66 in Columbus Ohio to 1.76 in El Paso. Between 1980 and 2003, the black-to-white ratio of drug arrests increased in all but five of the cities, and it doubled in 21 cities (King 2008, pp. 13–15). Beckett, Nyrop, and Pfingst (2006) calculated black and white drug arrest rates and ratios in 18 mid-sized cities in 2000 and found ratios ranging from 1.2 to 10.7. In the 75 largest counties, 49 percent of felony drug defendants are non-Hispanic blacks and 26 percent are non-Hispanic whites (Cohen and Kyckelhahn 2010).

C. Incarceration

The racial disparity evident in drug arrests increases as cases wend their way through the criminal justice system. Black defendants constitute 44 percent and white defendants 55 percent of persons convicted of drug felonies in state courts. Among defendants convicted of drug felonies, 61 percent of whites and 70 percent of blacks are sentenced to incarceration. Whites sentenced to incarceration for drug felonies received a mean maximum sentence length of 29 months, compared with 34 months for blacks (Durose, Farole, and Rosenmerkel 2009). In 2009, blacks were 46.2 percent and whites 35.6 percent of persons admitted to state prison with new convictions for drug offenses (Bonczar 2011). As Table 3 shows, the number of African Americans admitted to state prison as new court commitments on drug charges has consistently exceeded the number of whites during the past 10 years. In 2009, blacks accounted for 35.2 percent and whites 61.5 percent of commitments to federal prison for federal drug offenses (Bureau of Justice Statistics 2009).

Table 3 State Prison Admissions for Drug Offenses by Race, 2000–2009

	White	Black	Other*
2000	28,784	49,714	723
2001	29,704	49,798	797
2002	33,777	52,275	869
2003	34,958	49,285	876
2004	34,377	42,859	879
2005	40,707	43,251	1,024
2006	40,519	45,217	1,079
2007	35,364	45,174	1,084
2008	32,459	43,259	1,036
2009	31,380	40,790	828

(*) Includes some persons of Hispanic origin; however, there are additional persons of Hispanic origin who are new court commitments who were not categorized as to race and who are not included in these figures.

(**) Includes American Indians/Alaskan Natives, Asians, Native Hawaiians, or other Pacific Islanders.

Source: Bonczar 2011. Admissions limited to new court commitments.

Human Rights Watch calculated that the black rate of new court prison commitments on drug charges in 2003 was 10 times greater than the white rate. Black men were sent to prison on drug charges at 11.8 times the rate of white men, and black women at 4.8 times the rate of white women (Human Rights Watch 2008).

In 2009, the most recent year for which data are available, 50.5 percent of state prisoners serving time for drug offenses (122,300) were non-Hispanic blacks, 17 percent (41,400) were Hispanic, and 30.1 percent (73,300) were non-Hispanic whites (Guerino, Harrison, and Sabol 2011). Drug convictions are responsible for a greater percentage of black (21.1 percent) and Hispanic (19.5 percent) state incarcerations than white (13.9 percent) (Guerino, Harrison, and Sabol 2011). Among the 97,239 federal prisoners serving time for drug offenses at the end of 2009, 43.7 percent were black and 53.9 percent were white (Bureau of Justice Statistics 2009).

II. Who Engages in Drug Offenses?

For most serious crimes, arrest and victimization survey data provide useful—although incomplete—information on the demographics of criminal offending (Like-Haislip, in this volume). Determining the demographics of drug offenders is more complicated. Arrests primarily reflect geographic deployment of police personnel and law enforcement priorities. There are no victims in the traditional sense, and no victimization studies. The principal source of national data on drug offenders comes from national surveys and self-report studies. Research on drug transactions in particular localities sheds additional light.

The federal Substance Abuse and Mental Health Services Administration (SAMHSA) conducts national surveys of drug use using a sophisticated sampling methodology and extrapolation of national estimates. The surveys do not include people who are homeless or institutionalized (e.g., in jail or prison) and thus may somewhat undercount minorities who are disproportionately represented in those populations, but experts nonetheless consider the SAMHSA surveys to provide reliable current and longitudinal data on drug use. National youth surveys have also included questions on drug offending that yield useful information. The available data leave little doubt that racial differences in drug offending do not account for the stark racial disparities in arrests and incarceration.

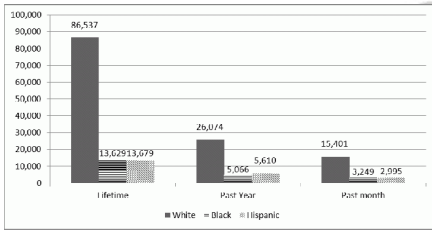
A. Drug Use

Use of illegal drugs is widespread. For 2010, SAMSHA estimates that 119,508,000 persons aged 12 and older had used illicit drugs in their lives, and 38,806,000 had used them in the past year (Substance Abuse and Mental Health Services Administration [SAMHSA] 2011). Decades of arrest and incarceration have apparently had little impact on the use of illicit drugs. In 1991–93, an average of 5.8 percent of persons aged 12 and older reported using an illicit drug during the previous month. In 2010, 8.9 percent did (SAMHSA 1996, 2011).

Anyone who uses drugs, by definition, violates laws against simple possession. Drug use data thus provide a valid surrogate for

Race and Drugs

possession offenses, and those data suggest that far more whites than blacks illegally possess drugs.



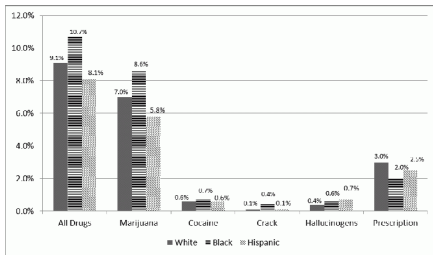
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Figure 2 Percentage by Race of Illicit Drug Use in Lifetime, Past Year, and Past Month Among Persons Aged 12 and Over

Note: Total includes all users regardless of race or ethnicity. "white" and "black" categories do not include people of Hispanic ethnicity.

Source: Substance Abuse and Mental Health Services Administration's (SAMHSA) 2011.

The percentages of blacks, whites, and Hispanics who report using illicit drugs in SAMHSA's surveys are roughly similar, as is shown in Figure 2.

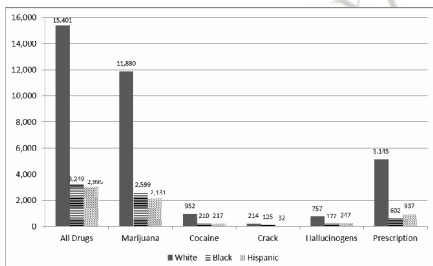


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Figure 3 Illicit Drug Use in Lifetime, Past Year, and Past Month Among Persons Aged 12 and Over by Race, Numbers in Thousands

Source: Substance Abuse and Mental Health Services Administration's (SAMHSA) 2011.

But because the white population in the United States is substantially greater than the black,⁴ comparable rates of drug use result in far greater numbers of white users. As Figure 3 shows, for example, slightly more than six times as many whites (86,537,000) report having used drugs in their lives as blacks (13,629,000). Among those who report using drugs in the past month, whites outnumber blacks almost five to one (SAMHSA 2011).



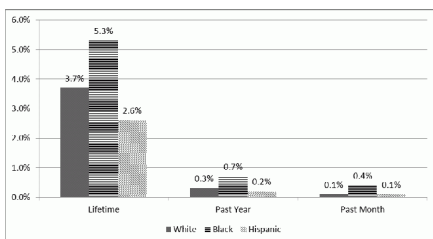
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Figure 4 Percentage by Race of Illicit Drug Use Among Persons Aged 12 and Over in the Past Month, by Type of Drug

Note: "white" and "black" categories do not include people of Hispanic ethnicity.

Source: Substance Abuse and Mental Health Services Administration's (SAMHSA) 2011.

Even assuming some undercounting of black drug use because the SAMHSA surveys do not include people who are transient, homeless, or institutionalized, there is little doubt that whites constitute a substantial preponderance of drug users. African Americans constitute 11.4 percent of all persons aged 12 and older who report they had ever used drugs in their lifetime; 13 percent of those said they used drugs in the past year, and 14.3 percent of those said they had used drugs in the preceding month (SAMHSA 2011).



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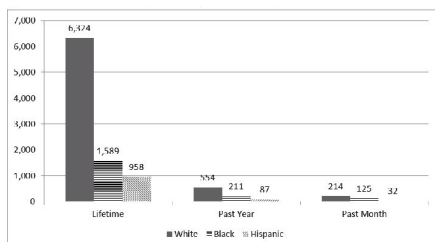
Figure 5 Illicit Drug Use by Persons Aged 12 and Over in Past Month by Race and Drug Type, Numbers in Thousands

Note: "white" and "black" categories do not include people of Hispanic ethnicity.

Source: Substance Abuse and Mental Health Services Administration's (SAMHSA) 2011.

Race and Drugs

Figure 4 shows that rates of drug use by type of drug do not substantially differ for whites, blacks, and Hispanics. African Americans rates are somewhat higher than whites' for the listed drugs except prescription drugs, but because of the different sizes of the black and white populations, the numbers of white users for every drug greatly exceed those for black users, as Figure 5 shows. The most heavily used drug is marijuana; the number of white marijuana users was more than four times the number of black users. Prescription drugs are the second most prevalent type of illicit drug use: among persons reporting using them in the preceding month, 5,145,000 were white and 602,000 were black.

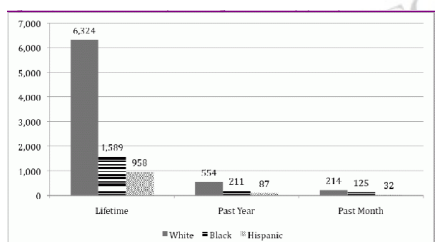


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Figure 6 Percentage by Race of Users of Crack Cocaine Among Persons Aged 12 and Over, Numbers in Thousands

Note: "white" and "black" categories do not include people of Hispanic ethnicity.

Source: Substance Abuse and Mental Health Services Administration's (SAMHSA) 2011



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Figure 7 Use of Crack Cocaine by Persons Aged 12 and Over, by Race, Numbers in Thousands

Note: "white" and "black" categories do not include people of Hispanic ethnicity.

Source: Substance Abuse and Mental Health Services Administration's (SAMHSA) 2011.

SAMHSA's data on crack use may be surprising in light of widespread stereotypes that crack is primarily used by blacks. As Figures 6 and 7 show, crack has been used by relatively few persons of either race relative to other drugs. The percentages of blacks who report crack use in their lifetime is low, particularly when compared with other drugs. If Figure 1 is compared with Figure 6, 45.1 percent of blacks report using drugs in their lifetimes, but only 5.3 percent report ever having used crack. Although 10.7 percent report using illegal drugs in the preceding month, only 0.4 percent report using crack.

The percentages of blacks reporting crack use exceeds those for whites in each reference period, but the much larger size of the white population means that a far greater number of whites than blacks have used crack. For example, as shown in Figure 7, in 2010, 6,324,000 whites report having used crack at least once in their life time, compared to 1,589,000 blacks. Even in 1991, just a few years after crack use in black communities became a focus of national concern, 65 percent of those who reported ever having used crack were white, 26 percent were black, and 9 percent were Hispanic (U.S. Sentencing Commission 1995). Other research in addition to SAMHSA's surveys has long contradicted the public belief that crack is a "black" drug. For example, research in Miami found few differences in levels of crack use based on race in a street-based sample of cocaine users (Lockwood, Pottieger, and Inciardi 1994). Others have concluded that if drug availability and social conditions were held constant, crack cocaine use does not differ significantly by race or ethnicity (U.S. Sentencing Commission 1995).

B. Drug Sales

There are relatively little independent data on the number or race of persons who violate laws against drug manufacturing and distribution. Those that exist, however, indicate that there are many more white than black drug sellers.

SAMHSA's annual national surveys have occasionally included questions on drug selling. In 1991, 0.7 percent of adult whites and 1.4 percent of adult blacks reported selling drugs in the past 12 months. In absolute numbers, far more whites (939,345) than blacks (268,170) reported drug selling (Fellner 2009). Fifteen years later, in 2006, 1.6 percent of whites and 2.8 percent of blacks reported to SAMHSA that they had sold drugs in the past 12 months, percentages that translate into an estimated 2,461,797 whites and 712,044 blacks—that is, three and a half times as many white as black drug sellers. Data collection between 1997 and 2001 as part of the National Longitudinal Survey of Youth, a long-term survey of a representative sample of young Americans, found that 13 percent of black youth reported ever selling drugs compared with 17 percent of white youth (Fellner 2009). SAMSHA surveys reported slightly higher drug selling rates by 12- to 17-year-old blacks than whites between 2001 and 2008 (Tonry 2011, p. 61).

Other research suggests that drug sellers are likely to have a racial profile similar to that of drug users—which translates into more white than black sellers (Fellner 2009). Drug dealing activities that violate laws against sales and delivery may be commonplace among frequent users (Hunt 1990; Beckett 2008; Oliver 2008). Frequent users transfer drugs to others, selling small quantities to finance their own habits

or to generate income. They may provide other services in drug distribution networks, such as acting as a lookout or courier. That being the case, drug sellers should have a racial profile similar to that of drug users—far more whites than blacks (Oliver 2008, p. 2; Fellner 2009, pp. 267–68). Other research indicates that drug users tend to obtain their drugs from people of the same race as themselves (Riley 1997). One researcher addressing racial congruity in drug activities observed, “dealers with direct contact with their customers ... are likely to look like the customers” (Hunt 1990, p. 172).

The race of drug sellers may vary by type of drug. In Seattle, Beckett, Nyrop, and Pflingst (2006) found that whites were the largest group of sellers of heroin, cocaine, methamphetamine, and ecstasy; a majority of crack cocaine sellers were black. Crack, however, accounted for a relatively small proportion of total drug transactions during the research period (Beckett, Nyrop, and Pflingst 2006). Given that the national market for crack is so small (as shown by crack drug use), the number of crack dealers is presumably quite small as well. Even if all crack dealers were black, they would account for only a relatively small number of all drug dealers.

The research on drug offending suggests a stark discrepancy between the racial characteristics of drug offenders and of those arrested for drug offenses. If there are five times as many white drug users and possessors as black, and an unknown but considerably greater number of white sellers than black, why do blacks account for over one-third of drug arrests? Why are more blacks in prison on drug charges than whites? Or, stated differently, why are whites disproportionately less likely to be arrested and incarcerated for their drug offenses?

III. Why Such Large Disparities in Arrests?

The answer is fairly straightforward. Drug offending cuts across all racial, socioeconomic, and geographic boundaries, but police do not enforce drug laws equally across those boundaries.

Most (61.7 percent) drug arrests occur in metropolitan areas. That is not surprising, given that people, crime, and law enforcement resources are concentrated there, and drug offending rates are higher in metropolitan than nonmetropolitan areas. But these factors do not explain why within urban areas African Americans are arrested in numbers far out of line with their proportion in the urban population or the urban drug using or selling population. In the 75 largest counties in the United States, in 2006, non-Hispanic blacks accounted for 49 percent of drug offense arrests, even though they represented only 16.3 percent of the population (Cohen and Kyckelhahn 2010). In New York City, between 1997 and 2006, blacks were arrested for misdemeanor marijuana possession at five times the rate for whites. Even though whites constituted a greater percentage of the population (35 percent) than blacks (27 percent), three and a half times as many blacks (185,000) as whites (53,000) were arrested for possessing small quantities of marijuana (Levine and Small 2008).

Because drug purchase and use are consensual, drug arrests are not a response to victim complaints but result from police decisions about resource allocation. In practice, police have focused on low-income, predominantly minority neighborhoods and have ignored other more upscale and white areas even though there is no evidence that drug use is less prevalent there. Police and prosecutors say increased attention to the poor minority neighborhoods is necessary to combat higher rates of violent crime and disorder in those communities and to respond to community complaints about drug trafficking. Some see low-level drug arrests, including arrests for marijuana possession for personal use, as justified by the “broken windows” theory of law enforcement.

The circumstances of life and the public nature of drug dealing in poor minority neighborhoods make drug arrests there less difficult and less time-consuming than in middle- or upper-class neighborhoods. In the former, drug transactions are more likely to take place on the streets, in public spaces, and among strangers (Beckett et al. 2005; Beckett, Nyrop, and Pflingst 2006; Tonry 2011). In white neighborhoods, drug transactions are more likely to occur indoors, in bars and clubs, private homes, and offices, and between people who already know each other. Here is how former New York City Police Commissioner Lee Brown explained the police concentration in minority neighborhoods and the consequent racial impact:

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.

(Bertram et al. 1996, p. 41)

But even in mixed-race outdoor venues, blacks are at disproportionate risk of drug arrests. In a mixed-race drug market in Seattle, Beckett and her colleagues found that 4 percent of drug deliveries involved a black seller, but 32 percent of drug delivery arrestees were black (Beckett, Nyrop, and Pflingst 2006).

Disproportionate drug arrests of minority suspects also reflect political and legal considerations. Street arrests are less complicated legally. William Stuntz observed, “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” (Stuntz 1998, p. 1823). Residents of middle- and upper-class white neighborhoods would also most likely object vigorously if they were subjected to aggressive drug law enforcement and, unlike low-income minority residents, they possess the economic resources and political clout to force politicians and the police to pay attention to their concerns. The bottom line is that it is “much more difficult, expensive, and politically sensitive to attempt serious drug enforcement in predominantly white and middle-class communities” (Frase 2009, p. 243).

A self-fulfilling prophecy may be at work. If police target minority neighborhoods for drug arrests, the drug offenders they encounter will be primarily black or Hispanic. Darker faces become the faces of drug offenders, which may also contribute to racial profiling. Extensive research shows that police are more likely to stop black drivers than whites, and they search more stopped blacks than whites, even though they do not have a valid basis for doing so. Similarly, blacks have been disproportionately targeted in “stop and frisk” operations in which police searching for drugs or guns temporarily detain, question, and pat down pedestrians (Fellner 2009). Although police generally find drugs, guns, or other illegal contraband at lower rates among the blacks they stop than the whites, the higher rates at which blacks are stopped result in greater absolute numbers of arrests (Tony 2011). According to Stuntz, “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” (1998, p. 1829).

Katherine Beckett and her colleagues showed that drug arrests in Seattle reflected racialized perceptions of drugs and their users (Beckett et al. 2005; Beckett, Nyrop, and Pfingst 2006). Although the majority of those who shared, sold, or transferred serious drugs were white, almost two-thirds (64.2 percent) of drug arrestees were black. Black drug sellers were overrepresented among those arrested in predominantly white outdoor settings, in racially mixed outdoor settings, and even among those who were arrested indoors. Three-quarters of outdoor drug possession arrests involving powder cocaine, heroin, crack cocaine, and methamphetamines were crack-related even though only one-third of the transactions involved that drug. Among indoor drug possession arrests, 69.6 percent involved crack even though only 25 percent of the transactions involved crack. The disproportionate pattern of arrests resulted from the police department’s emphasis on the outdoor drug market in the racially diverse downtown area of the city, its lack of emphasis on outdoor markets that were predominantly white, and, most important, its emphasis on crack. Crack was involved in one-third of drug transactions but three-quarters of drug delivery arrests; blacks constituted 79 percent of crack arrests.

The researchers could not find racially neutral explanations for the police emphasis on crack in arrests for drug possession or sale, or for the concentration of enforcement activity in the racially diverse downtown area rather than predominantly white outdoor areas or indoor markets. These emphases did not appear to be products of the frequency of crack transactions compared to other drugs, public safety or public health concerns, crime rates, or citizen complaints. The researchers concluded that the choices reflected ways in which race shapes police perceptions of who and what constitutes the most pressing drug problems. Blacks are disproportionately arrested in Seattle because of “the assumption that the drug problem is, in fact, a black and Latino one, and that crack, the drug most strongly associated with urban blacks, is ‘the worst’” (Beckett et al. 2005, p. 436; Beckett, Nyrop, and Pfingst 2006).

In 2010, as Table 4 shows, cocaine (including crack) and heroin arrests accounted for 22.5 percent of drug arrests nationwide even though, as Figure 3 shows, only a very small percentage of drug users (white or black) report using cocaine in any form. In a recent survey of the prevalence and frequency of heroin use, SAMHSA (1999) found that 1.1 percent of persons aged 12 and older reported using heroin in their lifetime, and 0.1 reported using it in the preceding year. Blacks were more likely than whites to report using heroin, but the percentages are quite low: 1.9 of non-Hispanic blacks reported ever using heroin and 0.2 reported using it in the past year. The proportion of drug arrests for cocaine and heroin thus seem to bear only a slight relationship to the prevalence of their use. In 2010, of all black drug arrests, 30.7 percent were for cocaine and heroin; 19 percent of white drug arrests were for these drugs. Boyum, Caulkins, and Kleiman (2011) observe that the enforcement of laws criminalizing cocaine accounts for “about 20 percent of the nation’s law enforcement, prosecution, and corrections” (p. 377).

Race and Drugs

Table 4 Arrests by Type of Offense, Drug, and Race, 2010

		White	Black	Native American	Asian	Total
Sales	Cocaine/Heroin	34,787	45,635	346	351	81,119
		42.9%	56.3%	0.4%	0.4%	100%
	Marijuana	50,196	30,210	582	838	81,826
		61.3%	36.9%	0.7%	1.0%	100%
	Other	60,015	11,369	480	703	72,567
		82.7%	15.7%	0.7%	1.0%	100%
	Total	144,998	87,214	1,408	1,892	235,512
		61.6%	37.0%	0.6%	0.8%	100%
Possession	Cocaine/Heroin	132,466	74,107	772	1,410	208,755
		63.5%	35.5%	0.4%	0.7%	100%
	Marijuana	392,127	187,577	4,806	4,906	589,416
		66.5%	31.8%	0.8%	0.8%	100%
	Other	207,809	41,004	2,009	2,718	253,540
		82.0%	16.2%	0.8%	1.1%	100%
	Total	732,402	302,688	7,587	9,034	1,051,711
		69.6%	28.8%	0.9%	0.9%	100%
Total	877,400	389,902	8,996	10,926	1,287,223	
		68.2%	30.3%	0.7%	0.8%	100%

(*) Includes manufactured narcotics that can cause true drug addiction (Demerol and Methadone) and other dangerous non-narcotic drugs (barbiturates and Benzadrine).

Source: Data provided by Federal Bureau of Investigation to author.

IV. Why Are Prison Disparities So Large?

All other things being equal, one would expect the racial distribution of prisoners sentenced for particular crimes to reflect the racial distribution of arrests for those crimes. Blumstein showed in 1982 that about 80 percent of racial differences in incarceration in 1979 could be accounted for by differences in arrest (Blumstein 1982). In the case of drug offenses, there was a significant difference between the racial breakdowns of arrests and incarceration. Racial disparities in imprisonment for drug crimes are even greater than disparities in arrest.

There are significant racial differences at different decision points in criminal justice processing of cases following arrest. Those differences compound, ultimately producing stark differences in outcomes (Kochel, Wilson, and Mastrofski 2011; Spohn 2011). In Illinois, for example, even after accounting for possible selection bias at each stage of the criminal justice system, nonwhite arrestees were more likely than whites to have their cases proceed to felony court, to be convicted, and to be sent to prison (Illinois Disproportionate Impact Study Commission 2010). After controlling for other variables, including criminal history, African Americans in Cook County, Illinois were approximately 1.8 times more likely than whites to be prosecuted rather than have their charges dropped or dismissed (Illinois Disproportionate Impact Study Commission 2010, p. 35).

Racial disparities exist at every stage. Black defendants are disadvantaged relative to white defendants in bail decisions (Brennan and

Race and Drugs

Spohn 2011). Young African-American men in Ohio had lower odds of pretrial release on their own recognizance, had higher bond amounts, and higher odds of incarceration relative to other demographic subgroups (Wooldredge 2012). The exercise of federal prosecutorial discretion with respect to charging decisions, motions for mitigated sentences based on substantial assistance by the defendant in the prosecution of others, and plea bargaining has led to racial disparities that affect sentences (Baron-Evans and Stith 2012, pp. 1635–36). Rehavi and Starr (2012) found that federal prosecutors were more likely to charge more serious offenses against black than white arrestees, including for offenses carrying mandatory minimum penalties. Ulmer and his colleagues found racial differences in downward departures under the federal guidelines, whether initiated by prosecutors or judges (Ulmer, Light, and Kramer 2011).

Researchers concluded that the defendant's race influenced the likelihood of incarceration in 15 studies of drug offender sentencing. All else considered, white felony drug offenders in North Carolina received less severe punishment than blacks or Hispanics (Brennan and Spohn 2011).

The effects of race on sentencing decisions is particularly notable when the studies take account of age, gender, or socioeconomic status (Spohn and Hollerman 2000; Doemer and Demuth 2010; Spohn 2011). Doemer and Demuth's study of sentencing decisions in federal courts found that young black and Hispanic males receive the harshest sentences of all racial/ethnic/gender-age subgroups and that the effects of race and ethnicity were larger in drug than in nondrug cases (Doemer and Demuth 2010, p. 14).

In 2003, the United States Sentencing Commission reported that black drug defendants were 20 percent more likely to be sentenced to prison than white drug defendants (U.S. Sentencing Commission 2003, p. 122). In its annual report for 2010, the United States Sentencing Commission reported that black (30.3 percent) and Hispanic (44 percent) federal drug offenders are significantly more likely than whites (23.1 percent) to be convicted of an offense carrying a mandatory minimum penalty. Blacks had higher average sentences than whites or Hispanics for powder and crack offenses, regardless of whether they were sentenced under the mandatory minimum provisions (U.S. Sentencing Commission 2011, pp. 181, 197).

Much of the research on racial disparities in case outcomes has sought to tease out the extent to which racial differences reflect the influence of legally irrelevant factors such as race, gender, and age. Yet research also shows that ostensibly race-neutral, legally relevant factors such as prior criminal records yield racial disparities.

Sentencing enhancements for repeat offenders are ubiquitous, both formally in sentencing laws and informally in sentencing practices. They may play a particularly significant role in drug cases because many drug defendants have significant histories of prior offending. According to the Bureau of Justice Statistics, for example, 66 percent of felony defendants arrested on drug offenses have prior convictions; 14 percent have 10 or more prior convictions (Cohen and Kyckelhahn 2010). Although there are no national data providing a breakdown of prior criminal records for drug offenders by race, the higher drug arrest rates for African Americans suggest they are more likely to have prior convictions. Frase (2009) found that criminal history was the single most important factor contributing to racial disparities in Minnesota—disparities that were substantially greater than at arrest and conviction. Black criminal history scores were higher than white within all major offense categories and were especially higher for drug offenders.

Criminal history influences the exercise of prosecutorial and judicial discretion in ways that disproportionately burden blacks. Spohn and Spears (2001) found that black drug offenders with prior felony convictions in Miami had higher odds of incarceration than white drug offenders with the same criminal record. Crawford, Chirico, and Kleck (1998) found that "the combination of being Black and being charged with a drug offense substantially increases the odds of being sentenced as habitual" (p. 496). Revisiting Crawford's study a decade later, Crow and Johnson (2008) found that "race (and ethnicity) still matter for habitual-offender designations" (p. 79). Black and Hispanic defendants are significantly more likely to be prosecuted as habitual offenders than white defendants, and the odds were greatest for black and Hispanic drug defendants (Crow and Johnson 2008, p. 77).

More research is needed to understand the effects of prior criminal records on drug offender sentencing. In New York, 77.9 percent of black drug offenders in custody at the end of 2011 had been sentenced as second felony offenders, compared with only 48.2 percent of white drug offenders (date provided to author by the New York State Division of Criminal Justice Services). Black drug arrestees in New York are more likely than whites to have prior convictions, given that blacks are far more likely to be arrested on drug charges.

Frase (2009) points out that the emphasis given to prior criminal records in sentencing is a policy choice and one that appears due for reconsideration. Although there is widespread support for imposing longer sentences on repeat offenders (Roberts 1997), there is scant evidence that habitual offender sentencing enhances public safety or reduces crime. Crow and Johnson (2008) conclude, "given the findings of over a decade of habitual-offender research that demonstrates racial and ethnic discrimination (unwarranted disparity), it may be time to reconsider the utility of habitual-offender statutes" (p. 80). Rehavi and Starr (2012), make the same point, "the heavy weight placed on criminal history in [federal] sentencing law is also a subjective policy choice with racially disparate consequences. Legislators and the Sentencing Commission members who are concerned about incarceration rates among black men may wish to consider these distributional consequences when assessing the costs and benefits of these aspects of the sentencing scheme" (p. 47).

The type of drug offense—possession or sales—influences drug sentences. Drug laws typically prescribe higher sentences for sales and manufacturing than for possession. Defendants convicted of sale are more likely to go to prison than are those convicted of possession, and the sentences are typically longer (Cohen and Kyckelhahn 2010). Blacks are disproportionately likely to be arrested for sales offenses, so it is likely that harsher sentencing for sales contributes to the disparities in sentencing outcomes.

Racial disparities in the incarceration of drug offenders also reflect legislative priorities. Federal sentencing laws treat crack cocaine offenses more harshly than powder. Because black Americans are more likely to be sentenced for federal crack offenses, they are disproportionately burdened by the higher crack sentences. In one recent year, 78.5 percent of federal crack offenders were black (U.S.

V. Race, Crime, and Punishment

There are racial disparities at every stage of drug case processing in state and federal criminal justice systems. As the Seattle research illustrates, race influences perceptions of the danger posed by the different people who use and sell illicit drugs, the choice of drugs that warrant the most public concern, and the choice of neighborhoods in which to concentrate drug law enforcement resources.

No public official admits to being influenced by race. Yet race is a powerful lens that colors what we see and what we think about what we see. In the United States, images of crime, danger, drug offenders, and criminals are deeply racialized. Criminal justice decision makers are not immune. Tonry (2011) and Provine (2007) summarize studies on the effects of racial attributions and stereotypes on people's perceptions, attitudes, and beliefs and the ways race correlates with policy choices. Whites may no longer consciously believe in the inherent racial inferiority of blacks, but they nonetheless harbor unconscious racial biases (Rachlinski et al. 2009). In one typical study, police officers shown black and white photographs of male university students and employees thought more of the black than white faces looked criminal; the more stereotypically black the face was, the more likely the officers thought the person looked criminal (Eberhardt et al. 2004).

Unconscious notions and attitudes are most likely to influence criminal justice decisions that have to be made in the face of uncertainty and inadequate information or in ambiguous or borderline cases. To recognize the influence of race on social psychology, unconscious cognitive habits, and "perceptual shorthand" (Hawkins 1981, p. 280) is not to accuse criminal justice professionals of being racist. The former can and does exist without the latter.

Race helps explain the development and persistence of harsh drug laws and policies. White Americans tend to support harsher punishments more than do blacks, a predilection that has strong roots in racial hostilities, tensions, and resentments (Tonry 2011, p. 91). Researchers have found that whites with racial resentments toward blacks are far more likely to support punitive anticrime policies and that whites are twice as likely as blacks to prefer punishment over social welfare programs to reduce crime (Unnever, Cullen, and Johnson 2008).

Even assuming public officials who championed the war on drugs decades ago operated from the best of motives or were simply remarkably ignorant about the likely effects of their decisions, good intentions or ignorance can be no excuse today. No reasonable public official can believe it is a good thing for black America to have in its midst a large caste of second-class citizens—banished into prisons and then branded for life with a criminal record.

The persistence of drug policies that disproportionately burden black Americans reflects factors similar to those that led to the adoption of harsh penal policies initially: punitive attitudes toward crime, fear of "the other," misinformation about drugs and their effects, the belief that using drugs is immoral and wrong, and the lack of instinctive sympathy for members of poor minority communities. At a structural level, the drug war—as part of the criminal justice system—retains its historic function of perpetuating and reinforcing racial inequalities in the distribution of political, social, and economic power and privileges in the United States. White Americans have long used the criminal justice system to advance their interests over those of blacks; the difference today is that they may no longer be doing so consciously.

Over a decade ago, observers of drug criminalization in the United States began labeling its impact on black Americans as the "new Jim Crow," recognizing that drug law enforcement has the effect of maintaining racial hierarchies that benefit whites and disadvantage blacks. In her best-selling book, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness*, Alexander (2010) contends that criminal justice policies and the collateral consequences to a criminal conviction today are—like slavery and Jim Crow in earlier times—a system of legalized discrimination that maintains a racial caste system in America: "today it is perfectly legal to discriminate against criminals in nearly all the ways that it was once legal to discriminate against African Americans.... As a criminal, you have scarcely more rights and arguably less respect, than a black man living in Alabama at the height of Jim Crow. We have not ended racial caste in America; we have merely redesigned it" (p. 2). She argues convincingly that drug policies have been and remain inextricably connected to white efforts to maintain their dominant position in the country's social hierarchy. As Tonry says, "the argument is not that a self-perpetuating cabal of racist whites consciously acts to favor white interests, but that deeper social forces collude, almost as if directed by an invisible hand, to formulate laws, politics, and social practices that serve the interests of white Americans" (Tonry 2011, p. 101).

According to Haney Lopez (2010, p. 4), the United States is in an era of "post-racial racism" in which "the various practices that collectively operate to maintain racial hierarchy [continue to exist] even in the face of broad social repudiation of purposeful racial mistreatment." He points out the dangerous trap of "colorblindness," in which we fail to recognize the role of race in interactions "not expressly predicated on race, no matter how closely correlated with racial hierarchy." The widespread belief—or hope—that race "no longer matters" has kept Americans from recognizing the ongoing salience of race in the criminal justice system in general and in the drug war in particular.

What will it take to change a quarter of a century of drug policies and practices that disproportionately and unjustifiably harm blacks? What will it take for Americans to condemn racial disparities in the war on drugs with the same fervor and moral outrage that they came to condemn the "old" Jim Crow?

One part of the answer has to be public recognition that racial discrimination can exist absent from "racist" actors. As Mendelberg (2001, pp. 18–19) pointed out, "in the age of equality, neither citizens nor politicians want to be perceived or to perceive themselves as racist. The norm of racial equality has become descriptive and injunctive, endorsed by nearly every American." White Americans, however, are

loathe to recognize or acknowledge structural racism because that would raise questions about their commitment to racial equality—and their willingness to give up the privileges of being white. White discomfort with even the very notion of structural inequality no doubt also is strengthened by conservative American political and moral cultures that stress individual responsibility. Implicit racial bias, racial self-interest, and conservative values combine to make it easy for whites to believe that black incarceration is a reflection of choices blacks have made and penal consequences they have merited. Whites rationalize or avoid seeing the inequities inherent in the war on drugs, assuming or persuading themselves “that the problem is not in the policies they and people like them set and enforce, but in social forces over which they have no control or in the irresponsibility of individual offenders” (Tonry 2011, p. 105).

The “myth of a colorblind criminal justice system” is widely influential in the United States because the language of police, judges, prosecutors, and public officials has been wiped clean of explicit racial bias (Roberts 1997, p. 263). United States courts, unfortunately, have made it easier for white Americans to ignore racial disparities in twenty-first century America. Under current constitutional jurisprudence, facially race-neutral governmental policies do not violate the constitutional guarantee of equal protection unless there is both discriminatory impact and discriminatory intent. As Laurence 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.

(Tribe 1999, p. 1509)

The courts offer no relief for racial inequalities “built into the very structure and doctrine of the criminal justice system” (Cole 1999, p. 9).

In contrast, international human rights law prohibits racial discrimination unaccompanied by racist intent (Fellner 2009). Under the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD),⁵ policies or practices that have “the purpose *or effect*” (emphasis added) of restricting rights on the basis of race are discriminatory. Obviously, laws that make explicit distinctions on the basis of race (other than affirmative action policies)⁶ constitute prohibited discrimination. But so do race-neutral laws or law enforcement practices that create unwarranted racial disparities, even if they were not enacted or implemented by culpable actors who intentionally sought to harm members of a particular race (United Nations Committee on the Elimination of Racial Discrimination 2005; Zerrougui 2005).

As a party to ICERD, the United States has undertaken to condemn and take steps to end racial discrimination within the war on drugs (ICERD Art 2[c]). The Committee on the Elimination of Racial Discrimination, which monitors compliance with ICERD, has pointedly reminded the United States that the stark racial disparities in the administration and functioning of its criminal justice system “may be regarded as factual indicators of racial discrimination” (United Nations Committee on Elimination of Racial Discrimination 2008, paragraph 20). It has recommended that the United States “take all necessary steps to guarantee the right of everyone to equal treatment before tribunals and all other organs 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” (United Nations Committee on Elimination of Racial Discrimination 2008, paragraph 20).

Laws or practices that harm particular racial groups must be eliminated unless they “are objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary” (United Nations Committee on the Elimination of Racial Discrimination 2008, paragraph 10). Are racial disparities in U.S. drug law arrests, convictions, and incarcerations justifiable? Are they the result of measures narrowly tailored to pursue a legitimate aim? The rates seem to bear little relationship to rates of offending. The operational and political convenience of making arrests in low-income minority neighborhoods rather than white middle-class ones may be an explanation but certainly not a justification. Even assuming the legitimacy of the goal of protecting minority neighborhoods from addiction and drug gang violence, the means chosen to achieve that goal—massive arrests of low-level offenders and high rates of incarceration—are hardly a proportionate or necessary response.

No independent and objective observer believes the United States can arrest and incarcerate its way out of its “drug problem.” Less harmful and perhaps even more effective alternatives to the “punitive paradigm” are available, such as increased substance abuse and mental health treatment, drug education, positive social and economic investments in low-income neighborhoods, and the substitution of drug regulation for criminalization.

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Race and Drugs

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Notes:

(*) Includes some persons of Hispanic origin; however, there are additional persons of Hispanic origin who are new court commitments who were not categorized as to race and who are not included in these figures.

(**) Includes American Indians/Alaskan Natives, Asians, Native Hawaiians, or other Pacific Islanders.

(*) Includes manufactured narcotics that can cause true drug addiction (Demerol and Methadone) and other dangerous non-narcotic drugs (barbiturates and Bensedrine).

(1) Most of the literature on the discriminatory impact of drug law enforcement has focused on black Americans. Capacity to other ethnic disparities is limited by national arrest and imprisonment data, which either do not or only inadequately indicate the ethnicity of those arrested, sentenced, held in prison, and released from prison.

(2) In the past decade, however, newer drugs (e.g., methamphetamine, ecstasy) and nonprescription use of pain killers are more associated with whites than with racial minorities and have garnered law enforcement attention. They account for a small proportion of arrests.

(3) The Uniform Crime Reports program receives arrest information from participating law enforcement agencies. Although possession of drugs with intent to sell is usually considered a trafficking or sales offense, according to conversations the author had with the FBI, there is no way to know whether some reporting agencies count arrests for possession with intent to sell as possession arrests.

(4) According to the U.S. Census Bureau (2010), in 2010, whites constituted 72.4 percent of the U.S. population and blacks 12.6 percent. Persons of Hispanic or Latino origin, who can be of any race, accounted for 16.3 percent.

(5) International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), G.A. Res. 20/2106 Annex, U.N. GAOR Supp.

Race and Drugs

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]. Human rights treaties are binding both on the federal and state governments (Human Rights Watch and Amnesty International 2005, p. 103).

(6) Under ICERD “special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination” ICERD, Article 1(4).

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