

Chapter 8

Criminal Justice, Race and the War on Drugs

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Introduction

As this book illustrates, a significant body of extant research examines issues of racial bias in criminal justice processes and law. Taken as a whole this body of research suggests that race affects a variety of criminal justice processes. To be sure, the strength of the evidence on racial disparity varies across specific issues, time and geographic space in the U.S., and can even depend, in some cases, on the method of analysis or the variables included within the analysis. Despite these observations, the relationship between race, law and criminal justice is the most pronounced and consistent with respect to drug crimes. Historically, the race-drug connection has been illustrated by various “wars” on drugs: the opiate wars in the U.S. from the 1870s through the early 1900s revolved around the use of these drugs among Asian populations; the focus on marijuana and black Americans became part of law enforcement’s campaign against drug use in the 1930s, spearheaded by Harry Anslinger, the first Commissioner of the Federal Bureau of Narcotics; the emergence of racial differentiation in sentencing in the 1986 *Controlled Substances Act* which provided penalties for crack cocaine, a drug more widely used in minority communities, that were 100 times as severe as the penalties for powdered cocaine, a drug more often used by affluent whites; to the long-running “war on drugs” that has influenced criminal legislation and crime control in the U.S. since the Civil Rights Movement.

This chapter focuses specific attention on the contemporary era of the war on drugs (WoD) and race associated with President Reagan and Nancy Reagan’s national crusade against drugs (Reagan, September 14, 1986) and passage of

the Anti-Drug Abuse Act of 1986. The contemporary WoD targeted low-level drug dealers and users for arrest by encouraging law enforcement officers to target these offenders and through increased drug sanctions for convicted drug offenders (e.g., long mandatory minimum prison sentences). These policies have had, as did earlier drugs wars, an especially detrimental effect on racial and ethnic minorities, but particularly on African-Americans (Musto, 1999).

To place this claim in context, consider that in 1980, prior to the WoD, the drug arrest rate was roughly twice as high for African-Americans (491 per 100,000) compared to whites (238 per 100,000). At the height of the drug war (1989) this ratio had increased to 4 to 1 and stimulated the expansion of racial disparities in imprisonment (Western, 2006). And while the WoD affected the growth of imprisonment for both blacks and whites, Blumstein and Beck (1999:25) estimated that the effect led to a 17% increase in incarceration for whites but a 36% increase in incarceration for blacks between 1980 and 1996.

Reflecting on this and similar evidence, Michael Tonry (1995:82, our emphasis) argued that “The War on Drugs was a *calculated effort*” to increase the percentage of young black men in prison. In contrast, John P. Walters (2001:19), U.S. drug czar under President George W. Bush and WoD proponent, stated that the idea of the criminal justice system “unjustly punishing young black men” is one of the “great urban myths of our time.”

The remainder of this chapter addresses whether African-Americans have been unjustly punished by policies instituted under the auspices of the WoD, or whether racial disparities in criminal justice outcomes are the consequence of differential drug use across racial groups.

The Contemporary War on Drugs: Background

As noted, the WoD was set in motion by Ronald Reagan and passage of the Anti-Drug Abuse Act of 1986. During the late 1980s, a “media frenzy” focusing on drug use, especially crack cocaine (Reinarman and Levine, 1997a) began when two young black athletes, Len Bias and Don Rogers, died within a week of one another after ingesting cocaine. Following these deaths, thousands of stories about cocaine appeared in the nation’s newspapers (Trebach, 1987) and TV news (Diamond, 1991), and touted the dangers of crack and the mayhem surrounding the “crack epidemic.”

This spate of news coverage emphasized four primary issues. First, that crack was highly addictive (e.g., see, *Newsweek*, March 17, 1986). Second, that addicted mothers gave birth to addicted babies who would suffer from a vari-

ety of maladies including brain damage and low IQs (Baum, 1996). Third, that crack markets generated other crimes, especially violent crime (for discussion see Brownstein, 1997). And finally, that crack use had reached epidemic proportions in America's inner cities and was spreading to middle-class suburbs (e.g., *Newsweek*, March 17, 1986). In retrospect, many of these themes proved to be inaccurate (Frank, Augustyn, Knight, Pell, and Zuckerman, 2001; Goode, 2005; Goldstein, 2001; USSC, 2007).

More important than these media themes was the link the media made between African-Americans and crack use (Reeves and Campbell, 1994). Prior to the WoD, Reeves and Campbell found that 60% of cocaine users/sellers shown on television news were white. After 1986, however, news accounts involving cocaine users most often showed non-whites (66%). Thus, television news shows left viewers with the image of cocaine offenders as blacks. This message was not lost on media consumers. A study by Burston, Jones and Roberson-Saunders (1995) found that 95% of respondents in a Washington, D.C. area survey described both the typical drug user and trafficker as black.

Politicians, including U.S. presidents Reagan and G. H. W. Bush, reinforced media themes of crack's dangers, and used these to demonstrate their commitment to law and order. In a well known incident, President George H.W. Bush held up a bag of crack confiscated by federal agents, and noted that crack was "turning our cities into battle zones and murdering our children," and that "the gravest domestic threat facing our nation today is drugs ... in particular, crack" (Bush, 1989). Congressman E. Clay Shaw (Republican, Florida) declared drugs "the biggest threat that we have ever had to our national security" (Baum, 1996: 231).

Media and political focus on the crack "epidemic" had a dramatic impact on public opinion. For example, in 1985 public opinion polls, only 1% of respondents identified drug use as "the most important problem facing the country today." In 1986, after the Bias and Rogers deaths and the ensuing political and media frenzy, this figure increased to 10% (Reinarman and Levine, 1997b: 24). In September of 1989, following President Bush's national address declaring drugs "the gravest domestic threat," 64% of respondents believed that drugs were the country's most important problem (Reinarman and Levine, 1997b: 24) despite the fact that drug use, including cocaine use had been dropping for several years prior to 1989.

To address the public concern they in part had stimulated, Congress passed a series of laws that spurred aggressive drug enforcement, significantly increased penalties for federal drug offenses, and provided federal financial support to states to fund law enforcement activities and build new prisons. The two central pieces of legislation that initiated the latest WoD were the federal Anti-

Drug Abuse Acts of 1986 and 1988. The Anti-Drug Abuse Act of 1986 included several new drug regulations and penalty provisions such as deportation penalties for alien drug traffickers, the prohibition of interstate commerce in drug paraphernalia, and the death penalty for certain drug offenses. The hallmark of this Act, however, were long mandatory minimum prison sentences for drug trafficking. The most controversial was the “100-to-1 ratio” that required, for example, first-time offenders to serve 10-year mandatory minimum prison sentences for the distribution of 5,000 grams (11.02 pounds or 177.32 ounces) or more of powder cocaine, or 50 grams (0.1102 pounds or 1.763 ounces) or more of crack cocaine. Under this law, the punishment for trafficking 100 grams (3.52 ounces) of powdered cocaine was effectively equivalent to those for trafficking 1 gram (0.0352 ounces) of crack cocaine. The 1988 Act escalated earlier provisions, and included among other penalties a five-year mandatory minimum sentence for the *simple possession* of 5 grams or more of crack cocaine. This provision made crack the only drug that required a mandatory penalty for a first-time possession.

Much has been written about the increased sentences for drug offenses created by Anti-Drug Abuse Acts, particularly the 100-to-1 crack/powder cocaine ratio. Considerably less attention has been given to what we believe is a bigger policy change—the targeting of street-level drug distributors and users. The Reagan/Bush administrations touted the need to focus drug enforcement activities on neighborhood level drug offenders as opposed to high level and international drug distributors targeted by previous administrations. The first National Drug Control Strategy (ONDCP, 1989) clearly reflected this thinking: “[S]treet-level enforcement remains the best tool we have for restoring a sense of order and civility to neighborhoods where drugs.... The first priority of local drug enforcement, then, is to employ effective police methods capable of fighting drugs at the neighborhood level” (p. 21, our emphasis). The Strategy also made clear the intended result of street-level drug enforcement: “Making streets safer and drug users more accountable for their actions requires the criminal justice system to expand and reform in an unprecedented way. *Effective street-level enforcement means dramatically increasing the number of drug offenders arrested*” (ONDCP, 1989: 24, our emphasis).

The seismic shift in federal drug policy established under the WoD was accompanied by billions of dollars in federal funds to states adopting law enforcement activities consistent with this new philosophy. The strings attached to the federal funds distributed to states had the effect of changing drug policy at the state level. States adopted more punitive sentences for drug offenders. For example, 31 states enacted mandatory minimum drug sentences by 1994 (Bureau of Justice Assistance, 1996). And at least fifteen states created

sentencing policies that distinguished crack cocaine from powdered cocaine and reserved harsher sentences for the former substance (USSC, 2007). The end result of these changes were sharp increases in average time served for drug offenses; average time served went from 14 months in 1983 to 24 months in 2001—a 70% increase (Western 2006). Without a doubt these changes in drug sentencing were dramatic; yet, they pale in comparison to WoD's effects on drug arrests.

The War on Drugs and Arrests

The initial effects of the WoD can be seen in increased arrests for drug offenses between 1980 (pre-WoD) and 1990 (post-WoD). During this time period, drugs arrests increased by 87.6% (from 580,900 to 1,089,500). Arrests for violent and property crimes also expanded during this period, but at much reduced levels—48.5% for violent crimes and 19% for property crimes. Drug arrests continued to increase significantly during the 1990s, and from 1990–2000, drug arrest rose by 45% compared to a decline in both violent crime arrests (-11.4%) and property crime arrests (-26.9%). In the new millennium (2000–2008) drug arrests continued to increase, though by only 15.4 percent. Property crime arrests rose as well, but by only 4.1%, while violent crime arrests declined (4.8%). Over the entire time period (1980–2008) drug arrests expanded by 191% while violent crime arrest increased by 25.2% and property crime arrests declined 9.4%.

Increasing arrests for drug offenses are also evident when examining arrest ratios between drug, violent and property crimes. For example, in 1980 there were 3.21 property crime arrests for every drug arrest. By 2008, this trend had reversed itself, and there were 1.01 drug arrests for every property crime arrest. A similar picture emerges when examining the ratio of drug to violent crime arrests. In 1980, there were 1.22 drug arrests for every violent crime arrest but by 2008 this ratio grew to 2.86.

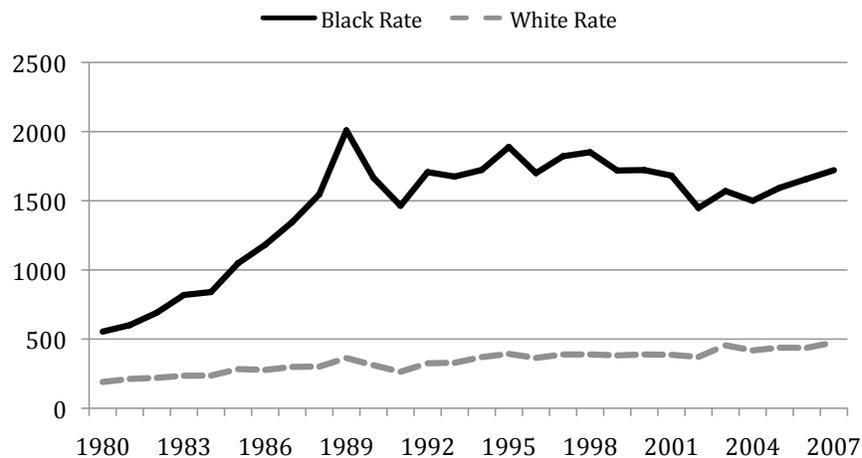
To illustrate the effect of the WoD on race and drug crime arrests, *Human Rights Watch* (HRW; <http://www.hrw.org/en/reports/2009/03/02/decades-disparity>) collected data on drug arrests by race of offender from 1980 through 2007 from the Uniform Crime Reports for adults. In 1980, 27% of drug arrests involved blacks but by 1988, after the initial spread of the WoD, 40% of drug arrestees were black. The percentages of drug arrestees who were black peaked in both 1989 and 1991 at 42%, and declined slowly to 35% by 2007.

To get a more complete picture of the extent of racial differences in arrest, it is useful to employ race-based offending rates adjusted by population (for discussion of various uses and misuses of these measures see: Lynch, 2002). In 1980, HRW reports (Figure 1) that the drug arrest rate for whites was 190 per 100,000 and 554 per 100,000 for blacks—a disparity ratio that is 2.9 times higher for

blacks. By 1988, the drug arrest disparity had increased to 5.1 times higher for blacks.

Race-based drug arrests rates for both whites and blacks grew as a result of the WoD. Between 1980–1988 the drug arrest rate grew 58.4% (to 301/100,000) for whites, *but expanded by 179% for blacks* (to 1,547/100,000). The disparity ratio reached 5.5 in both 1989 and 1991 (i.e., there were 5.5 times as many blacks arrested for drug offenses compared to whites), and declined slowly since to 3.6. Still, in 2007, the drug arrest rate for blacks was 1,721 per 100,000 or 211% higher than in 1980, while the drug arrest rate for whites rose by approximately 151% during this same period. Thus, while the WoD led to increased arrests for both blacks and whites, the effect was much greater for blacks than whites.

Figure 1. U.S. Rates of Adult Drug Arrests by Race, 1980–2007
(rates calculated per 100,000 residents of each race)



Source: Human Rights Watch, <http://www.hrw.org/en/node/81105/section/4>.

The effect of the WoD is by no means uniform across locations in the U.S. Disparity ratios, for example, vary widely across states. Still, there is no state in which whites are arrested for drug offenses more often than blacks per 100,000 population (see Human Rights Watch). For the 48 states for which this information is available for 2007, the mean disparity ratio was 4.98. Thirty-one states had disparity ratios below that mean (Hawaii had the lowest dis-



parity ratio, 2.0), with 17 states above the mean (both Iowa and Minnesota had mean disparity ratio of 11.3).

The War on Drugs and Imprisonment

The punitive shift associated with the WoD also impacted the U.S. prison system, increasing the number of prisoners serving time for a drug offense. In 1985 prior to implementation of the WoD there were 48,391 drug offenders incarcerated in the United States; by 2003 this figure has grown to 326,700—a 575% increase (Mitchell, 2009). While this punitive shift affected Americans of every race, it particularly affected black Americans (Western, 2006; Lynch 2007). As an example of this racial imbalance, consider that in 1985, of the roughly 22,000 newly admitted inmates with a drug offense as their most serious conviction, 39% were black and 38% were white; in contrast, in 2003, of the nearly 112,000 inmates who fell into this category, 53% were black and 30% were white (Mitchell, 2009). These are just a few of the statistics that illustrate the racially disparate impact of the WoD, but they are far from the only such statistics. There is a significant literature addressing this issue, and it is sufficient for our purposes to note that the WoD has been shown to have a large impact on imprisonment and on racially disproportionate prison admissions (Tonry, 1995; Blumstein and Beck, 1999; Western, 2006; Lynch, 2007). Rather than repeat this evidence, we turn our attention to the following question: given that blacks are arrested, convicted, and incarcerated at rates that greatly exceed those of whites, can these racial disparities be explained by differences in drug offending?

Explanations for Racial Disparity in Drug Sanctioning

There are three competing, but non-contradictory, hypotheses used to explain the growing racial disparities in drug arrests and incarcerations. We refer to the first explanation as the “differential involvement” hypothesis. According to this hypothesis growing racial disparities in criminal justice outcomes have emerged due to growing racial disparities in drug offending. Simply put, the increase in black drug arrests reflects their growing drug offending. Scholars adhering to this hypothesis note that black/white economic inequality grew during the 1980s and as a result blacks were increasingly tempted by “employment” in illicit drug markets and/or downtrodden blacks were increasingly likely to be heavy drug users as a means to cope with their situations (Currie, 1993; Duster, 1997).

The second explanation contends that blacks and whites are equally likely to engage in drug offending, but blacks are subject to greater police scrutiny due to racial differences in the nature of drug offending; hence, we refer to this as the “differential scrutiny” hypothesis. Scholars utilizing this perspective (e.g., Blumstein, 1993; Goode, 2002; Tonry, 1995) note that blacks’ lower economic standing leaves them with less access to private space and as a consequence drug offending in black communities is more likely to occur in public (e.g., street corners) and semi-public places (e.g., crack houses), involve smaller, more frequent transactions, and that police patrols are often concentrated in black communities. All of these factors expose drug offending in black communities to heightened police surveillance.

The third explanation centers on racial bias on the part of criminal justice policy-makers and/or criminal justice decision-makers (e.g., police, judges, prosecutors). In this view, racial disparities in drug arrests and incarcerations are due to racial bias on the part of policy-makers who constructed new policies that consciously or subconsciously targeted black drug offenders, including racial disparities in drug crimes produced by changes in law enforcement or sentencing practices that sanction black drug offenders more often and more harshly than whites.

It should be noted that racial bias does not need to be overt or even conscious to affect decision-making (Lynch and Patterson, 1996). Psychological research indicates that prevailing racial stereotypes can affect one’s actions, even if one holds no conscious racial animus, as cultural stereotypes that link minorities to drugs, crime, and other socially undesirable behaviors are pervasive, and, thus, may affect decision-making at a subconscious level (Fridell, 2008). For example, Devine’s research (1989) into the psychology of racism revealed that individuals who exhibit “low prejudice” on the Modern Racism Scale were as knowledgeable of racial stereotypes as “high prejudice” individuals. When asked to identify the components of black stereotypes, “the most common theme in subjects’ protocols was that blacks are aggressive, hostile, or *criminal-like* (Devine, 1989:9, our emphasis). Devine also found that when given a task that tapped automatic cognitive processes both low- and high-prejudice respondents reacted in a manner consistent with racial prejudice. Although the subconscious component of racism is extremely difficult to evaluate empirically, this notion is important because it highlights that one need not be a “racist” to make racially biased decisions.

Examining the Differential Involvement Hypothesis

With these hypotheses in mind, we return to the question: Is racial disparity in drug arrests a product of differential drug use patterns across blacks and

whites? As noted, available data indicates that even prior to the WoD, blacks had higher drug arrest rates than whites. This finding clearly indicates that racial disparity in drug arrest did not originate with the WoD. Evidence also suggests, however, that the WoD exacerbated racial disparities in drug arrests (Mauer, 2009). These disparities peaked in 1991 before subsiding, though they remain at levels above the pre-WoD period. For either of these patterns to explain the racial differences observed in drug arrests, black use of drugs would need to exceed white use of drugs by a significant margin.

To examine these expectations, we draw on data from the National Survey of Drug Use and Health (NSDUH) and restrict our analysis to 2008, though any year of these data could be employed. The NSDUH estimates drug use from a national sample, and is, in our view a more appropriate data sources than school-based drug use surveys, which are tainted by the omission of school drop-outs and chronic absentees. Moreover, because the data are based on households instead, of students, they include a wide age range. Here we use the portion of NSDUH related to adults (those 18 and over).

Table 1. Estimated Number of Self Reported Drug Users by Race for Non-Hispanics, 2008, Past Year Use, and Percent Reporting Use in the Past Year (in parentheses)**

	Whites	Blacks	W/B Ratio*	Percent Users Who were White
All Drugs	25,926,960 (13.9)	6,356,497 (16.8)	4.08	80.3
Marijuana	18,839,014 (10.1)	5,183,572 (13.7)	3.63	78.4
Cocaine	4,290,073 (2.3)	832,398 (2.2)	5.15	83.9
Crack	932,625 (0.5)	227,018 (0.6)	4.11	80.4
Hallucinogens	2,611,349 (1.4)	264,854 (0.7)	9.86	90.8
Inhalants	3,730,998 (2.0)	151,345 (0.4)	24.65	96.1

* The W/B Ratio is the number of white self reported drug users for every one self reported black drug user.

** These data were derived from the U.S. Department of Health and Human Services, National Household Survey on Drug Abuse, 2008 data. The most recent data released under NHSDA can be found at: <http://www.oas.samhsa.gov/nsduhLatest.htm/>.

Table 1 displays the findings from the NSDUH survey. That table shows the number of drug users for each drug use category (first row for each drug category) and the percent of each racial group reporting use of a particular drug category (second row). If we consider percent usage within each racial group, self reported drug use for blacks exceeds self reported drug use for whites in three categories: all drugs (16.8 to 13.9%); marijuana (13.7 to 10.1%); and crack (0.6 to 0.5%). These percentages appear to suggest that racial differences in drug arrests are possible given that within these racial groups, black drug use exceeds white drug use. These percentages are misleading, however, because they fail to take into consideration the fact that whites far outnumber blacks in the population. To reflect this fact, table one also includes the estimated number of users for each drug type based on the reported use rates and the population of whites and blacks in the U.S. These data reveal a vastly different picture of drug use.

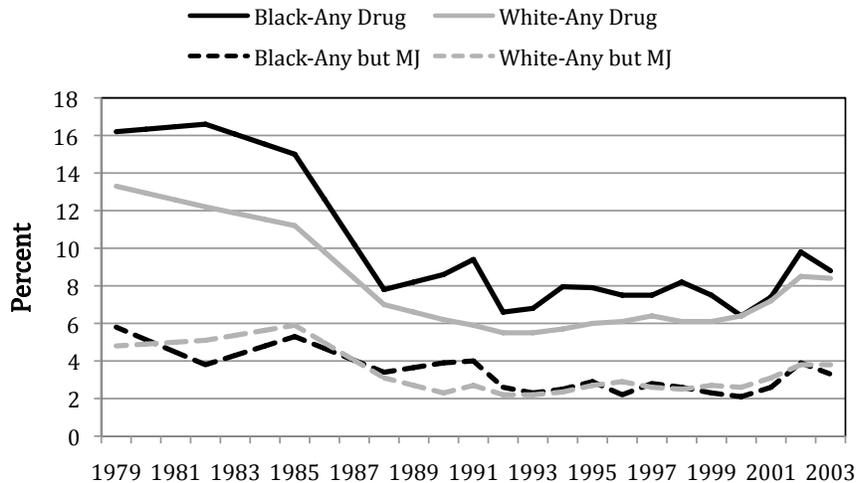
Reexamining Table 1 and focusing on row one for each drug type, it is clear that for every category of drug use, white users far outnumber black users in the prior year. For example, while 16.8% of blacks admit to using any drug in the prior year compared to 13.9% of whites, numerically there were nearly 26 million self admitted white drug users but only about 6.4 million black self reported drug users. In other words, for every one black self-reported drug user there are 4 self-reported white drug users. Adjusting for population size, then, in each drug use category there are far more white users than black drug users, and 80.3% of all reported drug use involves whites.

With these observations about drug use in hand, let us return to a consideration of arrest data. At the WoD's peak in 1991 42% of drug arrestees were black. Yet, NSDUH data indicates that approximately 80% of all drug users are white. In other words, if the NSDUH estimates are accurate, then blacks are arrested twice as often as their use rates would predict.

The NSDUH data can also be employed to examine the expectation of increasing disparities in drug use by race over time (see Mitchell, 2009). In regards to any drug use, the black-white drug difference was more than 3 percentage points in 1979, dropped to less than 1 percentage point by the late-1980s, and by the millennium drug use rates were virtually identical (see Figure 2). In effect, the NSDUH indicate that over time, black and white drug use rates have converged or become more similar within racial groups. These findings are at odds with expectations of a sharp increase in black drug use during the late-1980s and a marked increase in white drug use in the early-1990s. Simply stated, these drug use trends, which indicate increasing similarity in drug use by race, do not comport with drug arrest trends, which show

sustained and growing disparities by race. (For additional analysis relevant to drug use patterns and race see Mitchell, 2009).

Figure 2. Drug Use by Race and Type, 1979–2003



Source: National Household Survey of Drug Use and National Survey of Drug Use and Health, various years.

The results in Figure 2 indicate that the massive increase in black drug arrests cannot be explained by blacks' greater involvement in drug use. Perhaps this escalation in black drug arrest rates is due to blacks' greater involvement in drug distribution. Recent analyses of race and drug distribution data, however, indicate that racial differences in drug distribution also cannot explain racial disparities in drug arrests. Using the National Longitudinal Survey of Youth, Mitchell (2009) found that "between 1997 and 2006 whites were significantly more likely to be involved in drug distribution than blacks; 23.4% of whites and 19.1% of blacks had ever sold or helped sell any illicit drug. And whites and blacks were equally likely to have sold hard drugs, 10.2% vs. 8.9%, respectively. Yet, blacks were more likely than whites to have been arrested on a drug distribution charge, 4.3% vs. 2.5%" (Mitchell 2009: 62). More disturbing is that Mitchell discovered a large difference in self reported arrests among drug distributors by race: 28.8% of black drug dealers report being arrested compared to 12.4% of white drug dealers. Mitchell also found that white drug dealers were less likely to be convicted of a drug sales offense compared to blacks:

3.2% compared to 12.7%. Thus, the differential involvement hypothesis is not supported by data examining drug use or drug distribution.

The research of Beckett, Nyrop, and Pfingst (2006) also refutes the differential involvement hypothesis. These authors examined racial disparities in drug distribution arrests in Seattle. This research asked participants in a needle exchange program to describe the race/ethnicity of their suppliers, and compared the results Seattle Police Department drug arrest data. The survey data indicated that for all drugs except crack (47% black, 41% white) the majority of low-level methamphetamine, heroin, and ecstasy dealers were reported as white. Yet, black dealers were disproportionately arrested for every drug type in the police data. For example, while 47% of reported crack dealers were black, 79% of arrested crack dealers were black. Similarly, while 7.2% of methamphetamine dealers were black, 17.2% of those arrested for methamphetamine delivery were black. Beckett and colleagues attribute the over-representation of black drug dealers at arrest to the fact that police focus on: 1) crack, a drug with a greater proportion of black drug dealers; 2) outdoor drug transactions, instead of indoor transactions; and, 3) open-air drug markets that have a large percentage of minorities, instead of other open-air drug markets that have predominantly white dealers. Clearly, Beckett et al.'s work supports the differential scrutiny hypothesis and refutes the differential involvement hypothesis.

Examining the Differential Scrutiny Hypothesis

The structure of law and law enforcement, including the content of law, police tactics and sentencing patterns, have been widely discussed as explanations for racial disparities observed in the criminal justice system. With respect to the WoD, concern over drug use was, at first, stimulated by news coverage. This was the first phase in launching the attack against minority drug users, and it drew on and at the same time manipulated public perceptions and widely shared stereotypes of minorities identified in the psychological literature. Politicians used these media messages to demonstrate their concern with the rising crime problem associated with drug use, and elevated these concerns to a national campaign by producing a set of stringent Anti-Drug Acts and by providing funding for anti-drug initiatives. These new drug control strategies included specific policies that perhaps indirectly targeted minority drug offenders, which lead to massive increases in the number of black drug offenders being arrested. Policing tactics such as "street sweeps" of visible drug markets that are disproportionately located in lower income and minority communities had a disparate effect on African-Americans. Police agencies also engaged in drug dealer

and user “profiles,” which were often based on faulty data assumptions (Lynch, 2002) to create guidelines that caused police to focus attention on “suspicious” minorities (Cole, 1999). By creating policies that disproportionately affected blacks, policy-makers and police re-enforced cultural stereotypes linking racial minorities to drug crime.

In the end, the public nature of black drug dealing combined with the WoD’s policy decisions to focus on low-level drug offending produced stark racial disparities in police scrutiny, and in turn stark racial disparities in drug arrests. While it is impossible to empirically prove that *race* directly affected any of the decisions that set the WoD and its racially biased outcomes in motion, social psychological research supports the contention that internalized cultural racial stereotypes connecting blacks to crime, especially drug crime, could have played an important role in this process. Further, the racial disparate effects of the WoD’s key policies easily could have been predicted, if policy-makers had exercised even a modicum of due diligence.

Thus, the most cogent explanation of the worsening racial disparity in drug arrests is that police, in part at the behest of federal policy-makers, adopted tactics designed to make abundant low-level drug arrests. Policy-makers and police chose to focus on low-level drug dealers instead of wholesalers and importers. They chose to focus on open-air drug markets located in urban areas, instead of closed-door transactions characteristic of suburban and rural dealers. They chose to wage a war using tactics that exploit ignorance of the law (e.g., “consent searches”). None of these decisions is intrinsically racially biased, but all of these decisions capitalize on stark racial inequality that spatially, socially, and politically isolate blacks from whites. In other words, the commonality underlying these decisions is that they navigate the boundary between socially advantaged and disadvantaged groups without making an overt reference to race, but they nevertheless culminate in severe racial inequities in drug arrests.

Explaining Racial Disparities in Drug Sentencing

Not only are black drug dealers arrested and convicted at higher rates than whites, but they are also more likely to be sentenced to a term of incarceration if convicted. For example, in 2004, 71% of African-Americans but only 63% of whites convicted on similar felony drug offenses were sentenced to prison, yet once sentenced, both groups received the same average prison sentence: 31 months (BJS, 2007). Can the difference in incarceration described above be explained by “legally relevant” factors such as offense seriousness and prior criminal record rather than by race alone?

There is sizeable empirical research that examines racial disparities in drug offender sentencing. Findings from seventeen studies where offense seriousness and prior criminal history were controlled simultaneously have been summarized in Mitchell (2005). He found that sixteen (94%) of these studies reported that blacks were punished more harshly than whites after controlling for legally relevant factors. The mean random effects odds ratio was 1.44 (95% CI 1.28–1.62), which means that if 50% of whites were sent to prison, then 59% of blacks would receive the same treatment. These studies, however, found little evidence of racial disparity in the length of prison terms given to black versus whites.

The findings from Mitchell's meta-analysis indicate that racial disparity in decisions to incarcerate convicted drug offenders cannot be explained by differences in the severity of current offense or by differences in prior criminal conduct. The question becomes: Why are blacks incarcerated more often than whites convicted of similar drug offenses and with similar criminal histories? Extant research suggests that race matters in drug sentencing for two primary reasons: 1) blacks fit the prevailing stereotype of a drug offender; and, 2) the appropriate sentence in drug cases is often ambiguous. This ambiguity allows court actors the requisite freedom to use their discretion, which appears to be affected by an offender's race.

Again, in the latest American drug war, the principal drug of concern has been cocaine, which has been "associated in public imagery with disadvantaged *minority* residents of the inner cities" (Tonry, 1995: 94, our emphasis). Blacks have become the stereotypical drug offender in the current crusade against drugs despite the fact that whites are more likely to use and sell drugs. These prevailing perceptions that link race, violence, and involvement in drug offending may affect court actors as well as the general public unconsciously. For example, when asked to describe a "dangerous drug offender" Washington State court personnel responses included black drug offenders twice as often as white drug offenders, 16% vs. 8% (Steen, Engen, and Gainey, 2005). The researchers also found that white drug offenders who fit the profile of a dangerous drug dealer were sentenced more harshly than white dealers who did not fit the profile. In contrast, however, "decision makers do not appear to make sharp distinctions between the most 'dangerous' black offenders and most other black offenders ... For black offenders, decision makers appear to adjust all but the least-threatening cases upwards" (Steen, Engen, and Gainey, 2005, p. 461). This latter finding suggests that a drug offender's race, above and beyond other factors, is used as a marker of dangerousness and culpability.

In short, notions of a typical drug offender are steeped in contemporary racialized stereotypes, and the ambiguity of the appropriate sentence for such



offenders allows court actors' decisions to be affected by these stereotypes and other racial biases that result in more punitive sanctions for blacks than whites.

Discussion

In this chapter we have demonstrated four outcomes. First, racial disparities in drug arrests and sentencing outcomes *cannot* be explained by differential involvement in drug offending. At the same time that cross race drug use has converged, drug arrests continued to diverge sharply. Second, the differential in drug arrests is not due to differential involvement of blacks in more serious forms of drug offending, including the type of drug used and with regard to the distribution of drugs. Third, racial disparities in sentencing cannot be explained by differences in offense seriousness or criminal history. Finally, we have demonstrated that the drug-race-disparity connection has been exacerbated by the WoD. Clearly, racial disparities in drug sanctions predate the WoD, but the WoD did substantially add to existing racial disparities. Thus, the WoD is not the cause of these disparities; rather, the WoD is, like other forms of racial disparity, a symptom of the processes that generate racial disparities more generally. In our view, the racial disparities linked to the WoD are more deeply rooted within the structural context of American society and are found in: general racial stereotypes concerning African-Americans; stereotypes that associate minorities and drug use and trafficking; an economic system where stereotypes and structural inequities continue to produce disadvantages for African-Americans; and, a political system that uses racialized issues to gain the political support of whites.

As noted, WoD policies were accompanied by federal financial aid that led law enforcement agencies to adopt tactics that more closely scrutinized the public and semi-public drug markets common in inner-city, lower class minority areas. The tremendous discretion allotted to authorities when enforcing these policies has allowed conscious and unconscious racial bias to influence drug control efforts. The end result is a pattern of elevated racial disparities in drug arrests and incarcerations that cannot be explained by racial differences in drug offending.

Some (Kennedy, 1997; Stith, 1993) have argued that the racial disparities associated with the WoD should be interpreted within the context of efforts to help minority communities combat drug and crime problems. While there is some evidence that Congress supported the WoD out of concern about drug and crime problems in urban, largely minority communities, a host of indicators undermine the general conclusion that the WoD was enacted to help

black communities. First, this conclusion is at odds with historical evidence of racial bias in past drug control efforts such as Musto's (1999) observation that the history of U.S. drug control strategies has been most punitive when the drug of concern is associated with threatening racial or ethnic minorities—a pattern evident in the current drug war. Given America's long history of racial bias in drug control policy, its longer history of neglecting black victims of crime (both these histories are detailed extensively by Kennedy, 1997), and the contemporaneous rolling back of social programs designed to assist blacks, policy-makers' sudden concern for minorities and their communities is deeply puzzling.

Second, the policies and practices that Kennedy and others argue were designed to help black communities are most strongly disfavored by residents of those communities. In their national study of African-Americans, Bobo and Thompson (2006) found 66% believe that drug laws “are enforced unfairly against black communities,” whereas nearly 80% of whites believe that drug laws are applied equally to “all would be drug users.” More distressingly, nearly a quarter (24.8%) of African-Americans thought that the WoD was “just an excuse for police to harass and imprison the inner-city youth.” These authors argued that current drug control strategies undermine the legitimacy of the criminal justice system in black communities. Specifically, they found that respondents who perceived unfairness in the WoD expressed reduced confidence in the police and a greater willingness to let a guilty defendant go free (“jury nullification”) in cases where the defendant claimed to be a victim of racial bias. Taken together, the authors' results confirm that blacks are acutely aware of racial disparities in the WoD, they believe that the WoD is unfair, and this sense of unfairness affects their perceptions of the criminal justice system. If the WoD's policies were designed in large part to benefit black communities, then findings like these are difficult to explain.

Finally, if the WoD was launched to correct drug problems in minority communities, it should be challenged on these grounds as a failure. There is, in other words, little evidence that supports the effectiveness of the WoD as a useful drug reduction tool. Simply put, if policy-makers were truly concerned with effective drug control policy or the health of black communities, the WoD's policies would have been altered long ago.

In contrast to this “external aid” hypothesis, scholars argue that political expedience was a primary motivation for launching the WoD because alternative policies (e.g., drug rehabilitation and efforts to reduce social inequality) were perceived as “soft on crime,” and made politicians who pushed such policies vulnerable in future elections (Tonry, 1995; Beckett, 1997). More controversially, several scholars (Edsall and Edsall, 1991; Tonry, 1995) argue

that conservative politicians have used punitive criminal justice policies to appeal to the anti-black sentiment of some white voters and the resentment that some white voters have of the gains made by African-Americans (at white expense) since the Civil Rights Movement. These factors culminated in the creation of ineffective, costly, and unjust drug policies at the expense of the public coffers and the freedom of thousands of Americans, particularly African-Americans, while primarily benefitting the political ambitions of elected officials.

Because we view racial disparities within criminal justice processes as deeply entrenched within the structural, cultural economic, and political foundations of American society, there is no quick, easy or simple solution to this problem. In short, addressing racial bias as an outcome of social, cultural, economic, and political relationships and processes requires actions that eclipse traditional criminal justice policy reform. To address criminal justice processing biases, broad social and economic programs and reforms are required that eliminate the basis of these disparities as they exist outside the criminal justice system. These programs may include addressing the elimination or reduction of racial bias through educational programs that challenge racial stereotypes, enhancing inter-racial relationships through exposure and experience with diverse groups, economic reforms that address not only race based economic inequities, but economic disadvantage more generally, and political reforms that directly and openly discuss and address the critical, but often neglected, issue of race.

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