

# DRUG ARRESTS AT THE MILLENNIUM

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*Erich Goode*

People of conscience perforce agonize over the growing racial disparities in drug arrests and incarceration in the United States. One is forced to view with alarm the tendency of this nation to become increasingly a carceral society. That this tendency most strikingly characterizes drug offenses and more specifically the drug offenses of African Americans, should be troubling for us all. The drug war is being fought in earnest, we realize, and its enemy, it seems, is the black community.

One first confronts the racial disparities in the War on Drugs with a sense of outrage, a feeling that gross injustice is afoot in its prosecution. One concludes with no less a sense of outrage, but with the feeling that the injustices we observe begin at a much more basic and possibly more intractable level than the racial intent of the architects of the drug war. One also concludes with a sense of wonderment over how *deep*, how *ramifying*, and how *abiding* racial inequities in American society are, and how *ineluctably* they play themselves out in all corners of social life. In short, one shifts one's sense of outrage from the part to the whole.

Much of the drug policy debate centers around whether and to what extent the War on Drugs is racist. The charge can mean many things, of course, but one of its possible meanings is that African Americans are targeted for arrest specifically *because* they are black.

However, unless we find a smoking gun, it's unlikely that we will ever be able to locate direct, overt racist motives in the drug war. What we do have is a number of nearly iron-clad processes that both suggest inadvertence and are intricately intertwined with what used to be called institutional racism—that is, the structural reasons why identical factors and dynamics will produce very different outcomes for whites and blacks. In

other words, it is entirely possible that, to the architects of the drug war, racial disparities represent that very ugliest of military concepts—collateral damage.

## Recent Developments

In "The New Crisis of Legitimacy in Controls, Prisons, and Legal Structures," a classic of the many writings that express outrage over the racial disparities generated by the drug war, Troy Duster tracked the prison population (exclusive of inmates in jails and juvenile facilities) from 1981 to 1991, from 300,000 to 804,000 inmates—as he says, the largest absolute increase in the nation's history. What of recent developments? In the year 2000, the total number of inmates in state and federal prisons reached a total of 1,349,000—an even greater absolute jump over the past decade than was true of the previous one. Interestingly, the prison population declined one-half of one percent between the first and the second half of 2000, the first decline of any kind during the past 30 years. A ray of hope? Over the next couple of years, perhaps we shall see.

Given what everyone now knows about recent declines in the crime rate, it should come as no surprise that the increase in the prison population is *not* a result of a rise in criminal behavior. According to the Bureau of Justice Statistics, the decline in the violent crime victimization rate—which did not begin until the year *after* Duster wrote his article—continued unabated from 1994 to the year 2000, declining by nearly half, from 51.2 to 27.4 per 1,000 in the population. The decline in rates of property crime began much earlier. In fact, between 1977 and 2000, the total property crime victimization rate per 1,000 households declined by two-thirds—from 544.1 to 178.1, an astounding and unprecedented decline.

Remarkably, arrests for drug abuse violations grew almost unabated between the early 1970s and the late 1990s. Between 1970 and 1999, adult drug arrests more than quadrupled, from 322,300 to 1,337,600, and juvenile arrests doubled, from 93,300 to 194,600.

During the period of time Duster examined, that is, during the 1980s and very early 1990s, racial disparities in drug arrests prevailed. They have continued unabated throughout the decade of the 1990s and into the early 21st century. In 1970, African Americans made up 30 percent of the U.S. prison population; by 2000, it was just under half—47 percent. The 1997 rate per 100,000 adult residents of all adults held in prisons or jails was 6,838 for African American males and 990 for white males—a ratio of 6.9 to 1, up slightly from 1985, when it was 6.7 to 1.

In 1999, 54 percent of all white males incarcerated in federal prisons were convicted of a drug offense; for black males, the figure was 65 percent, and for females, the figure was 67 and 66 percent, respectively. For all inmates housed in federal penitentiaries, the percentage who had been sentenced for drug offenses increased from 16 percent of the total in 1970 to 56 percent in 2001. Interestingly, this percentage has been almost completely stable over the past decade, from 1991 to 2001.

The mean time served by federal prisoners convicted of a drug offense who were released in 1998 was 41.4 months, about the same time as that served by convicts sentenced for offenses related to arson and explosives (40.8 months), weapons charges (41.9 months), and racketeering and extortion (40.2 months). Drug offenders released from federal prisons in 1998 served only a year and a half less than violent offenders taken as a whole—41.4 versus 59.1 months.

African American federal drug offenders released in 1998 served a mean sentence of 49.2 months; whites, a mean of 38.0 months, a difference of nearly a year. The mean length of time to which drug offenders were sentenced in U.S. District courts in 1997 was 109.4 months for African Americans, and 64.1 months for whites—a disparity of just under three years. In 1998, 85 percent of persons convicted of crack cocaine offenses in U.S. District courts were black; only 6 percent were white. In contrast, 31 percent of persons convicted of powder cocaine offenses were black and 19 percent were white; the rest (49%) were classified as Hispanic.

## Collateral Damage?

In *Malign Neglect*, Michael Tonry takes Duster's analysis a step further by reading intent into consequences. Tonry insists that, *in advance*, any legislator with even the dimmest perception of social and criminal processes *had to have known* that the drug war would produce racial inequities. Accelerating the War on Drugs, Tonry insists, "foreseeably and unnecessarily blighted the lives of hundreds of thousands of young, disadvantaged black Americans." The forces that produced racial disparities were so widely known and firmly established in the criminological literature, Tonry insists, that these inequities provide *prima facie* evidence for the racist motives of the drug war. The drug war's architects "knew exactly what they were doing" and "should be held accountable for what they have done to damage young black Americans."

How are we to assess such claims? How are we to make sense of the drug war, which seems to make no sense whatsoever? What are the mechanisms and processes that produce the gross racial inequities we observe? Critics of these disparities often point to the fact that surveys indicate that racial differences in drug use are small, nonexistent, or even the opposite of what we would expect, given rates of drug arrests by race. Blacks are no more likely to use drugs than whites, they say, hence, the higher rates of arrest and imprisonment can only be attributable to racism.

It is true that racial differences among casual, recreational users are small. However, when we look at overdose statistics and drug tests, the African American edge in drug use looms large. African Americans are substantially over-represented at the upper reaches of use, among the most abusive substance users.

- According to DAWN, the Drug Abuse Warning Network's figures, 27 percent of persons who died in 1998 of a drug "overdose" were black, double their representation in the population—and double their representation among drug users as a whole. Over half of all persons whose death was caused or associated with cocaine use were African Americans. The same edge prevails with respect to DAWN's drug-related emergency room visits.
- A quarter of all admittees to public drug treatment programs are black, twice their representation in the general population.

- The Arrestee Drug Abuse Monitoring (or ADAM) data reveal that, nationwide, African American arrestees are significantly more likely to test positive for illicit drugs than whites (in 1997, 82 versus 68 percent), and strikingly more likely to test positive for cocaine—60 versus 25 percent.
- And in the state of Georgia in 1994, nine times as many African American newborns as whites—12.1 versus 1.3 per 1,000—tested positive for cocaine, indicating that their mothers used the drug.

It is not among casual, recreational, or typical users where arrest is most likely to take place but at the higher or more abusive levels of drug use. What counts here is that small but important minority that uses drugs in ways that lead to behavior associated with a high likelihood of arrest. And it is at these levels that African Americans are strikingly more likely to use illicit substances. Hence, the inevitable racial disparities we observe in arrest rates.

In addition, to the extent that the prosecution of the drug laws snares street sellers in buy and bust operations, it is more likely to arrest African Americans than if the police were to target higher-ups, who are more likely to be white. Arresting street dealers is easy and results in volume productivity. In contrast, going after major dealers is hard work, results in a low volume of arrests, and all too often comes up empty as a result of a tangle of legal and constitutional protections of suspects. Among other things, one byproduct of targeting street dealers is a major reason for racial disparities in drug arrest and incarceration.

In fact, a major reason why such disparities exist can be traced to what might be referred to as “point of contact” factors that are a product of racial and ethnic *styles* of drug dealing. As the United States Sentencing Commission observed in 1995, roughly two-thirds of crack defendants were considered by the police to be street-level dealers or couriers, only three out of 10 were regarded as mid-level dealers, and only one out of 20 was classified as a high-level dealer. Given their numbers as well as the nature of police tactics, the present distribution of African Americans and whites in arrest figures seems almost preordained.

The work of Eloise Dunlap, Bruce Johnson, and their colleagues suggests another linkage between routine police practices and racial disparities.

There are two “relatively distinct” types of drug selling careers, says Dunlap—the “inner-city” and the “middle-class” career types. In both types of drug-selling careers, seller-to-user dealers are primarily youths and young adults, male, and are characteristically heavy users themselves. But these types differ radically in styles of dealing.

Middle-class dealers “almost always sell to steady customers [known to dealers] in private settings.” Quantities tend to be fairly substantial, sales to each customer are intermittent, and violence tends to be rare. As the Office of National Drug Control Policy observed, powder cocaine is most likely to be bought and sold indoors—away from the open observation of the police.

Inner city dealers, in contrast, “often lack access to private settings for sales and typically sell in public [or semi-public locations—such as crack houses—which are accessible to nearly anyone walking off the street] to buyers they do not know.” They sell much more often and in smaller quantities, and high customer turnover is common. Crack cocaine is most likely to be bought in transactions that are readily visible to the police. In such settings, violence is a frequent accompaniment, and hence, arrest in such venues is highly likely.

None of these “point of contact” factors addresses the very real and, for blacks, palpable fact that, in the inner city, they are subject to intense and unequal police scrutiny and, all too often, interrogation. The offense, “walking down the street while black,” is a daily reality for the young, urban, African American male. But nonetheless, police tactics and the routine activities of drug use and dealing explains a major chunk of racial differences in arrests and incarceration; they cannot be ascribed to racist motives alone, and they will not disappear when and if the police no longer practice racial profiling.

In similar fashion, drawing a legal distinction between crack and powder cocaine also produces a higher volume of arrests and prosecutions of African Americans. Under federal law, the quantity of cocaine necessary to draw a five-year sentence is *one one-hundredth* for crack as that for powder cocaine—five versus 500 grams. Hence, for the same quantity, crack possession sentences are substantially longer than powder cocaine sentences.

Reformers and critics seem to be arguing that experts should explain to lawmakers that crack and powder cocaine are the same drug deserving

of the same or comparable penalties. The 100-to-1-penalty ratio seems hugely excessive to me, but nothing will convince the public or any politician that the two substances are precisely “the same drug.” The fact is, of course, crack and powder cocaine are “the same drug” only in the sense that wine and whiskey are the same drug: They both contain the same chemical, and both break down into the same chemical when metabolized in the body. But crack and cocaine are also ingested by different routes of administration, smoking versus intranasally, and hence, have very different effects. When smoked (or, more properly, inhaled) crack’s effects are substantially more pleasurable or reinforcing and therefore, a substantially higher proportion of its users become dependent.

### Drug Arrest Disparities

Does the issue of racial disparities in arrests and imprisonment work as a rhetorical device? To progressives, this inequity serves as a signal or summary phenomenon—a kind of legal and judicial “horror story” so blatant as to force every sentient being to sit up, take notice, and feel that injustice is afoot. How can we not be moved to action? The figures virtually cry out for a just remedy. But does this rhetorical device work with the general public? Does it work among politicians? What about in a court of law?

So far, none of the legal challenges to drug convictions based on the injustice of prevailing racial disparities has succeeded. Randall Kennedy, a legal scholar, suggests that legally, the argument fails on the very grounds on which it is based—equal protection under the law. Kennedy points out that what Tonry fails to mention—that 11 out of the 21 African Americans who were then members of the House of Representatives voted in favor of the law that created the 100-to-1, powder-to-cocaine differential. As Kennedy says, if racism, conscious or unconscious, were behind the enactment of this bill, it is noteworthy that none of the black members of Congress made this charge at the time of the bill’s debate, passage, or immediate aftermath.

In fact, he says, these politicians suggested exactly the reverse: *ignoring* crack’s devastating impact would be harmful to the African American community. Declared Congressman Major Owens, a liberal Democrat from New York’s Bedford-Stuyvesant: “We must make it perfectly clear that we view this drug [crack] as highly dan-

gerous and that we will not tolerate its importation, possession, or sale.” Said Alton Waldron, another liberal African American Democrat representing a predominantly black district in New York City, “For those of us who are black, this self-inflicted pain is the worst oppression we have known since slavery.... Let us crack down on crack.”

The charge that increasing the punishment for crack offenses represents an unequal burden to African American offenders and hence, to the African American community as a whole is specious, according to Kennedy, since crack dealing ravages mainly the African American community. Hence, he says, the failure to incarcerate crack dealers constitutes a failure to protect that community from harm. Does the refusal of the police to pursue a case against crack offenders in an African American community when African Americans lodge a complaint constitute a deprivation of equal protection under the law, he asks rhetorically? The fact that, in the face of the huge increases in drug arrests among African Americans and the insupportable sentences that have meted out as a consequence, many black politicians have altered their position over the past dozen years is less important than the fact that *at the time*, implicit racism was simply not on the agenda of lawmakers.

The rage of the critics of racial disparities in the drug war is misplaced. It is disingenuous to argue, as some have, that rates of drug use for blacks and whites are equal, ergo, to be fair and just, rates of arrest and incarceration must also be equal. Even if overall rates of use were equal, given the very different and distinctive racial styles and patterns of drug use, rates of arrest and incarceration *cannot possibly* be equal. In fact, *even if there were no drug war*—that is, if the country were to return to pre-1970s rates of drug arrests and incarceration—these disparities would remain. Accelerating the War on Drugs intensified the racial disparities, but it did not create them.

The higher rate of arrest and incarceration among African Americans is an outrage not because the architects of the drug war may or may not have targeted blacks (I do not think they did), or because drug arrests and incarcerations do in fact result in racial disparities. The outrage should be generated because these disparities are a product of inequalities that existed before and are far more basic to drug offenses and their prosecution. The drug war inadvertently but effectively

further marginalizes a segment of the population—the black underclass—very much in need of social and political inclusion.

By attributing a racial motive to the drug war, its critics have focused on an issue that has no policy purchase. There is simply nowhere to go with the issue of racial disparities because it is primarily the routine activities of use and the iron logic of the logistics of law enforcement, not racist motives, that generates them. The argument lacks both empirical grounding and rhetorical resonance. It is impossible to dismiss racist motives as one explanation for racial disparities in drug arrests and imprisonment, but again, we have no smoking gun. What we do have is racial differences that are firmly grounded in the dynamics of everyday life. And they are not going to disappear in a puff of speechmaking.

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### **I happen to think the War on Drugs is insane.**

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I happen to think the War on Drugs is insane. I am strongly committed to the reduction of harm. But any conceivable harm reduction strategy that has any hope of implementation could reduce the total number of arrests and imprisonment but cannot eliminate racial disparities. Street dealers will always be more subject to arrest than dealers who are more insulated from surveillance, and more abusive users of crack cocaine and heroin will always be more subject to arrest than recreational users of marijuana, LSD, and Ecstasy.

What would a solution to the drug war problem look like? Whose interests are served by continuing the War on Drugs? Given the dense entanglement of race with the routine activities of users and strategies of law enforcement, does the racial issue have maximum purchase for the reformer's agenda? If, in Duster's phrase, we are to "reconstruct" the drug war, we cannot afford to ignore these questions. Understanding racial disparities in drug arrests and imprisonment must be harnessed to a profound appreciation of how limited our capacity is to impose policy on the extremely rough timber of humanity.

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