



ST. MARY'S
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The Scholar: St. Mary's Law Review on Race
and Social Justice

Volume 16 | Number 1

Article 3

1-1-2013

Behind the Veil of the War on Drugs: An Institutional Attack on the African American Community.

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BEHIND THE VEIL OF THE WAR ON DRUGS: AN INSTITUTIONAL ATTACK ON THE AFRICAN AMERICAN COMMUNITY

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In the 1970s, President Richard Nixon announced the War on Drugs.¹ Today, over forty years later, federal drug enforcement costs upward of \$19 billion per year and our nation's prison systems are filled with more inmates convicted of drug offenses than those convicted of all other violent crimes combined.² Currently, there are approximately 480,000 imprisoned drug offenders across the country, comprising approximately fifty percent of the federal prison population.³ Yet despite the extreme cost and high incarceration rates of drug offenders, the War on Drugs has failed in substantially reducing drug trade and use.⁴

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1. *A Brief History of the Drug War*, DRUG POLICY ALLIANCE, <http://www.drugpolicy.org/new-solutions-drug-policy/brief-history-drug-war> (last visited Aug. 29, 2013) (providing a historical overview of the “war on drugs”); *Timeline: America's War on Drugs*, NPR (April 02, 2007), 5:56 PM, <http://www.npr.org/templates/story/story.php?storyId=9252490> (indicating that the War on Drugs has been ongoing since the late 1960s).

2. CATO INST., CATO HANDBOOK FOR POLICYMAKERS 338 (David Boaz ed., 7th ed. 2009), available at <http://www.cato.org/pubs/handbook/hb111/hb111-33.pdf>. See also *Violent Crime*, BUREAU JUST. STAT., <http://www.bjs.gov/index.cfm?ty=tp&tid=31> (last visited Aug. 29, 2013) (defining a violent crime as “murder, rape and sexual assault, robbery, and assault”).

3. *Id.*

4. *Id.* See also RICHARD DAVENPORT-HINES, *THE PURSUIT OF OBLIVION: A GLOBAL HISTORY OF NARCOTICS* 15–16 (W.W. Norton & Co. 2002) (2001) (describing the extent of the drug trade where only “10-15[%] of illicit heroin and 30[%] of illicit cocaine is inter-

In 2006, the federal Substance Abuse and Mental Health Services Administration (SAMHSA) found that approximately 49% of Caucasians and 42.9% of African Americans aged twelve years or older used illicit drugs at some point in their lives.⁵ Additionally, 14.8% of Caucasians surveyed reported illicit drug use in the year prior compared to 16.4% of African Americans.⁶ Moreover, 8.5% of Caucasians surveyed reported illicit drug use in the month prior compared to 9.8% of African Americans.⁷ These figures indicate relatively similar percentages of black and white drug users.

Research concerning the race of drug sellers is limited;⁸ however, studies suggest “drug users tend to purchase their drugs from individuals of the same race as the user, and that drug *seller* racial breakdowns are similar to drug *user* racial breakdowns.”⁹ In 1991, SAMHSA conducted na-

cepted[, d]rug-traffickers have gross profit margins of up to 300 per cent[,] [and] [a]t least 75[%] of illicit drug shipments would have to be intercepted before the traffickers’ profits were hurt”). Additionally, many academics argue the failed War on Drugs has actually increased the profitability of drug cartels. Ray B. Williams, *Why “The War on Drugs” Has Failed*, PSYCHOLOGY TODAY (June 6, 2011), <http://www.psychologytoday.com/blog/wired-success/201106/why-the-war-drugs-has-failed>. “At least 500 economists, including Nobel prize winners Milton Friedman, George Akerlof, and Vernon Smith have concluded that reducing the supply of marijuana through interdiction without reducing the public demand, causes the price and therefore the profits of drug cartels to rise.” *Id.* “Despite over \$7 billion spent annually towards arresting and prosecuting nearly 800,000 people for marijuana offenses in the U.S. in 2005, according to the FBI, the federally-funded Monitoring the Future Study reported that 85% of high school seniors found marijuana ‘easy to obtain.’” *Id.*; 1 NATIONAL INSTITUTE ON DRUG ABUSE, ET AL., MONITORING THE FUTURE: NATIONAL SURVEY RESULTS ON DRUG USE, 1975-2005—SECONDARY SCHOOL STUDENTS 402 (2005), available at http://www.monitoringthefuture.org/pubs/monographs/vol1_2005.pdf.

5. SUBSTANCE ABUSE AND MENTAL HEALTH SERVICES ADMINISTRATION, RESULTS FROM THE 2006 NATIONAL SURVEY ON DRUG USE AND HEALTH: NATIONAL FINDINGS 238 tbl.G.11 (2006), available at <http://www.samhsa.gov/data/nsduh/2k6nsduh/2k6results.pdf>.

6. *Id.*

7. *Id.*

8. Jamie Fellner, *Race, Drugs, and Law Enforcement in the United States*, 20 STAN. L. & POL’Y REV. 257, 268 (2009).

9. H.R. REP. NO. 111-670, pt. 1, at 4 (2009) (stating government data “demonstrates that drug users generally purchase drugs from sellers of the same racial or ethnic background”); LEADERSHIP CONFERENCE ON CIVIL RIGHTS & LEADERSHIP CONFERENCE EDUC. FUND, JUSTICE ON TRIAL: RACIAL DISPARITIES IN THE AMERICAN CRIMINAL JUSTICE SYSTEM 14 (2000), available at <http://www.protectcivilrights.org/pdf/reports/justice.pdf> (last visited July 28, 2013); Fellner, *supra* note 8. However, it is important to note some disagreement as to whether African Americans and Caucasians sell drugs at similar rates. See, e.g., U.S. SENTENCING COMM’N, SPECIAL REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY 2 (1997), available at http://www.uscc.gov/Legislative_and_Public_Affairs/Congressional_Testimony_and_Reports/Drug_Topics/19970429_RtC_Cocaine_Sentencing_Policy.PDF (finding in 1993, 88.3% of persons sentenced for crack cocaine were African Americans and 95.4% were an ethnicity other than Caucasian).

tional surveys of drug abuse and found 0.7% of white adults and 1.4% of black adults admitted to selling illicit drugs within the year.¹⁰ Fifteen years later in 2006, the same SAMHSA survey found that 1.6% of white adults and 2.8% percent of black adults reported selling illicit drugs in the prior year.¹¹

Despite the higher percentage of African American adults who participate in drug trade and similar percentage of black and white adult drug users, the total number of Caucasian drug offenders is far greater than the total number of African American drug offenders, as the Caucasian population is more than six times greater than the African American population.¹² In fact, Jamie Fellner, author of *Race, Drugs, and Law Enforcement in the United States* and Senior Counsel with the U.S. Human Rights Watch, found that African Americans constitute an estimated 13 to 20% of total drug offenders.¹³ Yet “[a]ccording to a 2006 report by the American Civil Liberties Union, African Americans account for 37% of those arrested on drug charges, 59% of those convicted and 74% of all drug offenders sentenced to prison.”¹⁴

The War on Drugs has failed to significantly decrease drug usage and trade, but even worse, it has “destroyed tens of thousands of destinies

10. Fellner, *supra* note 8 (citing author’s analysis of statistics released by SAMHSA in 1991).

11. *Id.*

12. Fellner, *supra* note 8. According to a 1991 SAMHSA survey, “[a]lthough the proportion of sellers was twice that among African Americans than among Caucasians, in absolute numbers far more Caucasians (939,345) reported drug selling than African Americans (268,170).” *Id.* (interpreting U.S. DEP’T OF HEALTH & HUMAN SERVS., NAT’L INST. ON DRUG ABUSE, NATIONAL HOUSEHOLD SURVEY ON DRUG ABUSE, (1991), available at <http://www.icpsr.umich.edu/icpsrweb/ICPSR/studies/6128>). “Black sellers constituted 12% of the combined number of self-reported black and white sellers.” *Id.* The 2006 SAMHSA survey followed suit, “estimat[ing] 2,461,797 Caucasians, and 712,044 African Americans.” *Id.* (analyzing U.S. DEP’T OF HEALTH & HUMAN SERVS., SUBSTANCE ABUSE AND MENTAL HEALTH SERVS. ADMIN., NATIONAL SURVEY ON DRUG USE AND HEALTH, (2006), available at <http://www.icpsr.umich.edu/icpsrweb/SAMHDA/studies/21240>). “[African Americans] thus represented 14% of the combined black and white sellers.” *Id.* See also H.R. REP. NO. 111-670 (stating “people of color are disproportionately subject to the penalties . . . of cocaine”).

13. Fellner, *supra* note 8, at 269; DEBORAH J. VAGINS & JESSELYN McCURDY, AMERICAN CIVIL LIBERTIES UNION, CRACKS IN THE SYSTEM: TWENTY YEARS OF THE UNJUST FEDERAL CRACK COCAINE LAW i (2006), available at https://www.aclu.org/files/assets/cracksin_system_20061025.pdf.

14. Arianna Huffington, Op-Ed., *AWOL in the Real Drug War*, L.A. TIMES, Mar. 24, 2007, <http://articles.latimes.com/2007/mar/24/opinion/oe-huffington24>. It should also be noted, “African Americans serve virtually as much time in prison for a drug offense (58.7 months) as Caucasians do for a violent offense (61.7 months).” *Criminal Justice Fact Sheet*, NAACP.ORG, <https://donate.naACP.org/pages/criminal-justice-fact-sheet> (last visited Aug. 28, 2013).

and lives in the African-American community.”¹⁵ This Article argues that as a result of media portrayal of drug users, unchecked discretion of police officers and prosecutors in enforcing and prosecuting drug offenses, and harsh sentencing policies, the War on Drugs has become a war on African American community.¹⁶

I. MEDIA PORTRAYAL

In an effort to generate continued public support for the War on Drugs in 1985, the Reagan Administration launched a media campaign in response to the emergence of crack cocaine, drawing particular attention to “horror stories [of] black crack users and black crack dealers in ghetto communities.”¹⁷ To be sure, the concerted media campaign achieved its

15. Clarence Lusane, *In Perpetual Motion: The Continuing Significance of Race and America's Drug Crisis*, 1994 U. CHI. LEGAL F. 83 (1994) (arguing “[illegal drug abuse and drug trafficking in the black community must be framed by three factors; racism as an ongoing factor in U.S. society; the applications of racial dynamics in the war on drugs; and the unwillingness on the part of the federal government to advance long-term solution”).

16. This Article recognizes that the War on Drugs impacts people of all races and acknowledges some academics have called the War on Drugs “a war on people of color.” Huffington, *supra* note 14 (considering drug offense incarceration rate for both African Americans and Hispanics). Additionally, other academics have gone so far as to call the War on Drugs the “New Jim Crow.” See generally MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLOR BLINDNESS* 56–57 (2010) (advocating the view that the War on Drugs is a new method of social control perpetrated against the African American community). In fact, Michelle Alexander argues:

[I]n response to a major disruption in the prevailing racial order—this time the civil rights gains of the 1960s—a new system of racialized social control was created by exploiting the vulnerabilities and racial resentments of poor and working-class whites. More than 2 million people found themselves behind bars at the turn of the twenty-first century, and millions more were relegated to the margins of mainstream society, banished to a political and social space not unlike Jim Crow . . . Ninety percent of those admitted to prison for drug offenses in many states were black or Latino, yet the mass incarceration of communities of color was explained in race-neutral terms, an adaptation to the needs and demands of the current political climate. The New Jim Crow was born.

Id.

17. ALEXANDER, *supra* note 16, at 102; see also Jane Gross, *A New, Purified Form of Cocaine Causes Alarm as Abuse Increases*, N.Y. TIMES, Nov. 29, 1985, <http://www.nytimes.com/1985/11/29/nyregion/a-new-purified-form-of-cocaine-causes-alarm-as-abuse-increases.html> (reporting on the crack epidemic early in its media heyday). In 1985, “[e]xperts estimate[d] that there [were] at least five million regular cocaine users in the United States” and that one-fifth of those users were in the New York area. *Id.* However, the depiction of crack dealing in the inner city included accounts of “dealers standing on street corners cracking an imaginary whip to signal their wares[,]” as opposed to the suburbs where dealing could only be assumed and was described as occurring indoors. *Id.* Additionally, crack houses located in inner city neighborhoods were identified as the site of days-long using binges and illicit sexual activity, including sex in exchange for the drug. *Id.*; see also H.R.

goal of publicizing the issue.¹⁸ “Almost overnight, the media was saturated with images of black ‘crack whores,’ ‘crack dealers,’ and ‘crack babies’—images that seemed to confirm the worst negative racial stereotypes about impoverished inner-city residents.”¹⁹ In one year alone, between 1988 and 1989, the *Washington Post* published 1,565 stories and articles about the “drug scourge.”²⁰ This media campaign turned “the War on Drugs from an ambitious federal policy to an actual war[,]” and due to the constant images of African American drug offenders, there was “little doubt about who the enemy was in the War on Drugs and exactly what he looked like.”²¹

The initial publicity campaign for the War on Drugs “solidified in the public imagination the image of the black drug criminal.”²² In fact, a survey of the general public in the area surrounding Washington, D.C. asked: “[w]ould you close your eyes for a second, envision a drug user,

REP. NO. 111-670 at 2 (describing the “dramatic claims about the effects of crack cocaine on users and communities”).

18. ALEXANDER, *supra* note 16, at 5.

19. *Id.* Interestingly, methamphetamine did not receive, and arguably has still not received, the same or similar negative media attention that crack cocaine has received, despite three main factors. First, “an estimated 10.4 million people . . . have tried methamphetamine at some point in their lives.” NAT’L INST. ON DRUG ABUSE, METHAMPHETAMINE ABUSE AND ADDICTION (2006), available at <http://www.drugabuse.gov/sites/default/files/rrmetham.pdf>. Second, “methamphetamine is stronger and longer lasting than cocaine . . . [as it] causes a more than 3-fold release of dopamine in the brain and has a half-life (the amount of time necessary for half of the drug to be metabolized) of 12 hours, compared with cocaine’s half-life of 1 hour.” CTR. FOR DISEASE CONTROL AND PREVENTION, METHAMPHETAMINE USE AND RISK FOR HIV/AIDS 3 (2007), available at <http://www.cdc.gov/hiv/resources/factsheets/PDF/meth.pdf>. Additionally, smoking methamphetamine can cause highs that last anywhere from eight to twenty-four hours, whereas smoking cocaine can cause highs lasting only twenty to thirty minutes. *Id.* And third, methamphetamine production is arguably more dangerous than crack cocaine “from start to finish,” as the production of methamphetamine can “result in explosions and fires that injure or kill not only the people and families involved, but also law enforcement or firemen who respond.” Methamphetamine FAQ, KCI – THE ANTI-METH SITE, http://www.kci.org/meth_info/faq_meth.htm (last visited July 24, 2013). “Any number of solvents, precursors and hazardous agents are found in unmarked containers at these sites. These potent chemicals can enter the central nervous system and cause neural damage, effect the liver and kidneys, and burn or irritate the skin, eyes and nose.” *Id.* Perhaps methamphetamine has not received as overwhelmingly negative media attention as crack cocaine because the largest numbers of methamphetamine users are Caucasians who reside in rural areas. *See* CTR. FOR DISEASE CONTROL AND PREVENTION, *supra* (describing a typical methamphetamine user as young, white adults living in rural areas).

20. ALEXANDER, *supra* note 16, at 152.

21. *Id.* at 102–103.

22. *Id.* at 102.

and describe that person to me?”²³ In response, “ninety-five percent of respondents pictured a black drug user, while only five percent imagined other racial groups.”²⁴ The survey group also identified an African American individual as the prototypical drug dealer.²⁵

Thus, regardless of the fact that Caucasian adults make up the vast majority of drug offenders, almost none of the survey’s respondents envisioned a Caucasian drug user or dealer.²⁶ Furthermore, in her book, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness*, Michelle Alexander argues that the survey would have produced the same results even if police officers and prosecutors had been surveyed, because “[l]aw enforcement officials, no less than the rest of us, have been exposed to the racially charged political rhetoric and media imagery associated with the drug war.”²⁷ Therefore, whether we are discussing the profile of a drug user or dealer from the perspective of the public or law enforcement, the prototypical image is an African American man, despite contrary statistical evidence.

II. UNCHECKED POLICE DISCRETION

Law enforcement officials have extraordinary discretion in stopping, searching, and arresting individuals for drug offenses.²⁸ Following the media’s lead in the War on Drugs, police have targeted African Americans in their enforcement of drug laws,²⁹ resulting in a disproportionate number stopped, searched, and arrested as compared to Caucasians.³⁰

23. Betty Burston et al., *Drug Use and African Americans: Myth Versus Reality*, 40 J. ALCOHOL & DRUG EDUC. 19, 20 (1995); see also ALEXANDER, *supra* note 16, at 103 (citing the survey and its results).

24. ALEXANDER, *supra* note 16, at 103; see Burston et al., *supra*, note 23.

25. Burston et al., *supra*, note 23; ALEXANDER, *supra* note 16, at 103.

26. ALEXANDER, *supra* note 16, at 103; see MARC MAUER, SENTENCING PROJECT, THE CHANGING RACIAL DYNAMICS OF THE WAR ON DRUGS 7 (2009) (indicating rates of drug use by race tend to proportionally follow the overall national population). For example, “Blacks constitute about 12% of the national population, and from 1999-2005 comprised between 11.5-14.0% of all regular drug users[;]” thus, Caucasians are the largest proportion of drug users because they constitute the largest racial demographic in the nation. *Id.*

27. ALEXANDER, *supra* note 16, at 103.

28. *Id.* at 101.

29. See Floyd D. Weatherspoon, *The Devastating Impact of the Justice System on the Status of African-American Males: An Overview Perspective*, 23 CAP. U. L. REV. 23, 30–31 (1994) (emphasizing the disproportionate targeting of African American communities by law enforcement regarding drug offenses).

30. Donna Coker, *Foreword: Addressing the Real World of Racial Injustice in the Criminal Justice System*, 93 J. CRIM. L. & CRIMINOLOGY 827, 835–36 (2003); Marc Mauer, *Justice for All? Challenging Racial Disparities in the Criminal Justice System*, 37 A.B.A. SEC. INDIVIDUAL RTS. AND RESPS. HUM. RTS. MAG. 14, 15 (2010), available at <http://www.>

For example, a study of traffic stops in New Jersey found that racial minorities comprised 15% of all of the drivers on the New Jersey Turnpike, yet they constituted 42% of all traffic stops, even though African Americans and Caucasians violated traffic laws at almost exactly the same rate.³¹ A traffic study in Volusia County, Florida, produced even more statistically staggering results.³² The study found that although Caucasians constitute the vast majority of interstate drivers, African Americans and Latinos comprise more than 80% of all traffic stops.³³

americanbar.org/publications/human_rights_magazine_home/human_rights_vol37_2010/fall2010/justice_for_all_challenging_racial_disparities_criminal_justice_system.html; Fellner, *supra* note 8, at 269–72.

31. See *State v. Soto*, 734 A.2d 350, 350 (N.J. Super. Ct. App. Div. 1996) (discussing expert testimony that included a study of New Jersey traffic stops). In *Soto*, seventeen African-American defendants brought motions to suppress, asserting that their arrests on the New Jersey Turnpike between 1988 and 1991 were the result of discrimination by New Jersey State Police officers. *Id.* at 352. The study in *Soto* found a disproportionate number of traffic stops of African American motorists as compared to the number of white motorists stopped by police officers. *Id.* at 352–53. The studies were designed by qualified expert witnesses specializing in statistics. *Id.* at 352. In one analysis of the study results, one expert witness testified that the surveys indicated that an African-American motorist was almost five times as likely as a white motorist to be pulled over between exits one and three on the New Jersey Turnpike. *Id.* at 353. The statistician affirmed that such results “led him to ‘suspect’ a racially non-neutral stopping policy.” *Id.* See generally DAVID A. HARRIS, *PROFILES IN INJUSTICE: WHY RACIAL PROFILING CANNOT WORK* 80 (2003) (highlighting data from the New Jersey State Police collected in 2000 that shows African Americans and Hispanics continue to be stopped at rates higher than Caucasians). Data show African Americans and Hispanics constituted 78% of people searched and that during traffic stops and searches, troopers found evidence 25% of the time when stopping and searching Caucasians, while only 13% of the time when stopping and searching African Americans and Hispanics. *Id.* Moreover, the study found Caucasians were nearly twice as likely to be found with contraband as African Americans. *Id.*; see generally ALEXANDER, *supra* note 16, at 131 (noting continued prevalence of racial profiling by the New Jersey State Police in their traffic stops and searches). In New Jersey, police records show that although Caucasians are more likely to carry illegal contraband, they are less likely to raise the suspicion of troopers. *Id.* Thus, they are not stopped as often as African Americans. *Id.* A former New Jersey attorney general called this phenomenon the “circular illogic of racial profiling,” explaining “[l]aw enforcement officials . . . often point to the racial composition of our prisons and jails as a justification for targeting racial minorities.” *Id.* However, “empirical evidence actually suggested the opposite conclusion was warranted[—]the disproportionate imprisonment of people of color was, in part, a product of racial profiling[,] not a justification for it.” *Id.*

32. See Jeff Brazil & Steve Berry, *Color of Driver is Key to Stops in I-95 Videos*, ORLANDO SENTINEL, Aug. 23, 1992, http://articles.orlandosentinel.com/1992-08-23/news/9208230541_1_stop-and-search-sentinel-drivers-stopped (reporting that video evidence from dash-mounted cameras in police cars showed that the majority of stops and subsequent searches by police officers involved minorities).

33. See *id.* (finding that seventy percent of motorists stopped were black or Hispanic). Although officers contended they only stopped cars for legitimate traffic violations, “only nine of the 1,084 drivers stopped—less than one percent—received traffic tickets.” *Id.*

Further, African American drivers subjected to traffic stops were also more likely to be searched than white drivers subjected to traffic stops.³⁴

In addition to traffic stops, police are also more likely to stop African American pedestrians.³⁵ A study of pedestrian stops by the Attorney General of New York found that African American pedestrians in New York City were six times more likely to be stopped and were stopped at a higher rate than Caucasian pedestrians.³⁶ In fact, the statistics were comparable to the other surveys discussed. The study noted that while African Americans comprised 25.6% of the population of New York City, 50.6% of all the pedestrians stopped during the study period were African American, whereas Caucasians, comprising 43.4% of the population, only accounted for 12.9% of all stops.³⁷

If Caucasians make up a majority of the population and thus are more likely to be in the possession of drugs, then what other explanation could there be for the fact that African Americans are more frequently stopped and searched for drugs other than racial biases? The situation in Seattle,

34. See U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, CONTACTS BETWEEN POLICE AND THE PUBLIC 2008, at 1 (2011) (noting the Bureau of Justice Statistics found in their Police-Public Contact Survey that “[b]lack drivers were about three times as likely as white drivers . . . to be searched during a traffic stop”); see also HARRIS, *supra* note 31 (reporting results from a study of stops and searches conducted by the Maryland State Police throughout 1995 and 1996). “[B]lacks made up more than 70 percent of all vehicles [stopped and] searched” for drugs even though they comprised “only [seventeen] percent of all drivers” and the rate at which troopers found contraband for African Americans and Caucasians who were stopped was virtually the same. *Id.*

35. See ALEXANDER, *supra* note 16, at 132 (highlighting statistics released by the New York Police Department in 2007). The New York Police Department statistics reported that officers stopped over 500,000 people in the prior year. *Id.* The majority of those stopped were minorities, while half of those stopped were African American. *Id.* These stops occurred as people were conducting various activities—walking to a grocery store or bus stop, for example—and involved searches for illegal weapons and drugs. *Id.*

36. See OFFICE OF THE ATT'Y GEN. OF N.Y., THE NEW YORK CITY POLICE DEPARTMENT'S “STOP & FRISK” PRACTICES vii, 95 (1999), available at http://www.oag.state.ny.us/sites/default/files/pdfs/bureaus/civil_rights/stp_frsk.pdf; see also ALEXANDER, *supra* note 16, at 132–33 (referring to the fatal shooting of Amadou Diallo by New York Police Department officers in 1999). “Diallo was followed to his apartment building by four white police officers . . . who viewed him as suspicious and wanted to interrogate him. They ordered him to stop, but, according to the officers, Diallo did not respond immediately. He walked a bit further to his apartment building, opened the door, and retrieved his wallet—probably to produce identification. The officers said they thought the wallet was a gun, and fired forty-one times. Amadou Diallo died at the age of twenty-two. He was unarmed and had no criminal record.” *Id.* After the shooting of Amadou Diallo, “the NYPD began collecting data on pedestrian stops.” *Id.* at 132.

37. See KATHERINE BECKETT, RACE AND DRUG LAW ENFORCEMENT IN SEATTLE 100 (2008), available at http://faculty.washington.edu/kbeckett/Race%20and%20Drug%20Law%20Enforcement%20in%20Seattle_2008.pdf (concluding there is racial disparity in Seattle drug delivery arrests).

Washington provides an instructive example. A study conducted by Katherine Beckett, a professor for the Law, Societies, and Justice Program and the Department of Sociology at the University of Washington, concluded that there is no other explanation for the drug law enforcement practices and the disparities in arrest rates among racial groups other than racial bias. The study evaluated drug arrests in Seattle, Washington, and found that while the majority of people who shared, sold, or transferred serious drugs were Caucasian, “64.2 percent of those purposefully arrested for delivery of serious drugs, including heroin, methamphetamine, powder cocaine, crack cocaine, and ecstasy . . . were black.”³⁸

Some of the reasons proposed by the study for the racial disparity of drug arrests in Seattle include the focus of the police on the downtown, outdoor drug market and the police purposefully seeking offenders possessing and selling crack cocaine.³⁹ The study found Seattle police prioritized policing the downtown, outdoor drug market, even though hundreds of drug transactions occurred in other areas where police were just as likely to receive complaints of suspected narcotics activities.⁴⁰ In Seattle, studies show that African Americans are more likely to conduct drug-related transactions outdoors versus indoors, and approximately seventy-eight percent of all drug delivery arrests occur outdoors, with most of those arrested outdoors being black.⁴¹

Additionally, the study indicates the majority of persons who used and delivered serious drugs outdoors were Caucasian,⁴² with the exception of crack cocaine.⁴³ In Seattle, “[seventy-four] percent of purposeful drug delivery arrests involved crack cocaine” and of those arrested for crack cocaine, 79% were African American, resulting in “nearly two-thirds of those arrested for delivering one of the five serious drugs” being African American, even though Caucasian were the majority users and dealers.⁴⁴

Thus, the targeting of crack cocaine offenses can neither be explained as merely a function of the frequency with which crack cocaine was delivered outdoors, nor can it only be explained by the health or safety needs of the community.⁴⁵ In Seattle and nationally, deaths resulting from a

38. *Id.* at 11.

39. *Id.* at 100 fig.15.

40. *See id.* at 12, 73–74, 88 fig.19 (exploring Seattle Police Department’s focus on outdoor drug markets as a possible explanation for the disparity in arrest rates between African Americans and Caucasians).

41. *Id.* at 12, 73–74.

42. *Id.* at 39–46 tbls.5–8.

43. *Id.* at 39 tbl.6.

44. *Id.* at 12.

45. *Id.* at 92, 95.

heroin overdose are more numerous than deaths resulting from crack and powder cocaine overdoses combined,⁴⁶ indicating that the police's focus on crack cocaine is not justified in terms of public health considerations.⁴⁷ Furthermore, the study found Seattle's crack cocaine market was no more violent than the other illegal drug markets, therefore providing minimal justification for the police's focus on crack cocaine offenses.⁴⁸ Accordingly, the study reveals that the racially disparate drug arrest rate in Seattle is the result of departmental practices based on "a racialized conception of who and what comprises the drug problem in Seattle[.]" essentially targeting drug activity by African Americans and rendering drug activity by Caucasians virtually non-existent to the Seattle police.⁴⁹

Tragically, the "racial dynamics reflected in Seattle's current drug law enforcement priorities are long-standing and can be found across the country."⁵⁰ For example, a 2002 survey conducted by the Bureau of Justice Statistics found that in the seventy-five largest counties across the country, African Americans accounted for 46% of arrests for drug-related charges; however, African Americans only represented approximately 15% of the population of the seventy-five counties.⁵¹ In another example, a 2008 study conducted by international non-profit organization Human Rights Watch, found that in New York State, African Americans comprised 17.4% of the total state population, yet accounted for 51.4% of drug-related arrests.⁵² Due to unchecked police discretion, these statistics demonstrate that African Americans across the nation are dispro-

46. *Id.* at 93 (finding opiates were involved in 54.8% of drug-related deaths, whereas derivatives of cocaine were involved in only 27.6% of drug-related deaths).

47. *Id.* at 92.

48. *Id.* at 95 (finding the association between the crack trade and high levels of systemic violence does not appear in Seattle, unlike in other cities, and that "crack cocaine arrestees [were the *least*] likely to carry dangerous weapons [versus] any other serious drug arrestee.").

49. *Id.* at 87; see also ALEXANDER, *supra* note 16, at 103 (concluding an often racialized cultural view which prevents officers from perceiving Caucasians as drug offenders).

50. Fellner, *supra* note 8, at 262.

51. THOMAS H. COHEN & BRIAN A. REAVES, BUREAU OF JUSTICE STATISTICS, FELONY DEFENDANTS IN LARGE URBAN COUNTIES, 2002, at 4 tbl.3 (2006), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/fdluc02.pdf>.

52. HUMAN RIGHTS WATCH, TARGETING BLACKS: DRUG LAW ENFORCEMENT AND RACE IN THE UNITED STATES 50 (2008).

portionately stopped,⁵³ searched, and arrested for drug offenses despite the fact that there are significantly more Caucasian drug offenders.⁵⁴

III. UNCHECKED PROSECUTORIAL DISCRETION

Prosecutors also have extraordinary discretion in enforcing the War on Drugs.⁵⁵ Prosecutors decide whom to charge for drug offenses, the exact charges, and whether to offer or accept a plea bargain.⁵⁶ State prosecutors can also transfer defendants of drug crimes to the federal system where the penalties are more severe.⁵⁷ Further, prosecutors can transfer

53. See, e.g., *United States v. Harvey*, 16 F.3d 109, 113 (6th Cir. 1994) (Keith, J. dissenting) (noting the arresting officer repeatedly testified that “he stopped the vehicle because the occupants were African-Americans”).

54. Weatherspoon, *supra* note 29, at 32 (quoting *20/20: Episode 3* (ABC News television broadcast, Nov. 6, 1992)). Responding to whether black men are harassed by police, Las Angeles Police Department Chief Willie Williams stated:

I think that African-American males and other minority males are more prone to be stopped for small or frivolous reasons than non-African-American males in not just big cities like Los Angeles and Philadelphia, but small, suburban and rural county towns. Whether you are Al Joyner, Olympic gold medalist; Blair Underwood a Hollywood actor; a construction worker; or a law professor at a prestigious law school; if you are an African-American male, this may be “probable cause” for police to stop and interrogate you.

Id.

55. ALEXANDER, *supra* note 16, at 112 (asserting “no one has more power in the criminal justice system than prosecutors [because] few rules constrain [their] exercise of prosecutorial discretion”).

56. Weatherspoon, *supra* note 29, at 32. Most criminal cases end in a plea bargain. See Rebecca Hollander-Blumoff, *Getting to ‘Guilty’: Plea Bargaining as Negotiation*, 2 HARV. NEGOTIATION L. REV. 115, 116–17, n.7 (1997) (citing U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 1997, at 412 tbl.534 (1997), available at <http://www.hsdl.org/?view&did=711236> in her discussion of studies showing ninety percent of all criminal cases end in plea bargains). Part of the reason many drug cases end in a plea bargain is because defendants feel pressured to plead guilty to avoid the harsh sentences imposed for low-level crimes, such as drug dealing and possession of crack cocaine that are higher than the sentences imposed for murder in other countries. ALEXANDER, *supra* note 16, at 88. “The typical mandatory sentence for a first-time drug offense in federal court is five to ten years. By contrast, in other developed countries around the world, a first-time drug offense would merit no more than six months in jail, if jail time is imposed at all.” *Id.* at 86.

57. ALEXANDER, *supra* note 16, at 122. Further:

According to the United States Sentencing Commission, federal courts in 1990 sentenced drug traffickers to an average of 84 months in prison, without possibility of parole. By contrast, state courts in 1988 sentenced drug traffickers to an average maximum sentence of 66 months, resulting in an average time served of only 20 months. Thus, the decision of a federal prosecutor to prosecute a suspected drug offender, rather than letting the case proceed in state court, can result in a prison term that is years longer than the sentence that would likely result from state prosecution.

juvenile drug defendants to adult court, where they can be tried and sentenced as adults—landing many in adult penitentiaries.⁵⁸

Relative to their Caucasian compatriots, prosecutors are likely to more severely charge African Americans for drug crimes and are less likely to be lenient in making plea bargains for black defendants.⁵⁹ A study conducted by the *San Jose Mercury News* examined the plea bargaining process of 700,000 criminal cases.⁶⁰ The study compared substantially similar

LEADERSHIP CONFERENCE ON CIVIL RIGHTS & LEADERSHIP CONFERENCE EDUC. FUND, *supra* note 9, at 12. For example, consider a Caucasian man and an African American man both charged with cocaine trafficking in Los Angeles. “Stephen Green, a black man, was arrested with 70 grams of crack and sentenced in federal court to 10 years in prison – the mandatory minimum federal sentence for selling more than 50 grams of crack.” *Id.* “Daniel Siemanowski, a white man, was arrested with 67 grams of crack, and was also therefore eligible for the 10-year mandatory sentence. But [sic] he was tried and convicted in state court, and received a jail sentence of less than a year.” *Id.* at 13; *see also* Dan Weikel, *War on Crack Targets Minorities over Whites*, L.A. TIMES, May 21, 1995, http://articles.latimes.com/print/1995-05-21/news/mn-4468_1_crack-cocaine (relaying the stories of Green and Siemanowski and explaining the larger problems of crack cocaine usage and arrests in Southern California).

58. ALEXANDER, *supra* note 16, at 112.

59. Weatherspoon, *supra* note 29, at 43; ALEXANDER, *supra* note 16, at 115–16. Alexander argues, “The risk that prosecutorial discretion will be racially biased is especially acute in the drug enforcement context, where virtually identical behavior is susceptible to a wide variety of interpretations and responses and the media imagery and political discourse has been so thoroughly racialized.” *Id.* Alexander provides a story from a former U.S. Attorney who stated:

I had an [assistant U.S. attorney who] wanted to drop the gun charge against the defendant [in a case in which] there were no extenuating circumstances. I asked, “Why do you want to drop the gun offense?” And he said, “He’s a rural guy and grew up on a farm. The gun he had with him was a rifle. He’s a good ol’ boy, and all good ol’ boys have rifles, and it’s not like he was a gun-toting drug dealer.” But he was a gun-toting drug dealer, exactly.

Id. at 116. Alexander concludes:

Whether a kid is perceived as a dangerous drug-dealing thug or instead is viewed as a good kid who was merely experimenting with drugs and selling to a few of his friends has to do with the ways in which information about illegal drug activity is processed and interpreted, in a social climate in which drug dealing is racially defined.

Id. In 1991, a study conducted by the USSC on federal mandatory sentencing found in cases where “[the] factors suggested that a charge could be brought that carried a mandatory penalty, prosecutors were more likely to offer [w]hite defendants a negotiated plea below the mandatory minimum than African American or Latino defendants.” Marc Mauer, *Addressing Racial Disparities in Incarceration*, 91 THE PRISON J. 87S, 92S (Supp. III 2011), available at <http://sentencingproject.org/doc/publications/Prison%20Journal%20-%20racial%20disparity.pdf> (citing statistics from the 1991 United States Sentencing Commission).

60. Christopher Schmitt, *Plea Bargaining Favors Whites as Blacks, Hispanics Pay Price*, SAN JOSE MERCURY NEWS, Dec. 8, 1991, at 1A.

cases according to the defendant's crime and criminal history.⁶¹ The study found that Caucasian defendants who committed crimes and had a criminal history similar to African American defendants were significantly more successful in every step of the plea bargaining process.⁶² Similarly, a prosecutor in a high profile case in which the defendant is African American is more likely to pursue the greatest penalty.⁶³

In juvenile drug offense cases, African American juveniles are more likely to be formally charged and sentenced to prison.⁶⁴ A study conducted by Eileen Poe-Yamagata and Michael Jones found among youth who had never been sentenced to juvenile prison, African American juveniles were more than six times more likely to be sent to prison than Caucasian juveniles for identical crimes.⁶⁵

Moreover, in *The Devastating Impact of the Justice System on the Status of African-American Males: An Overview Perspective*, Floyd Weatherspoon argues "the racial makeup of the prosecutor's office may impact how drug charges are pursued against African-American defendants."⁶⁶ Weatherspoon asserts "[t]he typical prosecutor's office is predominately staffed by young white male attorneys[,] which leads to "a lack of sensitivity to the needs of the African-American community."⁶⁷ Additionally, as elected officials, state prosecutors "have the continuous burden of illustrating to the public they are 'tough on crime' in order to get re-elected."⁶⁸ Weatherspoon concludes state prosecutors promote this "tough on crime" image by prosecuting drug dealers in the African American community.⁶⁹ Under this theory, prosecutors engage in racially discriminatory practices in order to remain in office.⁷⁰

61. *Id.*

62. *Id.* For example, the study found among adults arrested on felony charges, "a third of whites were able to get charges reduced . . . [whereas] only about a quarter of blacks got [sic] such reductions." *Id.*

63. Weatherspoon, *supra* note 29, at 43.

64. ALEXANDER, *supra* note 16, at 115.

65. EILEEN POE-YAMAGATA & MICHAEL A. JONES, NAT'L COUNCIL ON CRIME & DELINQUENCY, AND JUSTICE FOR SOME, DIFFERENTIAL TREATMENT OF MINORITY YOUTH IN THE JUSTICE SYSTEM 2 (2007), available at http://www.nccdglobal.org/sites/default/files/publication_pdf/justice-for-some.pdf.

66. Weatherspoon, *supra* note 29, at 44.

67. *Id.*

68. *Id.*

69. *Id.*

70. See LEADERSHIP CONFERENCE ON CIVIL RIGHTS & LEADERSHIP CONFERENCE EDUC. FUND, *supra* note 9, at 11 (arguing "prosecutorial discretion is systematically exercised to the disadvantage of black and Hispanic Americans"). Although "[p]rosecutors are not, by and large, bigoted . . . [their] prosecutorial judgment is shaped by a set of self-perpetuating racial assumptions." *Id.*

Prosecutorial motivation aside, criminal defendants have been largely unsuccessful in challenging racially disproportionate treatment by prosecutors.⁷¹ Furthermore, in 1996, the Supreme Court's decision in *United States v. Armstrong*⁷² made it more difficult for defendants to prove a prosecutor's racial bias. The defendants argued that federal prosecutors in the Central District of California selectively chose to indict African American drug defendants in federal court for crack cocaine offenses, whereas Caucasians were prosecuted in state court where a conviction carried a much shorter sentence.⁷³ To support their motion to compel discovery, the defendants presented an affidavit "from a criminal defense attorney alleging that in his experience many non[-]African Americans are prosecuted in state court for crack offenses."⁷⁴ However, the government's own evidence more powerfully proved that a racial bias existed.⁷⁵

The government "submitted a list of more than 3,500 defendants who had been charged with federal narcotics violations over the previous three years[, and] . . . the names of [eleven] non[-]black defendants whom it had prosecuted for crack offenses."⁷⁶ However, all eleven "were members of other racial or ethnic minorities[.]" and not "a single example of a white defendant" charged with a federal crack cocaine offense.⁷⁷

Despite such strong evidence of racial bias, the Supreme Court held the defendants did not "satisfy the threshold showing . . . that the Government declined to prosecute similarly situated suspects of other races."⁷⁸ Therefore, the defendants were not entitled to discovery on their claim of selective prosecution based on race.⁷⁹

The holding in *Armstrong* places African Americans defendants in a classic "Catch-22."⁸⁰ In order to state a claim of selective prosecution,

71. Coker, *supra* note 30, at 844.

72. *United States v. Armstrong*, 517 U.S. 456 (1996).

73. *Id.* at 459–60. Particularly in crack cocaine prosecutions, "prosecutorial decision to bring charges in federal court, or leave the case to the state system, is often exercised to the detriment of America's minorities." LEADERSHIP CONFERENCE ON CIVIL RIGHTS & LEADERSHIP CONFERENCE EDUC. FUND, *supra* note 9, at 12. Harsh, mandatory minimum penalties were enacted by Congress in 1986 for these offenses. *Id.* at 12–13. In the late 80s and early 90s, "hundreds of blacks and Hispanics—but no whites" were prosecuted by the United States Attorney's Office presiding over the Los Angeles area. *Id.* at 13. However, "several hundred whites were prosecuted in California state court for crack offenses[.]" thus proving "[t]he absence of white crack defendants in federal court could not be ascribed to a lack of whites engaged in such conduct." *Id.*

74. *Armstrong*, 517 U.S. at 460.

75. *Id.* at 483 n.6 (Stevens, J., dissenting).

76. *Id.*

77. *Id.*

78. *Id.* at 458.

79. *Id.* at 457.

80. Coker, *supra* note 30, at 846.

challenging defendants are required to offer evidence showing similarly situated defendants of other races were eligible for prosecution, but were not prosecuted.⁸¹ However, in most circumstances this evidence does not exist or is in the exclusive control of prosecutors.⁸² Practically speaking, “[t]he decision in *Armstrong* effectively shields this type of biased decision making from judicial scrutiny for racial bias.”⁸³ Thus, prosecutors across the nation who charge African Americans more severely than Caucasians for drug crimes and who are less lenient with African American defendants when plea bargaining have been effectively immunized by the Supreme Court from claims of racial bias, thereby allowing racial biases to thrive.

IV. HARSH SENTENCING POLICIES

Racial disparities in arrests and prosecution selection are further exacerbated by sentencing policies. “Sentencing and related criminal justice policies that are ostensibly ‘race neutral’ have in fact been seen over many years to have clear racial effects”⁸⁴ This Article focuses on three sentencing policies that further intensify the racial disparities in the War on Drugs: (1) sentencing disparity between crack cocaine and powder cocaine; (2) school zone drug laws; and (3) prior offense sentencing policies.

A. Sentencing Disparity Between Crack Cocaine and Powder Cocaine

From 1986 to 2010, 21 U.S.C. § 841(a)-(b) proscribed the sentencing disparity between powder cocaine offenses versus crack cocaine offenses at a ratio of 100 to 1.⁸⁵ Possession with the intent to distribute five grams of crack cocaine carried the same minimum sentence of five years incarceration as possession with intent to distribute 500 grams of powder cocaine.⁸⁶ Between 1986 and 2010, many defendants challenged this sentencing policy, arguing that the law was “arbitrary and irrational be-

81. *Armstrong*, 517 U.S. at 470.

82. Coker, *supra* note 30, at 846.

83. ALEXANDER, *supra* note 16, at 116.

84. Mauer, *supra* note 30, at 14. Mauer also argues that the racial effects from these sentencing policies “could have been anticipated by legislators prior to enactment.” *Id.*

85. 21 U.S.C. § 841(a)-(b) (2006); see U.S. SENTENCING COMM’N, *supra* note 9, at 2-3 (discussing the history of the former Act and disproportionate ratios).

86. 21 U.S.C. § 841(b) (2006); see U.S. SENTENCING COMM’N, *supra* note 9, at 2-3 (discussing the impact of sentencing guidelines). An appropriate anecdote to demonstrate the effects of the disparity in sentencing is the story of Edward Clary, outlined by Alexander in her book, *The New Jim Crow: Mass Incarceration in the Age of Color Blindness*. ALEXANDER, *supra* note 16, at 109. Edward Clary was convicted of a crack cocaine offense when the sentencing disparity was 100 to 1. *Id.* Due to the federal sentencing guidelines Clary, an eighteen-year old first-time offender, was sentenced to a minimum of ten years in federal prison for carrying fifty grams of crack (less than two ounces). *Id.*

cause it impose[d] vastly different penalties on two forms of the same substance.”⁸⁷

Furthermore, defendants argued the law discriminated against African Americans, because at the time these sentencing guidelines were challenged, “the majority of those charged with crimes involving crack cocaine at that time were black (approximately [ninety-three] percent of convicted crack cocaine offenders were black, [five] percent were white), whereas powder cocaine offenders were predominantly white.”⁸⁸ Thus, sentencing disparity between crack cocaine and powder cocaine “sent mostly black crack cocaine offenders to prison for longer terms than white powder-cocaine users were given.”⁸⁹

In August 2010, President Barack Obama signed the Fair Sentencing Act,⁹⁰ which reduced the sentencing disparity between federal crack cocaine and powder cocaine convictions from 100:1 to 18:1.⁹¹ A disparity of 18:1 is still an enormous difference, especially when a wide range of research supports equal sentencing between crack cocaine and powder cocaine offenses.⁹² For example, noted psychiatry and behavioral science professor Charles Schuster found “once cocaine is absorbed into the bloodstream and reaches the brain [the] effects on brain chemistry are identical regardless of whether it is in the form of crack or powder.”⁹³

87. ALEXANDER, *supra* note 16, at 110; *see also* U.S. SENTENCING COMM’N, *supra* note 9, at 1 (recognizing the policy’s fairness was challenged by “public officials, private citizens, criminal justice practitioners, researchers, and interest groups”).

88. ALEXANDER, *supra* note 16, at 110; *see also* U.S. SENTENCING COMM’N, *supra* note 9, at 8 (noting approximately ninety percent of offenders convicted in federal court were black).

89. Cynthia Gordy, *Dueling Views on New Crack-Sentencing Decision*, THE ROOT (July 5, 2011), <http://www.theroot.com/blogs/attorney-general-eric-holder/split-views-new-crack-sentencing-decision>. Academics have also argued that there is a significant racial disparity associated with those sentenced for crack cocaine offenses versus those sentenced for powder cocaine offense. *See* NICOLE PORTER & VALERIE WRIGHT, THE SENTENCING PROJECT, CRACKED JUSTICE 10 (2011), *available at* http://sentencingproject.org/doc/publications/dp_Cracked%20Justice.pdf (discussing how “rhetoric in response to the crack epidemic demonized crack as a ‘black’ drug”).

90. Fair Sentencing Act of 2010, Pub. L. No. 111-220, 124 Stat. 2372 (codified at 21 U.S.C. § 841 (2006 & Supp. 2012)).

91. *See* U.S. SENTENCING COMM’N, PRELIMINARY CRACK RETROACTIVITY DATA REPORT – FAIR SENTENCING ACT, at Introduction (2013), *available at* http://www.ussc.gov/Research_and_Statistics/Federal_Sentencing_Statistics/FSA_Amendment/2013-07_USSC_Prelim_Crack_Retro_Data_Report_FSA.pdf (discussing repercussions of the Fair Sentencing Act and the USSC’s decision of retroactive application).

92. *See* NICOLE PORTER & VALERIE WRIGHT, THE SENTENCING PROJECT, CRACKED JUSTICE 13 (2011), *available at* http://sentencingproject.org/doc/publications/dp_Cracked%20Justice.pdf (recommending eliminating crack and powder cocaine sentencing disparities).

93. *Id.*

Similarly, research indicates that crack cocaine does not cause significantly more violence than powder cocaine.⁹⁴ For example, in 2000, the United States Sentencing Commission (USSC) compared powder cocaine to crack cocaine offenses and found that “in 91% of all powder cases and in 88.4% of all crack cases there [was] no bodily injury. Threats were present in 4.2 % of powder cocaine cases and 3.7% of crack cases.”⁹⁵ Further, “[b]odily injury occurred in 1.4% of powder cases and 4.5% of crack cocaine cases and death occurred in 3.4% of both powder and crack cocaine cases.”⁹⁶ Thus, although the narrowing of the disparity in sentencing between crack cocaine and powder cocaine is a step in a more equitable direction, African American crack cocaine offenders will continue to receive unjustifiably longer prison sentences in comparison to Caucasian powder cocaine offenders.

B. *School Zone Drug Laws*

In 2000, the National Alliance for Model State Drug Laws found that all fifty states and the District of Columbia had enacted drug free zone laws that enhance penalties of drug offenses committed within a certain geographical range of a school, typically 500 to 1,000 feet, and other public and quasi-public locations.⁹⁷ The stated objective of these drug laws is

94. Memorandum from the Am. Civ. Liberties Union, to Interested Persons (May 21, 2002), <http://www.aclu.org/drug-law-reform/interested-persons-memo-crackpowder-cocaine-sentencing-policy> (citing U.S. SENTENCING COMMISSION, 2000 Drug Sample, Figure 25). It is important to note that while research currently indicates similar levels of violence between crack cocaine and powder cocaine, “[t]here is evidence that when crack cocaine was first introduced, a great deal of violence ensued. Violence associated with crack cocaine was linked to organizational competition for market share and profits, protection of drug-trafficking territory, regulation of employees in the new selling organizations, [etc].” James C. Howell & Scott H. Decker, *The Youth Gangs, Drugs, and Violence Connection*, NAT’L CRIMINAL JUSTICE REFERENCE SERV. (Jan. 1999), <https://www.ncjrs.gov/pdffiles1/93920.pdf>.

95. Memorandum, *supra* note 94.

96. *Id.* Furthermore, the U.S. Sentencing Commission found “of thousands of federally prosecuted cocaine cases [in] 2000, weapon involvement for powder cocaine offenses was 25.4% and for crack cocaine offenses, 35.2%. The frequency with which weapons [were] actually used [was] much lower. For powder offenders the use rate [was] 1.2% and for crack offenders it [was] 2.3%. . . .” Michael Coyle, *Race and Class Penalties in Crack Cocaine Sentencing*, THE SENTENCING PROJECT, at 3, available at <http://www.prisonspolicy.org/scans/sp/RaceandClass.Sentencing.pdf> (citing U.S. SENTENCING COMM’N, REPORT TO CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY (2007)).

97. JUDITH GREENE ET. AL., DISPARITY BY DESIGN: HOW DRUG-FREE ZONE LAWS IMPACT RACIAL DISPARITY – AND FAIL TO PROTECT YOUTH, JUSTICE POLICY INST. 5 (2006), available at <http://sentencing.nj.gov/downloads/pdf/articles/drugpolicy1.pdf> (“A handful of states make drug activity in a prohibited zone a separate, stand-alone offense, but in most states the drug-free zone charge is an enhancement to the penalty imposed for the underlying possession or sale offense. The penalties and penalty enhancements as-

to deter drug selling to schoolchildren.⁹⁸ However, “[m]any of these statutes apply much more broadly [and can] includ[e] drug sales between two adults during nonschool [sic] hours.”⁹⁹ Although school zone drug laws are seemingly race neutral on their face, these laws predominately affect African American drug offenders.

Marc Mauer, author of *Justice for All? Challenging Racial Disparities in the Criminal Justice System*, argues that the racial effects of school zone drug laws are due to housing patterns among the races.¹⁰⁰ Mauer asserts that “. . . [u]rban areas are much more densely populated than rural or suburban areas; [therefore,] it is more likely that any given drug offense will take place within a school zone district. And since people of color disproportionately reside in urban areas, a drug offense committed by an [African American] . . . will be more likely incur these enhanced penalties.”¹⁰¹

For example, in New Jersey, ninety-six percent of all people charged and incarcerated under violations of school zone drug laws in 2005 were black or Hispanic.¹⁰² “Recognizing this disparity, [in 2010] the state legislature restored sentencing discretion to judges in such cases.”¹⁰³ Though New Jersey restored discretion to judges, many states have not done so; thus, African American drug offenders continue to be predominately affected by the enhanced penalties of drug offenses occurring within a school zone.¹⁰⁴

C. *Prior Offense Sentencing Policies*

“Sentencing policies that enhance penalties based on an offender’s prior record likewise produce disproportionate racial effects even though they are racially neutral on the surface.”¹⁰⁵ As previously stated, African Americans and Caucasians engage in similar drug behavior.¹⁰⁶ African

signed to drug-free zone violations vary widely, but in many states they include mandatory or presumptive sentences.”) Mauer, *supra* note 59.

98. Mauer, *supra* note 59.

99. *Id.*

100. Mauer, *supra* note 30, at 14 (connecting the effect of densely populated urban areas to the disparate impact of drug free zones around schools to African Americans).

101. Mauer, *supra* note 59.

102. *Id.*

103. *Id.*

104. GREENE ET. AL., *supra* note 96, at 17 (highlighting Massachusetts as an example of this continuing disparity). The Massachusetts Sentencing Commission’s 2004 Survey of Sentencing Practices found that while “non-Hispanic [w]hites make up 80 percent of the resident population . . . [b]lacks and Hispanics made up nearly 80 percent of those convicted of drug-free zone violations.” *Id.*

105. Mauer, *supra* note 59.

106. Fellner, *supra* note 8, at 266.

Americans, however, are more likely to be stopped, searched, and arrested for drug offenses; therefore, African Americans are more likely to have a prior drug record.¹⁰⁷ However, an offender's prior drug record does not correlate with the offender's actual prior drug usage—rather, it correlates with the rate at which authorities in the criminal justice system actively look for drug offenses and the locations that they focus on.

Indeed, African Americans, unlike Caucasians, are more likely to receive harsher penalties for a second or third drug offense because police and prosecutors target them more heavily in the first place.¹⁰⁸ For example, in 1995, Georgia enacted a so-called “Two Strikes You’re Out Law,” almost exclusively affecting, if not targeting, African American offenders.¹⁰⁹ The law provides state district attorneys “unfettered discretion to seek”¹¹⁰ a life sentence for a second drug offense.¹¹¹ In fact, during this time, “98.4 [%] of those serving life sentences under the provision were [b]lack.”¹¹² Thus, sentencing policies that enhance penalties based on an offender's prior record amplify the racial disparity in the War on Drugs.

V. CONCLUSION

Hundreds of thousands of American citizens violate drug laws, making it impossible for police to discover and arrest every citizen who commits a drug offense. Charging every drug offense would overburden the criminal justice system; therefore, choices must be made about whom to target in the War on Drugs. The criminal justice system has chosen to specifically target African American offenders more than their Caucasian counterparts. “Going after low-level dealers and desperate addicts, both more

107. Mauer, *supra* note 30; Fellner, *supra* note 8, at 273; Mauer, *supra* note 59, at 91S-92S. Mauer shares the story of a defendant who received a lesser sentence than outlined in sentencing guidelines. *Id.* at 95S. The judge “noted that most of [the defendant’s] prior convictions were the result of traffic stops by Boston police. Given the history of racial profiling by law enforcement agencies, Judge Gertner reasoned that such practice essentially contributed to [the defendant’s] prior record, and as a result she imposed a lesser sentence of 2.5 years,” instead of the Sentencing Guideline range of four to six years. *Id.*

108. Mauer, *supra* note 59.

109. See LEADERSHIP CONFERENCE ON CIVIL RIGHTS & LEADERSHIP CONFERENCE EDUC. FUND, *supra* note 9, at 12 (noting Georgia’s “Two Strikes You’re Out” law “[was] imposed on 16 percent of eligible black defendants while the same sentence [was] imposed on only one percent of white defendants”).

110. *Id.* at 15.

111. See ALEXANDER, *supra* note 16, at 111.

112. LEADERSHIP CONFERENCE ON CIVIL RIGHTS & LEADERSHIP CONFERENCE EDUC. FUND, *supra* note 9, at 28. Defendants challenged Georgia’s “Two Strikes You’re Out Law;” however, the Georgia Supreme Court ultimately ruled “the fact that 98.4[%] of the defendants selected to receive life sentences for repeat drug offenses were [b]lack required no justification.” ALEXANDER, *supra* note 16, at 111–12 (citing *Stephens v. State*, 456 S.E.2d 560, 561–62 (Ga. 1995)).

visible in inner-city, low-income black neighborhoods, is not a War on Drugs, but a war on particular communities.”¹¹³

“To assert that African-Americans are adversely or disproportionately impacted by the American justice system is to understate the devastating effect that the justice system is having on the status of African-Americans.”¹¹⁴ The fact that African Americans comprise 75% of all those serving time in jail or prison for a drug offense is not the result of greater involvement in drug offenses.¹¹⁵ Rather, racial disparity is the result of discretionary decision making by the media consistently portraying images of African American drug offenders to the public; police stopping, searching, and arresting African Americans for drug offenses more frequently than Caucasians; prosecutors charging African Americans more severely for drug offenses; and harsh sentencing policies resulting in longer prison sentences for African American drug law offenders.

This Article does not imply drug laws should *not* be enforced against African American drug offenders—rather, this Article maintains that African American communities should not be disproportionately targeted for drug offenses. To eliminate the racial disparity present in the War on Drugs, four changes must occur. First, the media must stop saturating the public with images of African American drug offenders, and must begin portraying the accurate racial composition of drug offenses. Second, police officers must stop targeting African Americans in stops, searches, and arrests and must begin policing the community at large for drug offenses. Third, prosecutors must stop charging African American drug offenders differently than Caucasian drug offenders; they must not favor Caucasian drug offenders in plea bargains; and they must begin reporting racial statistics of all drug prosecutions. Finally, sentencing disparity between crack cocaine and powder cocaine must be eliminated, and school zone drug laws and prior offense drug laws should not automatically increase the length of a drug offender’s sentence, but should be considered as simply one factor in the overall sentencing of the offender. Until these changes occur, the War on Drugs will remain a war on the African American community.

113. Lusane, *supra* note 15, at 102. “[T]he reality is that many [b]lack defendants prosecuted in federal court are not high-volume traffickers . . . those high in the chain of drug distribution are seldom caught and seldom prosecuted. Instead, federal prosecutorial efforts have focused predominantly on low-volume dealers and low-level couriers who happen to be [b]lack and Hispanic.” LEADERSHIP CONFERENCE ON CIVIL RIGHTS & LEADERSHIP CONFERENCE EDUC. FUND, *supra* note 9.

114. Weatherspoon, *supra* note 29, at 24.

115. *Id.* at 38.