

# America's Anti-Drug Abuse Act, the Disproportionality of Drug Laws on Blacks: A Policy Analysis



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## Abstract

General William T. Sherman reportedly said war is hell. An immoral war is being waged by the United States. This war is not taking place in a foreign nation, but on American soil. Much like Sherman's Civil War, the source of conflict concerns liberty and black skin. However, this war's casualties are not measured in deaths alone but in numbers of arrests and convictions. The war on drugs taking place in the United States is a 50-year campaign that creates hellish conditions for African American men and women who are disproportionately arrested and incarcerated for drug offenses. Using Segal's model, we question the war on drugs, its rhetoric, and the continued national consequences as it rages unchecked. We challenge the legitimacy of policy that fuels the war on drugs and that reinforces racial hierarchies. African Americans are no more likely than white people to use drugs, yet they face a more punitive system of governance. We conclude that the war on drugs is racially unjust, imprisons hundreds of thousands of low-level, nonviolent drug offenders and erodes individuals, families, and neighborhoods. We suggest alternative policies and practices to facilitate the impartial treatment of all racial and ethnic groups.

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## Introduction

With the advent of the war on drugs, African Americans have been incarcerated at exponential rates, relative to their actual drug use and overall population (Koch et al., 2016). Many scholars assert that arrests of African Americans continue as the norm and regularized by law enforcement officials and members (Doherty et al., 2016). According to Mauer et al. (2011), the war on drugs can be contextualized as a war on communities of color. In fact, a longitudinal study found that African Americans were 1.6 times more likely than their white counterparts to be arrested. By contrast, Koch et al. (2016) found that white people use and sell marijuana at much higher rates than African Americans.

The practice of racial profiling and exclusively targeting underrepresented groups and their neighborhoods is graphically illustrated in the research of Beckett et al. (2006). Beckett and her colleagues found that police officers overlooked known public use of drugs by white people and intentionally targeted Black neighborhoods (Beckett et al., 2006). These “minority” neighborhoods became the target of enforcement. The point to be made is that minority communities continue to be the subject or target of law enforcement strategies and this data can be captured easily over the past four decades. During the 1980s, over 500,000 people were imprisoned, with approximately 1.30 million on probation or parole. In the 1990s, African Americans accounted for 53.2 percent of those in state prisons for drugs, compared to 38.2 percent for white people (Cole et al., 2010). By 2010 the imprisonment rates quadrupled to approximately 2.25 million with about 4.90 million on probation or parole (Glaser, 2015). In 2012, African Americans were eight times more likely than white people or Hispanic people to be crack cocaine defendants (Bennett, 2014). During each decade, an observation on expansion of the prison industrial complex and the criminalization of poor people and visible minorities were based upon drug use (Alexander, 2011).

Although President Obama enacted the Fair Sentencing Act of 2010 that modified the mandatory minimum sentencing, only eight crack cocaine offenders were pardoned under his administration. Under the new Act, they would have shorter sentences (Rhodan, 2014). It would take years to see a significant impact from the Fair Sentencing Act in reducing the war on drugs. Despite previous reform efforts of the Fair Sentencing Act of 2010, President Trump’s administration reinvigorated the war on drugs by targeting low-level drug offenders with the most punitive penalties that still stand today (Lynch et al., 2021). Therefore, we examine the quadrupling of the prison population through a policy analysis model.

### ***Policy Analysis Model***

This policy analysis provides a foundation by which to critically analyze the impact of sentencing decisions made in the United States. This method of analysis has been used effectively by scholars (Salas et al., 2010; Parekh & Adorno, 2017). We use Segal's (2016) policy model and the tenets of critical race theory to offer insights into America's drug policy. The strategic model by Segal is a critical theory prototype that examines power structures to determine if race, ethnicity, and class are part of identifying a societal issue and questions if these characteristics affect who benefits or not (Segal, 2016). Considering Segal's model, our analysis will be framed based upon the following concepts:

- 1) social problem
- 2) power imbalance or struggle
- 3) public reaction
- 4) policies, public laws, or administrative rules
- 5) actual impact
- 6) legislative intended impact
- 7) public expectations
- 8) affected populations

The use of the critical theory model by Segal (2016) allows us to inductively lift from research ideas and themes that may fall into any one of the eight categories. We lay the contextual background for development of drug policy in America that may be known as moral panic.

### ***Moral Panic***

The essence of the moral panic is that politicians and the media are complicit. The media provides the narrative and negative images associated with the conduct of politicians and criminal justice officials. Cole et al. (2010) argues that "moral panic" is a term coined and defined by Cohen (1972) as "... when a condition, episode, person or group of persons emerges to be defined as a threat to societal values and interests" (p. 9). One point about moral panic is "not that there is nothing there" but that social responses, like America's drug policy may be fundamentally flawed. The reaction to a perceived societal threat may be more damaging to society than the source of panic (Goode & Ben-Yehuda, 2009).

Moral panics can be understood as having an ideological dimension because they initiate calls by politicians to "do something" based upon a distorted reality.

According to Cole et al. (2010), a key component of the moral panic with respect to the war on drugs was African American use of crack cocaine, perceived violence and the presumption that the violence would spread into white middle income communities. A similar argument can be made with respect to President Trump's declaration that the country needs to build a wall to keep out "criminals and rapists." Moral panic (when used by politicians) has resulted in the war on drugs, increased penalties, and racial profiling.

### ***Social Problem***

Using the critical theory model, the criminal justice system has relied upon socially constructed images of a criminal Black man as a problem and as a threat. The threat or social problem resulting in the creation of the war on drugs reflects a broad level of disparate treatment for Black people in America and legitimates stereotypes of Black people as criminogenic. House of Representatives (H.R.) 5210 - Anti-Drug Abuse Act of 1988, is multifaceted and reflects the global efforts to control narcotics (United States Congress, 2021a). H.R. 5210 encompasses the war on drugs, a Congressional bill signed by President Ronald Reagan. The Act's objective was to combat unlawful drug trafficking, manufacturing, drug use, and to expedite drug cases (United States Congress, 2021a; Sacco, 2014).

This assumptive war on drugs has impacted the mass incarceration of African American males (Mitchell et al., 2017). As such, they are apprehended at greater rates and receive harsher sanctions for drug crimes, relative to their white counterparts (Dumont et al., 2013). Poor Black males are identified as the enemy and the war has become an unsuccessful social experiment in curbing the sale and use of illegal drugs. It has, for example, no predictable end and by many accounts has been a failure.

Aggressive drug policies and their enforcement exacerbate, not alleviate, the drug problem by increasing competition. They also widen the chasm of distrust between Black people and the criminal justice system, which leads to greater violence by the police and by Black people within their communities (Nunn, 2002). The problem with the Anti-Drug Abuse Act of 1988 is that it disproportionately impacts large concentrations of Black people in impoverished urban communities. The government has identified Black people as the social problem. And as a result, the American legal structure systematically marginalizes Black people (and other people of color).

### ***Power Imbalance or Struggle***

The sanctions for drug offenses extend beyond the realm of traditional punishment and create a power imbalance and subsequent struggle. Persons with drug arrests

and convictions, for example, are unable to find employment, do not qualify for loans, are politically silenced, disenfranchised, and socially stigmatized by their convictions (Western & Wildeman, 2009). A drug-related arrest alone is often sufficient to exclude the arrested person from enjoying similar opportunities with others despite the lack of a criminal conviction. And when convictions are achieved, they have devastating results upon the person and their family.

The Anti-Drug Abuse Act of 1988 creates the conditions that result in a steady flow of convicted persons, resulting in jobs for criminal justice personnel and contracts for the construction of prisons in rural communities (Thompson, 2010). The Anti-Drug Abuse Act of 1988 has empowered the state, disenfranchised the poor, and imprisoned large numbers of Black and brown populations. One quick inference here is that the state does not have the genuine interest of the people at heart, but rather control and power over impoverished populations. The third component of Segal's (2016) model is the public's reaction to the state's identification of the problem.

### **Public Reaction**

Initially, the public (like the politicians) wanted more punishment. In recent years, however, this is changing. Voters today are becoming less tolerant of harsh drug laws – associated with huge taxes. In some states, voters are demanding that drug-related penalty reductions be placed on the ballot (Beck, 2015). In California, voters downgraded previous felony charges to misdemeanors, which removed prison sentencing as an option (Porter, 2016). In the states of Colorado, Washington, and the District of Columbia the legalization of small amounts of marijuana has also helped to change the public's reaction to drug use (Travis, 2014). By contrast, Beck (2015) believes that upper middle class and affluent voters generally favor harsher drug laws. His reasoning is that such laws benefit economically advantaged groups, even though poor white groups may react favorably with regard to drug laws. In other words, middle/upper income groups are more likely to respond favorably to drug laws and their support is likely to be more robust if it does not impact them directly. By contrast, Black people are less likely to support stiff drugs laws and are most likely to suffer from America's *get-tough* drug policies through disproportionate arrest and incarceration. In all, the public reaction is mixed and channeled along social, economic, and racial lines.

### **Policies, Public Laws, or Administrative Rules**

The objective of policy at the federal level is the classification of drugs by their potential for harm, abuse, and medical usefulness. The Drug Enforcement Administration (DEA), for example, classifies powdered cocaine and crack cocaine in

the same threat group, yet the Anti-Drug Abuse Act of 1988 imposes differential sentencing for the two variations of the same drug, based upon the population that uses the drug (DEA, 2021; United States Congress, 2021a). In this category, we find confusion and contradiction in the rationale behind punitive legislation for use of certain drugs. Thirty-six states permit the use of medicinal marijuana despite the federal government contention that the drug has no medicinal purposes (NCSL, 2021). The inability of the federal government to reconcile its legislation with state laws is problematic.

Congress deemed crack a more hazardous agent. This regulation was based on trafficking offenses for cocaine (Murphy et al., 2002). The Anti-Drug Abuse Act of 1986 enforced severe consequences, such as felony charges for simple possession of controlled substances. The 1986 Act was known for mandatory minimum sentencing for specific drug smuggling crimes. It had two levels of mandatory sentences based on the amount and type of drug (United States Congress, 2021b). For example, the sentence for crack cocaine offenders was significantly higher than for powdered cocaine offenders (Sacco, 2014). The bill's implementation had a greater adverse effect on African Americans because unlike white people, African Americans tended to buy the cheaper crack variant (Beaver, 2010).

First time trafficking offenses resulted in a minimum penalty of five years for both 5 grams of crack and 500 grams of powder cocaine. A person trafficking 50 grams of crack and another trafficking 5,000 grams of powder cocaine both are penalized by ten-year minimum sentences (Murphy et al., 2002). The Anti-Drug Abuse Act made a distinction for simple possession of crack among other drugs in 1988 and the decision was made for mandatory minimum penalty (United States Congress, 2021a). This included enforced mandatory minimum sentencing of minors for drug crimes as well (Sacco, 2014). In addition, the 1988 Act for mandatory minimum sentencing meant the offender would be imprisoned for at least five years for simple possession of 5 grams or more of crack. The amount of possession of any other substance, including cocaine in its pure form, is a misdemeanor for a first-time offender with a maximum penalty of a one-year prison sentence (United States Congress, 2021a).

The Obama administration sought to reduce negative impacts of the war on drugs by allowing federal prosecutors discretion in charging drug offenders. In 2013, Obama instructed federal prosecutors not to pursue enhancements or mandatory minimum sentencing unless certain conditions were met. By 2017, these policies were rescinded, and more punitive measures restored. Specifically, federal prosecutors were required to behave more aggressively and seek mandatory minimum sentences for drug charges (Lynch et al., 2021). A relevant

policy question, then, pertains to the higher punitive scales set at the federal level, relative to the states and the District of Columbia. Malone (2018) explains “that between 1986 and 2010 a majority of U.S. states never passed differential sentencing laws for crack cocaine” (p. 118). Race, political partisanship, and urbanization are key determinants in how states implement drug legislation (Malone, 2018). There is disparity, perhaps intentional, with respect to implementation of laws.

### **Public Expectations**

Scholars attribute the war on drugs as a catalyst for increased drug market competition and violence (Black, 2007; Mitchell et al., 2017). The policy increased the incarceration of people of color, but drug use and violence never abated. With respect to public expectations, two perceptions emerged: First, the advocates for tough on crime policies were disappointed that despite billions of dollars spent, the Anti-Drug Abuse Act did not reduce drug use and violence. Second, some members of the public remain committed to this oppressive legislation, not because they believe in the policy but because they cannot admit the investment was never worth the cost – in many ways like Trump’s support for funding for a wall along the southern border.

### **Affected Populations – Critical Race Theory**

Biased practices do not operate in a vacuum and are preceded by historical events that influence political bodies at the local and national levels, which in turn structure their policies and laws accordingly. All races have been affected to some extent by the war on drugs, but the affected population is overwhelmingly African American (Smiley, 2016). The racialized construction and implementation of drug laws are akin to the root cause of many Black people’s disproportionate sentencing in the criminal justice system. Critical race theory (CRT) holds that systems and especially systems of law are designed to disadvantage people of color by reinforcing white privilege (Alexander, 2011). Through a CRT lens, Delgado and Stefancic (2017) propose the following six tenets about racial treatment:

- 1) racism is normal, not abnormal, and therefore difficult to treat
- 2) racism advances white interests
- 3) race is a social construction, not biological condition
- 4) racialization and perception of groups evolve
- 5) no person has a singular identity
- 6) racial minorities have a presumed competence to speak about racism

Theorists use the above principles and adaptations to argue that the criminal justice system classifies crime through biased practices and addresses it through selective enforcement (Cullen & Agnew, 2006). Critical theorists such as Jacobs (1979) also explain that the preferential treatment of different classes and the degree of government involvement in social oppression can be predicted by race and economics. Likewise, Weisburd and Braga (2006) contend that minority and poorer people become the focus of minor violations that are ignored in other communities. Under CRT, police strength and regulation by default are focused on certain lower and racial classes, but distinctively increases with the growth of specific racial minority populations (Sever, 2001). This system of minority threat has the most detrimental impact on Black people as they are the most targeted racial group in the U.S. (Alexander, 2011).

The war on drugs fosters the racial over-policing of minority communities, which feeds the school-to-prison pipeline (Fornili, 2018). Countless families have been separated because of this ineffective policy. Some would argue that more than a modicum of racism is involved in the continuation of policies that have been both ineffective and oppressive. Many of the individuals affected by these policies continue to be marginalized as a result.

According to Sledge (2013) the war on drugs has cost America a great deal of money. In 2013, over \$25 billion dollars was earmarked for combatting drugs. Approximately \$15 billion was spent on law enforcement, interrupting illegal drug activity, and stemming the drug flow into the U.S. from other nations. Local, state, and federal drug expenditures total nearly \$51 billion when factors such as costs of enforcement and incarceration are considered. To date, the numbers are indisputably exacerbated. Over a 50 a fifty-year period approximately \$2.5 trillion dollars have been allocated to fighting a war on drugs (Cummings, 2012). The financial beneficiaries of this war have largely been corporations and politicians (Cooper et al., 2016; Fornili, 2018).

## **Discussion**

Deconstructing the operative terminology of a “war on drugs” reveals a few things. To wage a war requires elements that include a cause, an enemy, an expectation of victory, and preferably, a foreseeable end (McMahan, 2005). Ideally, a nation does not wage war on its citizens. For example, in President Lyndon B. Johnson’s metaphoric war on poverty, improving quality of life was the goal, poverty itself was the enemy and the policy aim was to address underlying causes through education,

prevention, and government aid (Bailey & Duquette, 2014; Fornili, 2018). The elements of war are applied more traditionally in drug policy.

Judicial members, social justice advocates, policy analysts, researchers, and even some criminal justice practitioners are opposed to the stringent sentencing policy attached to the Anti-Drug Abuse Act (Pfaff, 2015). In separate occasions, 27 federal judges, former Vice President Joe Biden (now President Biden), and Gil Kerlikowske, former commissioner of U.S. Customs, challenged and condemned the Anti-Drug Abuse Act as archaic and unnecessarily harsh. Those officials have also asked that the Anti-Drug Abuse Act be revisited based on its lack of merit (Beaver, 2010). However, a few researchers identify the privatization of prisons and the outsourcing of prison labor as a reason the Act has not been sufficiently amended or abolished.

Cooper et al. (2016) specifically link a politically influential alliance of corporations known as the American Legislative Exchange Council (ALEC) to policy manipulation. Multiple companies associated with ALEC allegedly secure profitability by using state labor to fulfill private contracts. ALEC supports severe policies, including the Anti-Drug Abuse Act that increase prison sentences, prison growth, and ALEC reportedly has blocked progressive policy reform.

Perhaps, the most vocal and least heard people are those directly affected that identify problems with the policy. This category includes four groups: people presently incarcerated for drug offenses, the formerly incarcerated, their families, and people that will be potentially incarcerated. A future of drug-related incarceration is a reality for many young Black people.

National drug policy and practice deny all Americans equal protection and equitable treatment guaranteed by the U.S. Constitution. Historically, America has engaged in oppressive political, economic, and social treatment of underrepresented groups, which is played out in the criminal justice system through targeted legalized discriminatory drug laws. Although Black people bear the brunt of policy ills stemming from the Anti-Drug Abuse Act, marginalization and inequality takes many forms.

## **Conclusion**

The United States has the highest incarceration rate in the world (World Prison Brief, 2021). The U.S. imprisons more people individually than twenty-six of the largest European nations total, even though about 50% of them meet clinical criteria for addiction (NADCP, 2021). Enacting drug policies for substance abuse

treatment should address the problem as opposed to the traditional and historic use of imprisonment. There is a need for drug treatment programs for nonviolent offenders that does not result in imprisonment. The pursuit of alternative programs will reduce the overall cost of imprisonment to taxpayers and decrease the numbers of offenders in prison for nonviolent drug-related offenses. As it stands, African Americans who sell and use drugs, must also cope with systemic inequalities caused by institutional racism generated by the Anti-Drug Abuse Act. One can also argue that the policy engineers did not consider the economic incentive of replacement dealers for those arrested nor the psychological and emotional dependency of the users.

Within the literature, the Act has no redeeming features. If any benefits exist, the positive effects are unknown or accidental. The negative effects, however, are legion, well-documented and recorded in history as a reminder that blind commitment to any policy can be detrimental. In agreement with Campbell et al. (2015), we suggest that the Act never amounted to a coherent national strategy, only a legislative grab at power to impress the public, appease constituents, and marginalize affected populations.

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