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**Unfair by Design: The War
on Drugs, Race, and the
Legitimacy of the Criminal
Justice System**

INTRODUCTION

A COMMON ELEMENT IN DISCUSSIONS OF WHAT MAKES THE UNITED States unique is readily conveyed by the phrase “the American Dream.” While an exact definition of this concept eludes us, widely accepted ways of thinking about it make reference to notions of freedom, opportunity, and equality. Lurking not far beneath the surface of these lofty notions is an idea about the good society—about what is just and what is fair.

As Gunnar Myrdal’s *An American Dilemma* (1944), one of the canonical texts of the American Dream, put it, we are bound together by an “American Creed.” This creed contains ideas and values that Americans of almost any station in life can articulate, namely “inalienable rights to freedom, justice, and a fair opportunity.” These rights were rooted in a belief in Enlightenment notions of the moral dignity, worth, and value of each individual. Such reverence for the worth of the individual demanded a sort of equality of treatment, at least before the hands of government and the authority of the state. Among other things, then, this creed calls for and is understood as requiring that we all stand equal before the law.

What we wish to suggest in this paper is that this ideal, this great American promise of freedom, opportunity, and equality—of a truly fair and just society where citizens stand equal before the law—is in trouble. This source of deep uneasiness and anxiety about the American promise of fairness concerns the gradual but profoundly punitive transformation of the crime response complex in the United States.¹ Legal scholar Michael Tonry opened a 1999 *UCLA Law Review* article by suggesting that:

We live in a repressive era when punishment policies that would be unthinkable in other times and places are not only commonplace but also are enthusiastically supported by public officials, policy intellectuals, and much of the general public (Tonry 1999: 1752).

He closed by declaring that, “For a civil society, the United States has adopted justice policies that reflective people should abhor and that informed observers from other Western countries do abhor” (1789).

We very much share these sentiments, especially with regard to one major facet of this era of “unthinkable punishment,” as Tonry put it; namely, the radically disproportionate impact this repressive era has had on African Americans and African-American communities across this country. More concretely, we maintain that over the past two to three decades the United States has enacted a series of policies that have effectively reformed a historically troubled linkage between race, crime, and the functioning of the legal system. Among the effects of these changes are a deep crisis of legitimacy for the legal system in the eyes of black America and a real threat to the promise of equality before the law.

In general, we seek to render the current rates of black incarceration both more politically visible and problematic. We make three empirical claims in pursuing this agenda. First, and least controversially, we argue that the United States has enacted policy changes that have created an extraordinary—indeed, truly world-historic—rise in

the use of incarceration for purposes of social control. These actions have had sharply disproportionate effects on African Americans, though we hasten to add that the mechanisms of such systematic racial disproportion are more indirect, covert, and implicit than the mechanisms of racial bias evident in the past. Second, African Americans directly experience and are very much aware of these changes. Yet, so far, the black community is neither of one mind nor acutely politicized about these trends. Black Americans are, however, by overwhelming margins deeply disillusioned with the current situation. They regard the current situation of inequality before the law as a signal failure of progress in civil rights and of the promise of fairness at the heart of the American Creed. Finally, this disillusionment is contributing to a crisis of legitimacy, a crisis that will have effects on how blacks engage legal authority in terms of interactions with police and with the court system. The two latter claims we substantiate with data from two innovative sets of national sample surveys from the Race, Crime, and Public Opinion study (Bobo and Johnson, 2002). With these data we are able to show both high general rates among blacks of perceived racial bias in the crime response complex and, more specifically, a perception of racial bias in the conduct of the so-called War on Drugs. Both of these outlooks, in turn, undermine a readiness for positive engagement with the police and with the court system.

BACKGROUND

We as a society have normalized and, for the time being, largely depoliticized, a remarkable set of social conditions. These conditions have been characterized by some as the emergence of a “prison industrial complex” (Marable, 2002), by others as a new “carceral state” (Wacquant, 2001), and by yet others as a trend toward becoming a “mass imprisonment society” (Garland, 2001a). Whichever label one uses, such a society is rightly regarded, at a minimum, as *divided against itself*, and arguably as deeply pathological (King, 1998). According to sociologist and legal scholar David Garland, the mass imprisonment society has two features: first, “a rate of imprisonment that is markedly above the

historical and comparative norm for societies of this type” and second, “the *social concentration* of imprisonment effects,” such that incarceration “ceases to be the incarceration of individual offenders and becomes the systematic imprisonment of whole groups of the population.” (Garland, 2001b: 5-6)

A major outcome of the shift in the United States to a “mass imprisonment society” is to again breathe life into the old folk wisdom and perception that African Americans are treated as inferiors who stand unequal before the law (Hagan and Albonetti, 1982). Jurist and legal scholar A. Leon Higginbotham argued that American law once overtly embraced a “precept of inferiority” with regard to blacks, a precept that we suggest continues to exert discernible effects even into the present day. Accordingly, the United States legal system was organized so as to “presume, protect, and defend the ideal of superiority of whites and the inferiority of blacks. In application, this precept has not remained fixed and unchanged. Nonetheless, it has persisted even to recent times, when many of the formal, overt barriers of racism have been delegitimized” (Higginbotham, 1996: xxv). This emergent social condition of mass incarceration, we maintain, reinscribes racial injustice into the body politic through a set of policies and practices that close scrutiny strongly suggests were unfair by design (Tonry, 1995; Cole, 1999; Mauer, 1999).

This is not to say that nothing has changed, or that direct racial discrimination by police, prosecutors, the courts, and the prison system continues without important change. Distinguished legal scholar Randall Kennedy (1997) has traced two historic patterns of race bias. The first, *unequal protection* by the law, points to times and conditions when blacks could not rely on the police or the courts to protect them from predation by whites. The second historic pattern of bias, *unequal enforcement* of the law, identifies the unusually harsh or capricious treatment that would await blacks suspected or accused of a crime. Kennedy rightly traces the substantial diminution of these direct and typically overtly racial forms of bias. Indeed, he credits many of the basic civil liberty and civil rights protections enjoyed by all Americans as growing

out of legal rulings designed to prevent racial discrimination and bias against blacks.

Without asserting direct and overt racial discrimination by police, the courts, or other law enforcement agencies, we do seek to establish that, at a minimum, we have arrived at a set of contemporary law enforcement practices and policies that are seen as unfair by design in the eyes of most black Americans. These practices have resulted not only in the vastly disproportionate incarceration of African Americans, but also now threaten the all-important legitimacy and claim to fairness that should be a hallmark of legal institutions in a democratic society. A legal system seen as illegitimate is a system likely to face suspicion, guardedness, and even open resistance and challenge from important segments of the citizenry (Tyler and Huo, 2002).

Mass Black Incarceration as Social Problem

The United States has undergone a radical expansion in the numbers of people physically incarcerated or otherwise under direct supervision by the state. As figure 1 shows, since 1980 there has been a steady rise in the numbers of people in jail, on parole, in prison, or on probation, with the numbers in prison or on probation undergoing the sharpest increases. In 1980, for instance, there were fewer than 300,000 people in prison. By 2000, however, that number had risen to over 1 million. Indeed, a prison population below 300,000 characterized most of the twentieth century in the United States. Thus, by beginning in 1980, this figure understates the extreme and abrupt character of the social change, which can be traced to post-1980 policy reform. Henry Ruth and Kevin Reitz help put these trends in perspective in their recent book *The Challenge of Crime* (2003) where they write:

Over a one hundred year period, 1880 to 1980, the nation added a total of about 285,000 inmates to the prison systems. During just the ensuing twenty years, 1980 to 2000, the nation added about 1.1 million inmates. From 1850 through 2000, the nation's prison system expanded

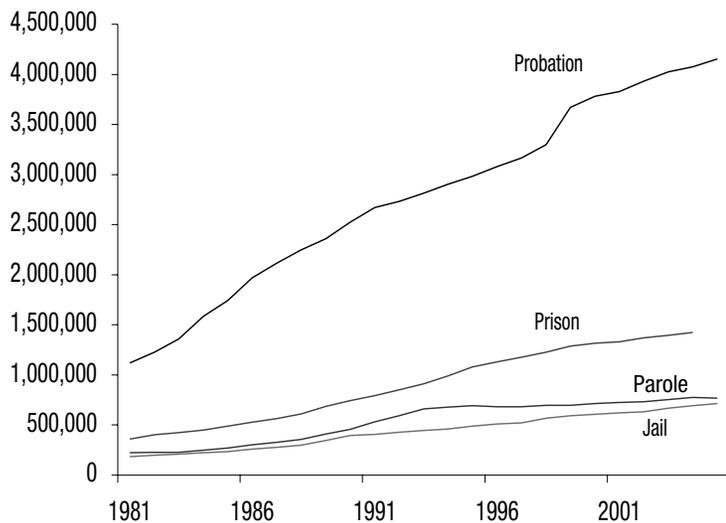


Figure 1 Adult Correctional Population, 1980-2004

Data source: Bureau of Justice statistics, correctional surveys. 2005 (Annual Probation Survey, National Prisoner Statistics, Survey of Jails, and Annual Parole Survey).

about 206 times over, during a period of only about twelve-fold population growth. Total people on probation or parole status rose almost nine-fold between 1965 and 2000 (Ruth and Reitz, 2003: 283).

Furthermore, not captured by these numbers is also a lengthening of the average amount of time served.

The radical and extreme nature of this change only becomes clear by comparison. On an international scale, the rate of incarceration per 100,000 citizens in the United States far exceeds that of all other western industrial nations. The ratio ranges from a low of 4 to 1 when compared to our closest neighbor, Mexico, to very nearly 12 to 1 when compared to places like Sweden and Japan. Only Russia comes close, where the most recent data shows a Russian incarceration rate of 532 per 100,000 as compared to a US rate of 726 per 100,000 in 2005 (Mauer, 2005).

We argue, as do others, that the bulk of this rapid increase in incarceration rates can be traced to the “War on Drugs” and associated sentencing practices, not to changes in the level or nature of crime itself (Tonry, 1995). In particular, contrary to popular perception and rhetoric, the great rise in rates of incarceration is not driven by a response to violent crime. As Marc Mauer explains:

There were 154,361 more offenders sentenced to prison in 1995 than 1985, for an increase of 84 percent. The vast majority of this increase . . . [sic] (77 percent) consisted of nonviolent drug and property offenders; drug offenders alone accounted for over half the increase. Less than one-in-four of the increased [involved] a violent offense” (Mauer, 1999: 32).

All told, there was more than a 400 percent increase between the 1980s and the 1990s in the chances that a drug arrest would ultimately result in a prison sentence.

Of critical importance is that while federal, state, and local mandates pursued a “War on Drugs,” local police departments were under pressure to show progress. The quickest way to show results (for example, arrests) is to enhance policing and arrest in already disadvantaged neighborhoods, which are disproportionately poor and black. The predictable outcome, according to Tonry, is a rise in black arrests and incarceration (Tonry, 1995).

Indeed, the end result has been a rising disproportion of black-to-white in jails and prisons. In 2004, for example, black males constituted 43.3 percent of those incarcerated in state, federal, and local prisons or jails, though only 13 percent of the total population. Whites on the other hand represented 35.7 percent of the male inmate population in 2004, well under their 75 percent of the total male population. The Hispanic population, which represents about 18 percent of the total male inmate population, is also overrepresented but much closer to their share of the total population of about 14 percent. Looked at in

absolute terms, the numbers are just as striking. In 1954, there were only about 98,000 African-Americans in prison or jail (Mauer and King, 2004). By 2002 the numbers had risen to 884,500, an increase of 900 percent, with some states, such as California, incarcerating blacks at a rate of 2,757 per 100,000 compared to 470 per 100,000 for non-Hispanic whites and 827 per 100,000 Hispanics.²

It is important to recognize that these trends reflect recent policy changes, not some inevitable consequence of changes in the nature of crime. As distinguished criminologist Alfred Blumstein has documented (2001), the black incarceration rate nearly tripled between 1980 and 2000 and is now over 8 times that for non-Hispanic whites. The effects of the War on Drugs is most evident in the consequences it has had on the life course of black Americans, in particular black males. Indeed, fully 2 percent of the black population was incarcerated in 1999 and nearly 1 in 10 black males in their twenties were in state or federal prison in 1999. Even more disturbing, nearly one in three black males in their twenties were under some form of criminal justice supervision (including probation and parole). In some areas, more than half of the black males in their twenties were under criminal justice supervision. And black males born in the 1990s faced almost 1-in-3 lifetime odds of ending up in jail or prison as compared to well under 1-in-10 lifetime chances for non-Hispanic white males (Blumstein, 2001).

Like many criminologists, Blumstein interprets these numbers as largely indicative of real underlying differential rates of involvement in crime. But, even Blumstein rightly decries these conditions as a failure of democracy and an acute problem for the legitimacy of the legal system.³ While it is not possible for the purposes of this paper to develop a full sociological account of differential black involvement in crime it is important to put this judgment in perspective. It is of paramount importance to recognize that differential black involvement with crime reflects the interplay of key economic, political, and cultural factors. Specifically, such outcomes stem from the joint effects of what eminent sociologist William Julius Wilson (1987, 1996) has called the new or intensified ghetto poverty and the patterns of social adaptation

it has spawned, on the one hand, and of what social policy changes did to engage or exacerbate attendant patterns of social disorganization, on the other hand. The latter includes sharp reductions in federal aid to cities and the panoply of policing and legal changes attendant to the War on Drugs. That is, differential black involvement with criminal behavior is primarily traceable to differential black exposure to structural conditions of extreme poverty, racial segregation, changed law enforcement priorities, and the modern legacies of racial oppression.⁴

The new intensified and racialized mass incarceration has a number of reverberating social effects that reach beyond the mere fact of imprisonment. First, and most immediately, a criminal record ultimately diminishes the employment prospects of individuals so stigmatized. A recent field experiment, or “auditing study,” conducted by sociologist Devah Pager (2003) found that although low-skill blacks can generally expect to face discrimination in seeking a job, blacks with a criminal record had vanishingly small prospects of an effective job search. Indeed, only 5 percent of blacks with a criminal record who applied for a job received a call back. These numbers are dismal when compared to the already low likelihood of receiving a callback for blacks without a criminal record who were called back about 14 percent of the time (compared to whites without a criminal record who were called back about 34 percent of the time). At least as distressing is her finding that even whites *with* a criminal record fared better than blacks *without* a record! They at least received a callback 17 percent of the time.

Second, the experience with incarceration is on the verge of becoming a normal life-course expectation in some black communities. Pettit and Western (2004) have recently shown that among the age cohort 30 to 34 in 1999, fully 60 percent of black men without a high school diploma had been incarcerated at some point. This is more than 3 times the rate of 17 per 100 for the same age cohort in 1979, prior to the War on Drugs. To put this in perspective, the rate for whites increased considerably too, going from 2.9 percent to 11.2 percent; however, these numbers only highlight the stark contrast in the effects of incarceration on the life-course trajectories of both

groups. Given the high rates of black high school dropouts and rising chances of incarceration—up to 1 in 5, even for those who do complete high school (or the GED)—this is a very troubling trend. Indeed, the likelihood of experiencing incarceration over the life course for black males is greater than the likelihood of having a bachelor degree (Pettit and Western, 2004).

Third, in many states a felony conviction not only means losing the right to vote for the length of a term of incarceration; it can also mean a permanent loss of voting rights. Nearly 2 million African Americans are affected by felon disenfranchisement laws. On the basis of careful statistical modeling, sociologists Chris Uggen and Jeffery Manza (2002) have shown that black disenfranchisement alone can affect which of the major political parties has control of the US Congress and, furthermore, was easily the numerical margin of victory in the 2000 presidential election.

In sum, there has been a sharp rise in black incarceration driven by policy changes and not by changes in rates of violent crime or illegal drug use. The extent of the change and its deep social effects on individuals, whole communities, and the larger body politic need to be borne in mind as we shift attention specifically to how African Americans perceive and respond to the public institutions that constitute the crime response complex.⁵

ASSESSING RACE AND CRIME IN PUBLIC OPINION

In the light of these trends, the Race, Crime, and Public Opinion project pursues three interconnected objectives. First, the project aims to amplify the voices of African Americans in response to these enormous policy shifts and social trends through large nationally representative surveys and a series of small focus groups. Second, the project aims to better understand the typically enormous black-white differences in opinion on law and order issues (Hurwitz and Peffley, 2005) and to disentangle the effects of racial prejudice as a factor in the apparently durable appetite in the American public for punitive crime response policies (Johnson, 2001). Third, the project aims to assess the malle-

ability of public opinion on crime response issues through the use of survey-based framing experiments (Bobo and Johnson, 2004).

The main data of the larger project comes from two national web-based social surveys: the 2001 and 2002 Race, Crime, and Public Opinion surveys (RCPO), as well as four focus group discussions. Each of the surveys involved large samples of African Americans—1,010 in the 2001 RCPO study and 1,187 in the 2002 RCPO study. There were also 978 whites in the 2001 RCPO study and 1,200 whites in the 2002 RCPO study. Data for other racial groups was not collected. In all, there were 1,988 respondents in the 2001 RCPO study and 2,387 in the 2002 RCPO study. In each case, the survey data was collected by Knowledge Networks, which employs a full probability design web-based survey technology. A full report on sample characteristics for the 2001 data is contained in Bobo and Johnson (2004). The sample characteristics of the 2002 data are similar in nature to the 2001 data.

Before considering perceptions of bias and disillusionment with the crime response complex, it is important to underscore that there are acutely high levels of concern about the problem of crime in black communities. In our 2001 survey we found that a full 24 percent of blacks named “crime, violence, and drugs” as the nation’s most important problem, as compared to only 13 percent of whites. Blacks more often mentioned crime and crime-related issues when given a set of “closed ended” options to select from in the question. Whites, however, felt the “breakdown of morals/family” was the most important problem facing America, with 34.1 percent of whites agreeing, compared to only 16.8 percent of blacks. The same pattern of race difference holds whether the question is asked in a closed-question fashion or completely open-ended fashion. When it comes to crime, blacks are much more likely to rate it as an important issue.

In another set of questions, we asked respondents to assess just “How serious is the crime problem in the United States?” Again, the numbers showed just how critical of an issue crime is to blacks, with some 57 percent of African Americans rating crime as an “extremely serious problem” in the United States as compared to 40 percent of

whites. And blacks were almost twice as likely as whites to rate crime as a “serious problem” in their own neighborhoods (25.2 percent versus 14.0 percent). Each of these differences is only modestly reduced by taking into account differences in class background factors such as level of education and income. The experience of crime and the urgently felt need for an effective and just response to crime is clear in the black community (Meares, 1997) and should be kept in mind as we consider the matter of perceived bias in the system and the consequences of a seriously compromised claim to legitimacy.

Perceived Racial Bias

In another set of questions in the 2001 RCPO study we asked respondents about their perceptions of criminal justice bias in the courts and police. A sizeable 89 percent of African American affirmed the idea that the criminal justice system is biased against blacks, as compared to 38 percent of whites, a difference of some 51 percent points. Fifty-six percent of whites, on the other hand, felt the criminal justice system “gives blacks fair treatment,” compared to only 8 percent of blacks. A difference of roughly comparable magnitude emerged when respondents were asked about the court system, where 79 percent of whites expressed “a lot” or “some” confidence that judges treat blacks and whites equally whereas only 28 percent of blacks expressed such opinions. And again, when respondents were asked about confidence in equal treatment by prosecutors, a difference of similar size emerged. Just as startling are the gaps in confidence in the police, where 68 percent of whites expressed “some” or “a lot” of confidence in the police compared to a mere 18 percent of blacks. Thus, whether focused on the general character of the criminal justice system or specific sectors of it—such as judges and the courts, prosecutors, or police—African Americans by large margins see a system suffused with racial bias, and most white Americans do not.

The texture and detail of these perceptions of racial bias, however, are captured only in broad outline by the data we have reported so far. Much more of the grassroots human meaning, substance, and flavor of these perceptions came through in our first

round of focus group discussion results.⁶ Early in the focus group discussions the participants were asked what “the biggest problem facing your community” is? The black group, almost in unison said “crime and drugs,” and a few voices chimed in, “racism.” One middle-aged black woman reported: “I was thinking more so on the lines of myself because my house was burglarized three times. Twice while I was at work and one time when I returned from church, I caught the person in there.” The strong racial thread to her story became clearer when she later explained exactly what happened in terms of general police behavior in her community:

The first two robberies that I had, the elderly couple that lived next door to me, they called the police. I was at work when the first two robberies occurred. They called the police two or three times. The police never even showed up. When I came in from work, I had to go . . . file a police report. My neighbors went with me, and they had called the police several times and they never came. Now, on that Sunday when I returned from church and caught him in my house, and the guy that I caught in my house lives around the corner, he has a case history, he has been in trouble since doomsday. When I told [the police] I had knocked him unconscious [she kept a baseball bat behind the door], oh yeah, they were there in a hurry! Guns drawn. And I didn't have a weapon except for the baseball bat, [and] I wound up face down on my living room floor, and they placed handcuffs on me.

The moderator, incredulous, asked: Well, excuse me, but they locked you and him up?” “They locked me up and took him to the hospital,” she said.

Indeed, the situation was so dire, the woman explained, that had a black police officer who lived in the neighborhood not shown up to help after the patrol car arrived with sirens blaring, she felt certain the two white police officers who arrived, guns drawn, would probably

have shot her. As it was, she was arrested for assault, spent two days in jail, and now has a lawsuit pending against the city. Ironically, although poignant, the story did not seem to shock or scandalize the other black focus group participants. They all saw it as a readily understandable example of how police behave in their community.

To elaborate on this perception, consider the remarks of one of our black male participants in the focus group who, when asked about relations with the police, went on to say:

I see the police a lot but for some reason a lot of the white police officers that come to our community . . . sometimes harass blacks. When they are really needed, when you see the guys standing out there, you know they are selling drugs, and you see the things going on out there and [the cops] are never around. The truth of the matter is we can see this stuff everyday, and until something [violent] happens then they come and it's 20 or 25 of them. But in terms of patrolling the community, no they don't do that.

This comment conveys both a concern with abuse at the hands of police, general underpolicing, and then a sense of excessive or heavy-handed response to a situation allowed to fester until it was out of control. This sort of outlook proved to be a commonly shared view in the focus group.

We directed special attention in the focus groups to matters of the War on Drugs and its impact. Among the issues we raised was the differential treatment under federal law of crack versus powder cocaine. This aspect of the discussion was instructive not only for what it illustrated about perceived racial bias in the system, but also for the profound sense of illegitimacy that perception of bias is encouraging. For example, as one participant said in discussing whether it was fair to treat crack differently from powder cocaine:

The bottom line is that cocaine itself is what crack is made from. It is definitely disproportionate, again, because the access the government has with cocaine itself, all the way

from overseas to here. It is really interesting when you talk about your question about the way they incarcerate people based on whether you have crack or powder. Again, it is a racist thing, bottom line.

Or as another focus group participant put it during the same session:

I've known for a long time [about the sentencing differential for crack versus powder]. To me, again, it's a white man's law because when you go into the suburbs and they go out there and get the young boys, or whoever, they are going to have cocaine. They are not trying to put them in jail for a hundred years. They will find an excuse. And you're going to find more crack in the inner city. That's how I have always felt about it when I first heard it.

And perhaps what was most intriguing about this discussion is the extent to which it suggested that many average African Americans see the government itself as directly implicated in the international drug trade and as, therefore, waging a deeply cynical War on Drugs at home. One participant noted that:

They need to start at the top. The top is US senators and our congressmen and those people in the Bush and Clinton administrations. What I'm saying is this stuff is way bigger than what we are talking about. Border patrol? For every one boat they catch ten get through. It's bigger than what we think and it's not just a community thing. It's starting some place else. The drugs have to be thrown in our neighborhoods somehow.

Our participants are well aware that there has been a sharp increase in the rate of black incarceration. When asked about who it is that ends up in prison and why, the following exchange between the focus group moderator and one of the black female participants took place:

* Moderator: "Who is in prison? Who is in the jails?"

* Black Female Participant: "Niggers and Puerto Ricans."
[group laughs]

* Moderator: "Why do you say that?"

* Black Female Participant: "Personal experience. I said, 'Well, where is the justice?' They said 'You got it: JUST US! Niggers and Puerto Ricans.'"

As part of the same discussion a black male focus group participant offered the following remark:

My belief is this: Why do so many young blacks get incarcerated at such an early age? If you get a criminal record on you it affects you for the rest of your life. If I get a felony conviction on you, it's going to affect you the rest of your life. I really believe that if you target a group of people and we get a record on you before you become 18 or 19 that will follow you for the rest of your life. It happens. It stays with those kids. Their records are always there. This kid has been arrested for this or that. It's targeting.

This sort of view of the criminal justice system as targeting black youth, while complicated by the shared perception of the real need to control crime and to deal with serious criminal elements, was also widely shared and acknowledged in the group.

Perceived Bias in the War on Drugs

All of the preceding results draw from our first round of surveys and focus groups from the Race, Crime, and Public Opinion project. These results, especially the focus group discussion, produced such strong evidence of distrust and disillusionment with the institutions of the crime response complex that our second round of work emphasized trying to assess just how widespread the perception of bias in the conduct of the war on drugs had become, and whether such percep-

TABLE 1: BELIEFS ABOUT THE WAR ON DRUGS

Question	Race of Respondent	
	White	Black
Are Drug Laws Enforced Fairly?		
Enforced Fairly on All Would Be Drug Users	79.4 %	33.7 %
Enforced Unfairly Against Black Communities	20.6	66.3
Chi square = 552.02 (p = .00)	(1,167)	(1,134)
Drug Use and the Government		
Drug Use Would be a Much Worse Problem Without Current Anti-drug Policies	70.9	48.6
Drug Use Would Not Be Such a Problem if Government Officials Did Not Somehow Benefit From It.	29.1	51.4
Chi square = 137.54 (p = .00)	(1,171)	(1,146)
The War on Drugs is:		
An Effort to Prevent Drug Addiction and Crime	95.4	75.2
Just an Excuse for the Police to Harrass and Imprison the Inner-city Youth	4.6	24.8
Chi square = 192.35 (p = .00)	(1,175)	(1,148)

Source: Race, Crime and Public Opinion Survey 2002

tions of bias were consequentially undermining the legitimacy of the legal system. Thus, we sought in subsequent survey research to gauge the extent of this disillusionment and to assess some of its potential effects.

In our second round of surveys we asked a national sample of blacks and whites a series of three paired statements about the War on Drugs.⁷ The first asked whether drug laws are enforced fairly on all would-be drug users or are enforced unfairly against black communities. As table 1 shows, 66 percent of blacks said “unfairly against black communities” as compared to just 21 percent of whites. In the second set of paired statements, 51 percent of blacks said that “drug use would not be such a problem if government officials did not somehow benefit from it,” as compared to only 29 percent of whites. Most whites (71 percent), however, endorsed the view that “drug use would be a much worse problem without current government antidrug policies,” a view shared by 49 percent of blacks. And in the third set of paired state-

ments, 1 in 4 blacks endorsed the statement that “the war on drugs is just an excuse for the police to harass and imprison inner-city youth,” a view accepted by only 5 percent of whites.

It is important to stress that these differences in judgments of bias in the War on Drugs are primarily to be understood through the lens of race. We created a scale of responses to the perceived racial bias in the war on drugs item (see table 2). In multivariate analyses predicting scores on this measure, the single largest effect is for the race variable, net of controls for respondents age, sex, region of residence (South versus non-South), and size of community. In addition, adding controls for the class factors of education and income did nothing to reduce the size of the race effect on these perceptions. This sort of “legal cynicism” may well have an important connection to general patterns of African American group consciousness and identity. But it almost surely also reflects differential experiences and encounters with police and other agents of the legal system (Sampson and Bartusch, 1998).

Effects of System Illegitimacy

The second round of survey results aimed not only at assessing the extent to which the War on Drugs was seen as a policy rife with racial bias, but also to assess the possible implications and effects of such a perception of bias. That is, we sought to determine if illegitimacy would translate into other types of problems or challenges for the crime response complex. Specifically, we posed a series of questions about expectations for police performance, and about willingness to engage in jury nullification. A focus on these two domains was quite deliberate. Judgments about the police are one of the areas where large black-white differences in opinion routinely emerge (Lauritsen and Sampson, 1998; Weitzer and Tuch, 1999, 2002; Skogan and Frydl, 2004). Public beliefs about the fairness of procedures and motivation of police are also key elements of the legal system’s claim to legitimacy (Tyler and Huo, 2002). As to jury nullification, legal scholar Paul Butler has made a controversial call for “racially based jury nullification” (1995). In effect, he suggests that black jurors should take stock of patterns

of law enforcement and policy trends, asking themselves what is in the best interests of the black community when sitting on a jury, not merely whether an accused black defendant has broken the law. Our strong expectation was that the extent of perceived racial bias in the criminal justice system, particularly with regard to the conduct of the War on Drugs, was such that African Americans have developed acutely low expectations for police performance and high potential receptivity to appeals to engage in race-based jury nullification.

The question regarding expectations of police asked respondents to “Imagine that your house or apartment has been burglarized and you are missing items worth \$300. Please indicate how likely it is that: 1) you would call the police and file a report; 2) the police would respond quickly to your call; and 3) the police would take your complaint seriously?” It is worth stressing that these questions make no explicit reference to race and that respondents were encouraged to think in terms of their own personal circumstances and communities. The overwhelming fraction of black (90 percent) and white (93 percent) respondents would indeed take the step of calling and filing a police report. However, substantial lower fractions of blacks (32 percent) and whites (55 percent) expect police to respond quickly or to take the complaint seriously—only 35 percent of blacks expect to be taken seriously compared to 60 percent of whites. The racial gap here is quite large. Whereas a majority of whites expect a quick response and to be taken seriously, only about a third of African Americans express such views. That is, on the whole, whites are almost twice as likely as blacks to expect timely and serious consideration of a complaint of a burglary.

In another hypothetical question, respondents were asked to imagine serving on a jury where a young black male accused of a crime for the first time faced a charge of drug-possession (nonviolent), with the evidence tending to suggest that the person is guilty. Then, on an experimental basis, a randomly selected subset of respondents was told that the defendant had accused the arresting officer of racial bias. With regard to the nonviolent drug arrest, there is strong evidence of susceptibility to jury nullification appeals among African Americans. Fully

50 percent of African Americans expressed a willingness to let a guilty person go free in this case compared to 38 percent of whites; a number that rises to 69 percent for blacks when there is an accusation of police racial bias while having little effect on whites who are still only willing 39 percent of the time to let a guilty person go free.

Are the expectations for police performance and for readiness to engage in jury nullification influenced by general perceptions of racial bias in the crime response complex or by specific beliefs that the war on drugs is racially biased in its conduct? The short answer is a very strong yes for both outcomes and for both types of perceptions as the results in table 2 show. Consider first the expectations for police performance in table 2a which we treat as a scale composed of the three items mentioned above: "that respondent would call the police and file a report," "that police would respond quickly," and "that police would take complaint seriously" if house were burglarized—with high scores reflecting stronger, more favorable expectations for police responsiveness. Model 1 for the pooled analyses shows a large black-white difference consistent with the large individual differences in expectations about police responsiveness. Model 2 of the pooled results then introduces the measures of perceived criminal justice system bias against blacks and of bias in the war on drugs. Both measures have highly significant negative effects on expectations for police responsiveness. Indeed, introducing these perceptions of racial bias completely eliminates the earlier black-white difference in expectations. We performed separate analyses to determine if the impact of the general or drug war specific perceived racial bias items had stronger effects among blacks than among whites. These tests for interaction proved to be insignificant. As the results for the black respondent only and white respondent only models reveal, the size of the coefficient for both perception measures is essentially identical for black and white respondents.

Table 2b shows the multivariate analysis results for the jury nullification experiment. Model 1 of the pooled results shows that support for jury nullification—willingness to let a guilty person go free—is higher for blacks than for whites and that there is a significant experi-

mental effect (support for nullification increases when the defendant makes an accusation of racial bias from the arresting officer). However, as Model 2 shows, there is an interaction of race and experimental ballot. Only black respondents, not whites, are influenced by the accusation of racial bias on the part of the police: in our experiment such an accusation from a black defendant greatly increases readiness to engage in jury nullification. Model 3 shows, furthermore, that both the general perception of racial bias and of bias in the war on drugs positively influence support for jury nullification. Again, we found no support for an interaction of respondent race with either of the perception of bias measures (and comparing the separate models among black and white respondents shows the coefficients to be of roughly similar magnitude).

CONCLUSION

Social commentators from Alexis de Tocqueville (1969 [1848]) to Seymour Martin Lipset (1979) have remarked on the importance of the condition of equality to establishing the United States as a “new nation.” This notion of equality applied not so much to the capacities or resources of individuals as it did to moral standing among one’s fellow citizens and, especially, in relation to the authority of the state. It is well established that during the colonial period, slavery, and the Jim Crow eras that the law systematically and deliberately denied such equality of treatment to African Americans (Higginbotham, 1996; Kennedy, 1997). In the post-civil rights era, however, the expectation for fairness in application of the law without regard to race has only grown. And certainly with respect to the types of overtly discriminatory practices that once characterized the US legal system we have indeed witnessed great change.

In the modern era, political expediency and the exploitation of moral panics about crime (Chambliss, 1995) helped to usher in an increasingly repressive law and order regime (Beckett, 1997). This legal regime is now punishing and incarcerating American citizens in general, and African Americans in particular, at a previously unthinkable scale

TABLE 2A: REGRESSION RESULTS FOR EXPECTATIONS OF POLICE RESPONSIVENESS SCALE 1

Variables of Interest	Pooled Results		Black Only		White Only	
	Model 1	Model 2	Model 1	Model 2	Model 1	Model 2
Constant	3.28 ***	3.68 ***	2.79 ***	3.48 ***	3.47 ***	3.85 ***
Black	-0.23 ***	0.00	-	-	-	-
Perceived CJS Bias Against Blacks ²	-	-0.13 ***	-	-0.17 ***	-	-0.13 ***
Perceived Drug War Bias ³	-	-0.29 ***	-	-0.30 ***	-	-0.28 ***
Adjusted R Square	0.10	0.18	0.05	0.15	0.03	0.09
N	2,185	2,185	1,068	1,068	1,118	1,118

TABLE 2B: REGRESSION RESULTS FOR JURY NULLIFICATION OF DRUG POSSESSION CHARGES

	Pooled Results			Black Only		White Only	
	Model 1	Model 2	Model 3	Model 1	Model 2	Model 1	Model 2
Constant	2.51 ***	2.57 ***	2.07 ***	2.95 ***	2.22 ***	2.51 ***	1.99 ***
Black	0.33 ***	0.20 **	-0.05	-	-	-	-
Ballot: Drug Possession with Police Bi:	0.18 ***	0.06	0.07	0.31 ***	0.29 ***	0.06	0.07
Ballot x Race (Black = 1)	-	0.25 *	0.22 *	-	-	-	-
Perceived CJS Bias Against Blacks ²	-	-	0.19 ***	-	0.17 **	-	0.19 **
Perceived Drug War Bias ³	-	-	0.29 **	-	0.26 **	-	0.33 **
Adjusted R Square	0.08	0.08	0.11	0.04	0.06	0.04	0.07
N	1,073	1,073	1,073	498	498	575	575

Source: Race, Crime, and Public Opinion Survey (2002).

Note: Models Control for Age, Gender, Education, income, Southern/Non-Southern, Metropolitan Residence, and Political Conservativeness

*p<.05, **p<.01, ***p<.001

¹The Police Responsiveness Scale is a scale of the three questions on what would happen if house were burglarized. They include likelihood of calling police, belief that police would respond quickly, and belief that police would take complaint seriously (Coded 1 to 4 with 1 being 'very unlikely'). Cronbach's Alpha = .661.

²Perceived CJS Bias Against Blacks is a scale constructed from four question in the 2002 RCPO survey. The questions asked whether or not respondents believed the "CJS is biased in favor or against blacks" and if they had confidence in 1)police 2) judges and 3)prosecutors treating blacks and whites equal. Higher values represent more perceived bias. Cronbach's Alpha = .863

³Perceived Drug War Bias is a scale constructed from the three questions in table 1. Higher values represent an unfavorable opinion. Cronbach's Alpha = .560.

(Garland, 2001a). The change and absolute scale is now such that some scholars argue for viewing matters of law and order as a fundamental aspect of social welfare policy provision more broadly understood

(Beckett and Western, 2001). Yet, the process and the outcome have been quietly accepted, as if these trends were all just the inevitable product of naturally occurring social conditions, rather than the result of deliberate policy actions and choices.

In this article, we sought to make both visible and problematic that set of worrisome trends and policy outcomes. We are now a society characterized by a condition of racialized mass incarceration. Given profound changes in the law, as well as in the composition and leadership of police forces, one might have expected current black-white differences in opinions about the functioning of the crime response complex to be small and for blacks, on the whole, to express some real measure of confidence in the system. Just the opposite is what we find. Blacks are not only far more likely than whites to believe that racial bias is still a deep problem in all facets of the legal system, but do so by generally high absolute margins.

Although the blanket patterns of unequal protection and unequal enforcement written of by legal scholar Randall Kennedy are no longer the common experience, we do not have a criminal justice system free of the taint of race bias. Indeed, we believe our evidence on public opinion makes it clear that, in the eyes of most African Americans, the system continues to be seen as essentially unfair by design. Such perceptions of bias matter. They clearly influence how people expect to be treated by police and even appear to affect how they are likely to behave should they be called upon to serve as jurors in criminal cases. A large element of this current taint of racial bias can be traced to a belief that the conduct of the war on drugs is unfair to black communities.

Social psychologist Tom Tyler is right to assert that legitimacy matters, both for the practical goal of the effective functioning of law enforcement and for the profoundly moral goal of ensuring a government that treats all of its citizens with an equal measure of respect. The racialized mass imprisonment society is a society preying on its most vulnerable members. The crisis of legitimacy growing out of this circumstance calls for our urgent attention and immediate steps at policy reformulation. The goals of such reformulated policy should be crime

prevention, rehabilitation for criminal offenders—especially those with drug-abuse problems—and, ultimately, social reintegration for those who do break the law. At present, however, social policy would seem to be driven mainly by a punitive and retributive logic. Our results suggest that this is a sure path to deepening racial polarization and a further weakening of the legal system’s claim to fairness and legitimacy.

NOTES

1. Ruth and Reitz (2003: 5-6) propose the term “crime response complex” as a better rubric than criminal justice system. The former avoids the presumptions of a consensus on purposes and functioning, of state agencies as the only relevant actor (that is, an increasing number of functions relevant to law enforcement are privatized), and underscoring why justice is more an aspiration than an actual or soon to be attained goal.
2. It is important to recognize that the incarceration of women, especially of African American women, is also rapidly rising. In percentage terms, the growth is actually greater for black women than for black men (Richie 2002). The absolute base and overall levels today remain, however, at much lower levels for women.
3. Although he interpreted high rates of black incarceration as primarily a function of actual differential rates of criminal behavior, distinguished criminologist Alfred Blumstein declared that: “Even if they represented totally even-handed administration of justice, the high rates of intrusiveness—and especially the glaring disparities between Blacks and Whites—must raise profound concerns and an intense search for means of reducing the racial disparities” (2001: 22).
4. Both Massey (1995) and Sampson and Wilson (1995) provide powerful sociological analyses of the ecological niches for crime created by the conjunction of severe poverty, persistent unemployment, and racial residential segregation. The key point is that group differential involvement in crime is not some autonomous cultural phenomenon or trait but rather the result of structural social conditions and processes.

5. These are not the only broader social effects of the rise in incarceration. In addition to consuming an increasingly large fraction of scarce state financial resources (Chambliss, 1995), mass incarceration also disrupts families and communities (Chesney-Lynd 2002) and contributes to the perpetuation of negative racial stereotypes, especially stereotypes of black males as dangerous and involved in crime (Entman and Rojecki 2001).
6. A more complete description of the focus group characteristics is provided by Bobo (2004).
7. Our focus group discussions directly inspired the construction of these questions about racial bias in the conduct of the War on Drugs.

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