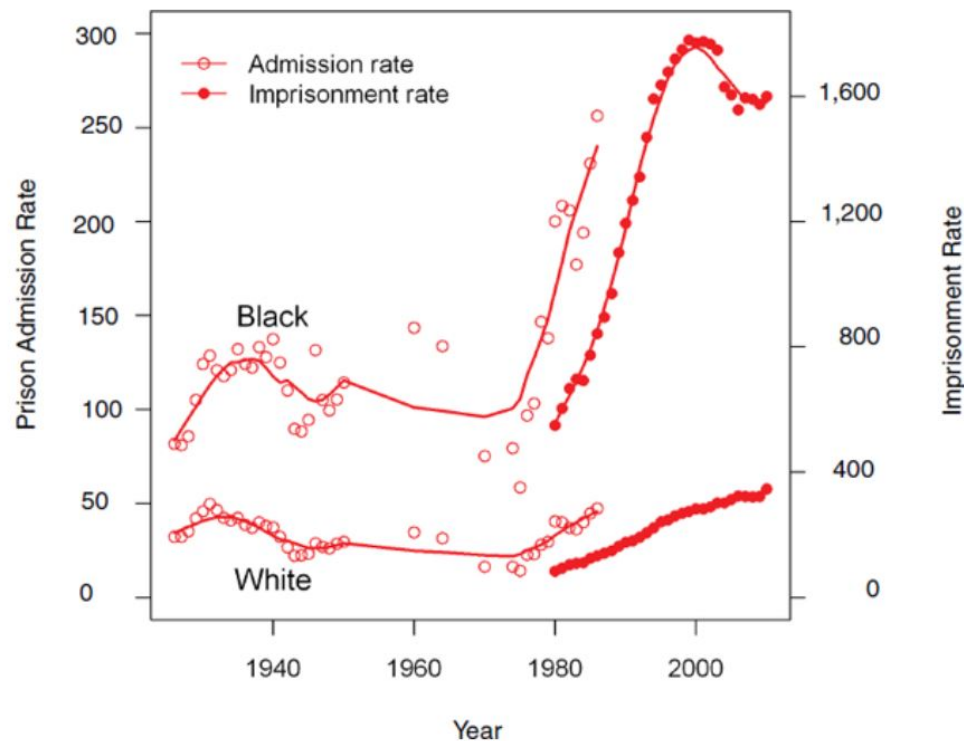


Session 8

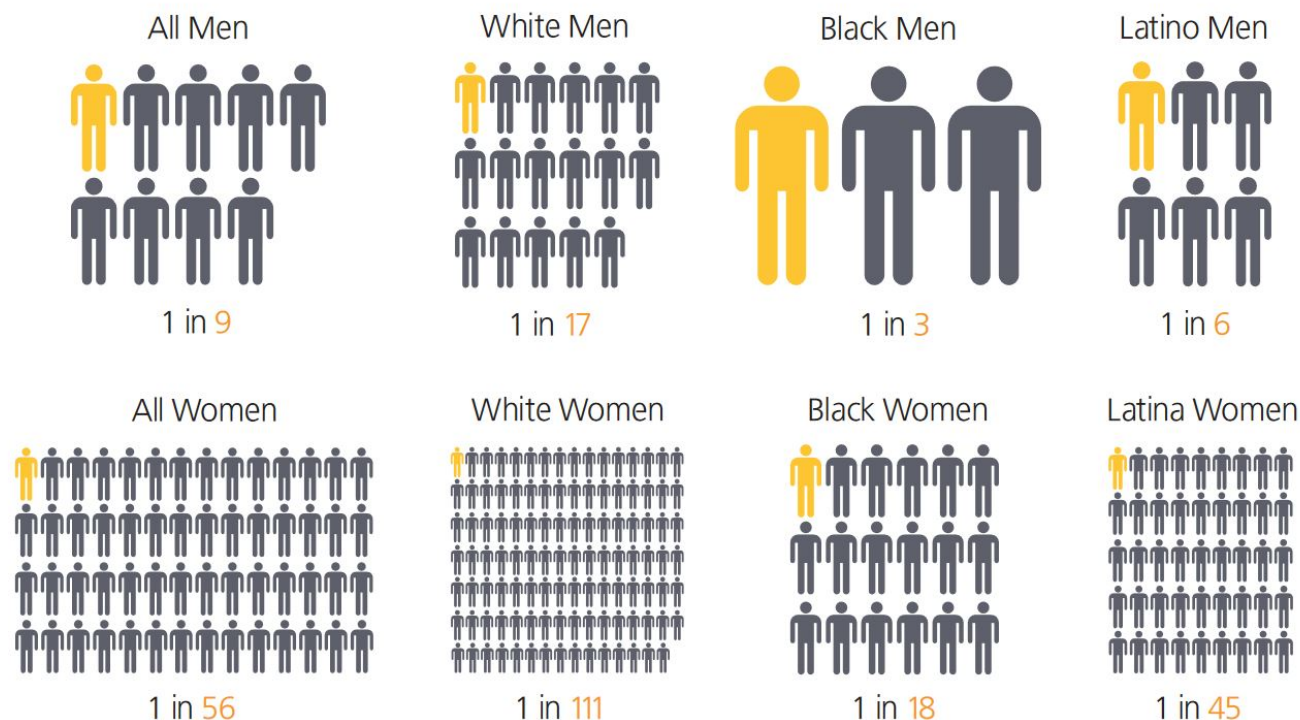
Race and Mass Incarceration

November 7, 2018



<https://www.nap.edu/read/18613/chapter/4#57> [_ \(https://www.nap.edu/read/18613/chapter/4#57\)](https://www.nap.edu/read/18613/chapter/4#57)

Lifetime Likelihood of Imprisonment of U.S. Residents Born in 2001



Source: Bonczar, T. (2003). *Prevalence of Imprisonment in the U.S. Population, 1974-2001*. Washington, DC: Bureau of Justice Statistics.

<https://sentencingproject.org/wp-content/uploads/2016/01/Trends-in-US-Corrections.pdf> (<https://sentencingproject.org/wp-content/uploads/2016/01/Trends-in-US-Corrections.pdf>)

In this session, we'll explore the impact of race on mass incarceration. Much of this material is borrowed from Michelle Alexander's excellent book, [The New Jim Crow: Mass Incarceration in the Age of Colorblindness](https://www.amazon.com/New-Jim-Crow-Michelle-Alexander-ebook/dp/B0067NCQVU/ref=sr_1_1?s=books&ie=UTF8&qid=1532799976&sr=1-1&keywords=the+new+jim+crow) (https://www.amazon.com/New-Jim-Crow-Michelle-Alexander-ebook/dp/B0067NCQVU/ref=sr_1_1?s=books&ie=UTF8&qid=1532799976&sr=1-1&keywords=the+new+jim+crow). We'll also look at the question raised in the last section regarding whether mass incarceration is the reason for the massive drop in crime in the U.S. since the 1980's.

The question regarding race is a simple one: why are minorities disproportionately incarcerated? The percentage of African Americans, Hispanic, and White Non-Hispanic in the United States is [12.7%](#), [17.8%](#), and [61.3%](#)

(https://en.wikipedia.org/wiki/Race_and_ethnicity_in_the_United_States). Yet African Americans and Hispanics represent 40% and 19% of the incarcerated population: five times and twice the incarceration rate of whites:

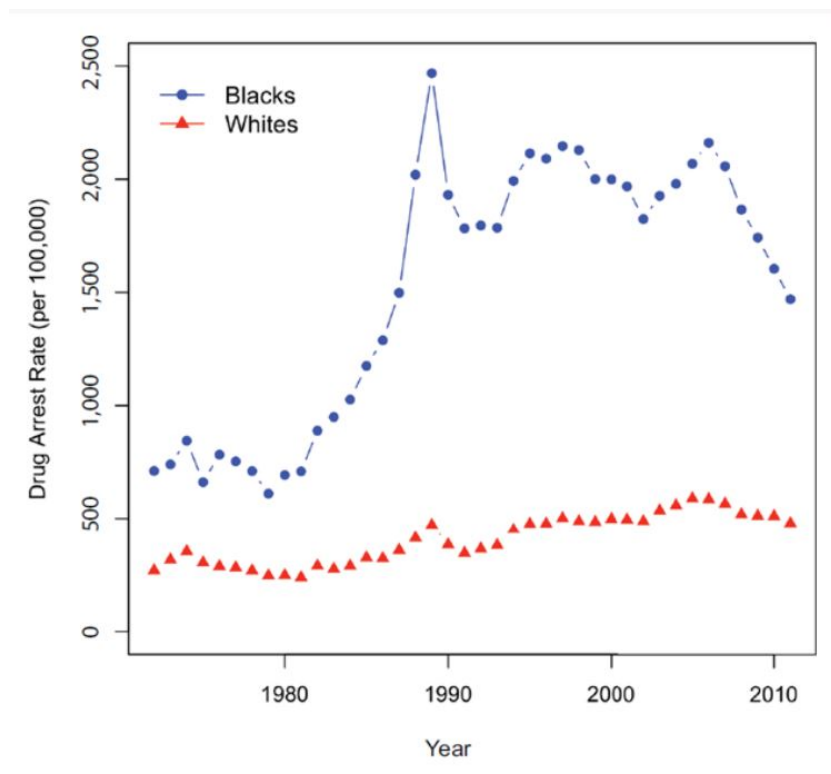
2010. Inmates in adult facilities, by race and ethnicity. Jails, and state and federal prisons. ^[55]			
Race, ethnicity	% of US population	% of U.S. incarcerated population	National incarceration rate (per 100,000 of all ages)
White (non-Hispanic)	64	39	450 per 100,000
Hispanic	16	19	831 per 100,000
Black	13	40	2,306 per 100,000

https://en.wikipedia.org/wiki/Incarceration_in_the_United_States#Ethnicity

(https://en.wikipedia.org/wiki/Incarceration_in_the_United_States#Ethnicity)

Not all of the prison population is incarcerated for drug crimes, in fact only 20% of federal and state prisoners are in for drug crime. But that is partly due to the fact that drug crimes tend to get shorter sentences than violent crimes; over the past several decades [more people were sent to prison for drug crimes](https://www.brookings.edu/blog/social-mobility-memos/2015/11/25/drug-offenders-in-american-prisons-the-critical-distinction-between-stock-and-flow/) (<https://www.brookings.edu/blog/social-mobility-memos/2015/11/25/drug-offenders-in-american-prisons-the-critical-distinction-between-stock-and-flow/>) than violent or property crimes. About [25-30% of property crimes](https://www.bjs.gov/content/DCF/duc.cfm) (<https://www.bjs.gov/content/DCF/duc.cfm>) are committed by offenders to get money for drugs. In addition, many violent crimes are drug related. Urban gangs thrive on the drug economy. Nationally 13% of all homicides, and [50% of homicides in Chicago and Los Angeles](https://www.nationalgangcenter.gov/survey-analysis/measuring-the-extent-of-gang-problems) (<https://www.nationalgangcenter.gov/survey-analysis/measuring-the-extent-of-gang-problems>) are gang related, and thus drug related. So it is reasonable to estimate that close to half of all incarcerations are directly related to drugs. If you include the fact that [65% of inmates have a substance abuse problem](https://www.centeronaddiction.org/newsroom/press-releases/2010-behind-bars-II) (<https://www.centeronaddiction.org/newsroom/press-releases/2010-behind-bars-II>) and another 20% were under the influence of alcohol or other drugs at the time of their crime, committed their offense to get money to buy drugs or were incarcerated for an alcohol or drug law violation, then perhaps the great majority of incarcerations are related to drugs.

The arrest rates for drug crimes shows similar racial disparities as for the overall prison population:



<https://www.nap.edu/read/18613/chapter/4#61> [_ \(https://www.nap.edu/read/18613/chapter/4#61\)](https://www.nap.edu/read/18613/chapter/4#61)

According to a report titled [Race, Drugs and Law Enforcement in the United States](https://www.hrw.org/news/2009/06/19/race-drugs-and-law-enforcement-united-states) [_ \(https://www.hrw.org/news/2009/06/19/race-drugs-and-law-enforcement-united-states\)](https://www.hrw.org/news/2009/06/19/race-drugs-and-law-enforcement-united-states), In the last six years, the ratio of black to white drug arrest rates has ranged between 3.5 and 3.9. This discrepancy reflects the focus of police efforts in black inner cities. In 2007, for example, 77% of drug arrests occurred in cities. Although urban blacks account for approximately 6% of the national population, they constituted 29.8% of all drug arrests in 2007. The disparity carries over to convictions and sentencing. Blacks constitute 43% and whites 55% of persons convicted of drug felonies in state courts, and blacks account for 53.5% and whites for 33.3% of persons admitted to state prison with new convictions for drug offenses. In 2007, blacks accounted for 33.2% of people entering federal prison for drug offenses.

Now this would all make sense if blacks used and sold drugs at a much higher rate than whites. Evidence suggests that isn't the case. In the 2000 National Survey on Drug Abuse, 6.4% of whites, 6.4% of blacks, and 5.3% of Hispanics reported current usage of illegal

drugs. According to the 2006 surveys conducted by the federal [Substance Abuse and Mental Health Services Administration \(SAMHSA\)](https://www.samhsa.gov/) [_Part II: Who_](https://www.hrw.org/news/2009/06/19/race-drugs-and-law-enforcement-united-states#_Part_II:_Who), an estimated 49% of whites and 42.9% of blacks age twelve or older have used illicit drugs in their lifetimes; 14.5% of whites and 16% of blacks have used them in the past year; and 8.5% of whites and 9.8% of blacks have used them in the past month. Even among powder and crack cocaine users-which remain a principal focus of law enforcement-there are more whites than blacks. According to SAMHSA's calculations, there are 27,083,000 whites who have used cocaine during their lifetime, compared to 2,618,000 blacks and, indeed, 5,553,000 whites who have used crack cocaine, compared to 1,537,000 blacks.

Could the racial arrest and sentencing disparities reflect drug dealing as opposed to drug usage? Unfortunately no. Research indicates that most people purchase drugs from a dealer of the same race. 1.6% of whites and 2.8% of blacks surveyed in 2006 reported they had sold drugs in the past twelve months, or an estimated 2,461,797 whites, and 712,044 blacks. Blacks thus represented 22% of the combined black and white sellers.

Focus on the Inner Cities

According to Michelle Alexander the first reason for the racial sentencing disparity in the war on drugs is police discretion: blacks are targeted by police for drug crimes more than whites. Every year there are 20 million users of illegal drugs, 1.5 million drug arrests, and 175,000 sent to prison for drugs. If the police were colorblind in their policing they would be arresting far more white people and far fewer black people. But police do not typically stop and frisk students in Weston, Lincoln and Newton, they target [blacks in Dorchester](https://aclum.org/our-work/aclum-issues/racial-justice/ending-racist-stop-and-frisk/) [_https://aclum.org/our-work/aclum-issues/racial-justice/ending-racist-stop-and-frisk/](https://aclum.org/our-work/aclum-issues/racial-justice/ending-racist-stop-and-frisk/). Police overlook drug crime in wealthy neighborhoods and target drug crime in poor neighborhoods because poor neighborhoods are target rich environments; the [crime rate in Dorchester](https://www.areavibes.com/boston-ma/north+dorchester/crime/) [_https://www.areavibes.com/boston-ma/north+dorchester/crime/](https://www.areavibes.com/boston-ma/north+dorchester/crime/) is 32% higher than the average for Boston and 94% higher than the average for Massachusetts. To understand how the inner cities became blighted, we must look to the [Great Migration](https://en.wikipedia.org/wiki/Great_Migration_(African_American)#Causes) [_https://en.wikipedia.org/wiki/Great_Migration_\(African_American\)#Causes](https://en.wikipedia.org/wiki/Great_Migration_(African_American)#Causes), a period from 1910 to 1970 when 40% of African Americans migrated from the South to Northern Cities to escape segregation, racial violence and lack of economic opportunities. These people settled in big Northern inner cities such as New York, Chicago, Philadelphia, St. Louis, Detroit, Pittsburgh and Indianapolis. Especially after World War II, these cities had strong industrial bases with many manufacturing jobs which offered blacks a path out of poverty into the middle class. The 1940's and 1950's was the most dynamic and vibrant economic period for urban blacks. But starting in the 1960's the inner cities began their slow descent into hell. One of the factors were the [urban riots of the 1960's](https://en.wikipedia.org/wiki/Urban_riots#1960s) [_https://en.wikipedia.org/wiki/Urban_riots#1960s](https://en.wikipedia.org/wiki/Urban_riots#1960s), where many protested police brutality, lack of affordable housing and

economic inequality. Another factor was perversely, desegregation, which allowed middle class blacks to flee the inner city instead of helping to gentrify it. For these reasons as well as labor cost issues, manufacturers moved their factories from the cities of the north to the non-unionized south and west of the country, and later to Mexico and the Pacific Rim. Between 1967 and 1987, [Chicago lost 60 percent of its manufacturing jobs, Detroit 51%, New York City 58%, and Philadelphia 64%](https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=6978&context=jcllc) (<https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=6978&context=jcllc>). The unemployment rate for blacks overall soared, but even more so for those in the inner city:



<http://www.dailymail.co.uk/news/article-5242079/Trump-congratulates-low-black-unemployment-rate.html>
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The lack of employment in the inner city combined with the emergence of crack cocaine in the early 1980's to form an explosion of drug dealing. Selling crack was one of the few ways to make money and about the only way to get rich. [Thomas Feiling](https://www.amazon.com/Cocaine-Nation-White-Trade-World-ebook/dp/B00M9Z3V1Y/ref=sr_1_1?ie=UTF8&qid=1532882138&sr=8-)
https://www.amazon.com/Cocaine-Nation-White-Trade-World-ebook/dp/B00M9Z3V1Y/ref=sr_1_1?ie=UTF8&qid=1532882138&sr=8-

[1&keywords=cocaine+nation](#)) interviewed Freeway Ricky Ross, at one time America's largest crack dealer. *'I was a youngster. Uneducated, uninformed, unemployed...I mean, you could just keep going on with the "uns". I was looking for opportunities. I wanted to be important in the world, somebody who was respected. Basically I wanted the American dream, so I guess I was ripe for the picking. The opportunity came in the form of drugs, and I latched on to it.'*

The nightly news propaganda on the drug war in the 1980's with TV coverage showing raids in the inner city made a strong association of drug crime and the inner city in people's minds. A survey was conducted in 1995 asking the following question: "Would you close your eyes for a second, envision a drug user, and describe that person to me?" The startling results were published in the Journal of Alcohol and Drug Education. Ninety-five percent of respondents pictured a black drug user, while only 5 percent imagined other racial groups, despite the fact that whites represent the majority of drug users.

This unconscious racial stereotyping is a problem for the police as well as for the general public. A 2005 study titled [Drug Use, Drug Possession Arrests and the Question of Race](#) [_ \(https://www.thestranger.com/images/blogimages/2010/10/28/1288284278-beckett_social_problems.pdf\)](https://www.thestranger.com/images/blogimages/2010/10/28/1288284278-beckett_social_problems.pdf) examined drug arrests in Seattle. Seattle is 70.1% white, 8.4% black, 5.3% Latino and 13.1% Asian.

Over a 28 month period however, 51.1% of drug law violations of any type were recorded to be black. Data from a needle exchange program showed that 68.1% of intravenous drug users were white, 16.6% black and 7.5% Hispanic. Part of the reason it seems for the disproportionate percentage of black arrests is that the Seattle police prioritized crack cocaine arrests far more than marijuana, heroin, methamphetamine or powdered cocaine; crack arrests represented nearly 50% of all drug arrests. But even among crack cocaine users blacks were disproportionately targeted. Whites used approximately 50% of crack cocaine, but only represented 26.3% of the arrests.

The researchers hypothesized that perhaps the black crack users were buying and selling in open air markets, while the whites transacted behind closed doors and were thus harder to target. Unfortunately that was not true; police targeted open air markets where blacks were dealing and within those open air markets police disproportionately targeted blacks. Meanwhile, other parts of town where crack, heroin and methamphetamines were being sold openly by whites were routinely ignored by police. It is these routine decisions by police to more heavily police black areas, and to differentially target blacks for drug crimes within these neighborhoods that has helped to disproportionately incarcerate people of color.

Operation Pipeline: Driving While Black

In 1984 the DEA launched Operation Pipeline, a training program for local police. In this program, police are trained to use pretext stops of vehicles in order to find drugs. Since 1986 Operation Pipeline has trained 27,000 officers in 48 states. In 1996 in [Whren v.](#)

[United States](https://en.wikipedia.org/wiki/Whren_v._United_States) [_ \(https://en.wikipedia.org/wiki/Whren_v._United_States\)](https://en.wikipedia.org/wiki/Whren_v._United_States) the Supreme Court condoned the use of traffic stops as pretexts for drug searches. According to Michelle Alexander, in New Jersey the Operation Pipeline data showed that only 15 percent of all drivers on the New Jersey Turnpike were racial minorities, yet 42 percent of all stops and 73 percent of all arrests were of black motorists—despite the fact that blacks and whites violated traffic laws at almost exactly the same rate. While radar stops were relatively consistent with the percentage of minority violators, discretionary stops made by officers involved in drug interdiction resulted in double the number of stops of minorities. A subsequent study conducted by the attorney general of New Jersey found that searches on the turnpike were even more discriminatory than the initial stops—77 percent of all consent searches were of minorities. The Maryland studies produced similar results: African Americans comprised only 17 percent of drivers along a stretch of I-95 outside of Baltimore, yet they were 70 percent of those who were stopped and searched. Only 21 percent of all drivers along that stretch of highway were racial minorities (Latinos, Asians, and African Americans), yet those groups comprised nearly 80 percent of those pulled over and searched. What most surprised many analysts was that, in both studies, whites were actually more likely than people of color to be carrying illegal drugs or contraband in their vehicles. In fact, in New Jersey, whites were almost twice as likely to be found with illegal drugs or contraband as African Americans, and five times as likely to be found with contraband as Latinos. Targeting of blacks using pretext traffic stops is extremely pervasive and has been documented by the ACLU in a recent report: [Driving While Black](https://www.aclu.org/report/driving-while-black-racial-profiling-our-nations-highways) [_ \(https://www.aclu.org/report/driving-while-black-racial-profiling-our-nations-highways\)](https://www.aclu.org/report/driving-while-black-racial-profiling-our-nations-highways). Unfortunately, there may be little anyone can do about it; at this point in time it appears to be perfectly legal.

Stop and Frisk



<https://abcnews.go.com/Nightline/video/nypds-stop-frisk-racial-profiling-proactive-policing-19088868>

(<https://abcnews.go.com/Nightline/video/nypds-stop-frisk-racial-profiling-proactive-policing-19088868>)

Another way minorities are harassed and disproportionately arrested in the drug war is stop and frisk: the practice of stopping and searching people on the street for no reason at all. The fourth amendment to the Constitution protects “the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.” In [Terry versus Ohio](https://en.wikipedia.org/wiki/Terry_v._Ohio) (https://en.wikipedia.org/wiki/Terry_v._Ohio) the Supreme Court ruled that the Fourth Amendment prohibition on unreasonable searches and seizures is not violated when a police officer stops a suspect on the street and frisks him or her without probable cause to arrest, if the police officer has a reasonable suspicion that the person has committed, is committing, or is about to commit a crime and has a reasonable belief that the person “may be armed and presently dangerous.” The New York Police must be a very suspicious bunch. According to [Michelle Alexander](https://www.amazon.com/New-Jim-Crow-Michelle-Alexander-ebook/dp/B0067NCQVU/ref=sr_1_4?s=books&ie=UTF8&qid=1532888617&sr=1-4&keywords=new+jim+crow) (https://www.amazon.com/New-Jim-Crow-Michelle-Alexander-ebook/dp/B0067NCQVU/ref=sr_1_4?s=books&ie=UTF8&qid=1532888617&sr=1-4&keywords=new+jim+crow), in 2008, the NYPD stopped 545,000 in a single year (1,493/day), and 80 percent of the people stopped were African Americans and Latinos. Whites comprised a mere 8 percent of people frisked by the NYPD, while African Americans accounted for 85 percent of all frisks. A report by the New York Times found that the highest concentration of stops in the city was a roughly eight-block area of Brownsville, Brooklyn, that was predominately black. Residents there were stopped at a rate thirteen times the city average. Although the NYPD frequently attempts to justify stop-and-frisk operations in poor communities of color on the grounds that such tactics are necessary to get guns off the streets, [only 0.1% percent of stops \(1 in 1,000\) resulted in guns being found](https://fivethirtyeight.com/features/it-takes-a-lot-of-stop-and-frisks-to-find-one-gun/) (<https://fivethirtyeight.com/features/it-takes-a-lot-of-stop-and-frisks-to-find-one-gun/>), and guns and other contraband were seized less often in stops of African Americans and Latinos than of whites. The actions of the New York police are not unusual; the cities of [Newark, Los Angeles, Philadelphia, Chicago and Baltimore](https://www.theatlantic.com/magazine/archive/2014/04/is-stop-and-frisk-worth-it/358644/) (<https://www.theatlantic.com/magazine/archive/2014/04/is-stop-and-frisk-worth-it/358644/>) are equally aggressive. These stops are corrosive to the victims; they are daily reminders that they are suspects and they do not have constitutional rights. In 23% of pedestrian stops, police used [physical force](https://www.prisonpolicy.org/reports/stopandfrisk.html) (<https://www.prisonpolicy.org/reports/stopandfrisk.html>): pushing people to the ground, forcing them against a wall or a car, pointing guns at them, and using batons or pepper spray. The corrosive culture also extends to the police, who may become dehumanized after years of treating people like animals. Perhaps this is part of the reason the [rate of extrajudicial killings](https://thefreethoughtproject.com/police-kill-citizens-70-times-rate-first-world-nations/) (<https://thefreethoughtproject.com/police-kill-citizens-70-times-rate-first-world-nations/>) by police is so much higher in the United States than other developed countries. [This article](https://www.thedailybeast.com/the-cost-what-stop-and-frisk-does-to-a-young-mans-soul) (<https://www.thedailybeast.com/the-cost-what-stop-and-frisk-does-to-a-young-mans-soul>) tells a story of years of humiliation and brutalization of one black man by the police.

Police Corruption

It is said that for decades J. Edgar Hoover refused to allow the FBI to become involved in drug investigations for fear of the high potential for corruption. Police corruption in the drugs trade tends to be covered up and there is no nationwide data on it. Occasionally a few high profile cases reach the news such as the Baltimore Police Department's Gun Trace Task Force which was accused of [systematically robbing large and small drug dealers](http://www.baltimoresun.com/news/maryland/crime/bs-md-gttf-drug-trade-20180209-story.html) [_ \(http://www.baltimoresun.com/news/maryland/crime/bs-md-gttf-drug-trade-20180209-story.html\)](http://www.baltimoresun.com/news/maryland/crime/bs-md-gttf-drug-trade-20180209-story.html). Similar drug related scandals have occurred in [Miami, Los Angeles, Atlanta, Chicago, Cleveland, Detroit, New Orleans, and Philadelphia](https://scholarworks.bgsu.edu/cgi/viewcontent.cgi?article=1009&context=crim_just_pub) [_ \(https://scholarworks.bgsu.edu/cgi/viewcontent.cgi?article=1009&context=crim_just_pub\)](https://scholarworks.bgsu.edu/cgi/viewcontent.cgi?article=1009&context=crim_just_pub). The recent use of police body cameras has shown police planting drug evidence in [Baltimore](https://www.youtube.com/watch?v=5zUxb0yY7BU) [_ \(https://www.youtube.com/watch?v=5zUxb0yY7BU\)](https://www.youtube.com/watch?v=5zUxb0yY7BU), [Los Angeles](https://www.youtube.com/watch?v=uMz-y4XsccU) [_ \(https://www.youtube.com/watch?v=uMz-y4XsccU\)](https://www.youtube.com/watch?v=uMz-y4XsccU), [New York](https://www.youtube.com/watch?v=SeYRvxP-BRo) [_ \(https://www.youtube.com/watch?v=SeYRvxP-BRo\)](https://www.youtube.com/watch?v=SeYRvxP-BRo) and [Atlanta](https://www.history.com/news/the-notorious-botched-cover-up-that-became-alabamas-watergate) [_ \(https://www.history.com/news/the-notorious-botched-cover-up-that-became-alabamas-watergate\)](https://www.history.com/news/the-notorious-botched-cover-up-that-became-alabamas-watergate). This begs the question of how many people are framed on drug charges and set to jail, perhaps to make arrest quotas for their drug task forces. The Innocence Project, citing multiple studies, estimates that [between 2 and 5% of prisoners are innocent](https://www.huffingtonpost.com/entry/exonerations-2015_us_56ac0374e4b00b033aaf3da9) [_ \(https://www.huffingtonpost.com/entry/exonerations-2015_us_56ac0374e4b00b033aaf3da9\)](https://www.huffingtonpost.com/entry/exonerations-2015_us_56ac0374e4b00b033aaf3da9), forced into prison through crooked cops, coerced confessions, flawed forensic evidence, or flawed or coerced eyewitness testimony. With 2.3 million prisoners, a 2% innocent rate would mean that 46,000 innocent people are behind bars.

Prosecutorial Discretion

"It's a funny war when the "enemy" is entitled to due process of law and a fair trial. By the way, I'm in favor of due process. But that kind of slows things down. [William Bennett Drug Czar](http://archive.fortune.com/magazines/fortune/fortune_archive/1990/03/12/73172/index.htm) [_ \(http://archive.fortune.com/magazines/fortune/fortune_archive/1990/03/12/73172/index.htm\)](http://archive.fortune.com/magazines/fortune/fortune_archive/1990/03/12/73172/index.htm)

Discrimination by police is only the beginning of the process of disproportionate incarceration. In 1999, blacks constituted 13 percent of the country's drug users; 37 percent of those arrested on drug charges; [55 percent of those convicted; and 74 percent of all drug offenders sentenced to prison](https://www.aclu.org/report/driving-while-black-racial-profiling-our-nations-highways) [_ \(https://www.aclu.org/report/driving-while-black-racial-profiling-our-nations-highways\)](https://www.aclu.org/report/driving-while-black-racial-profiling-our-nations-highways). In today's criminal justice system, prosecutors have all the power: they are judge, jury and executioner. As Michelle Alexander writes, *"Few rules constrain the exercise of prosecutorial discretion. The prosecutor is free to dismiss a case for any reason or no reason at all, regardless of the strength of the evidence. The prosecutor is also free to file more charges against a defendant than can realistically be proven in court, so long as probable cause arguably exists. Whether a good plea deal is offered to a defendant is entirely up to the*

*prosecutor. And if the mood strikes, the prosecutor can transfer drug defendants to the federal system, where the penalties are far more severe. Juveniles, for their part, can be transferred to adult court, where they can be sent to adult prison. Angela J. Davis, in her authoritative study *Arbitrary Justice: The Power of the American Prosecutor*, observes that “the most remarkable feature of these important, sometimes life-and-death decisions is that they are totally discretionary and virtually unreviewable.” Most prosecutors’ offices lack any manual or guidebook advising prosecutors how to make discretionary decisions. Even the American Bar Association’s standards of practice for prosecutors are purely aspirational; no prosecutor is required to follow the standards or even consider them.”*

The rise of prosecutorial discretion coincided with the get tough sentencing reform of the 1980’s and 1990’s: fairness in sentencing statutes that prevent early parole, mandatory minimum sentences and the three strikes laws. A simple possession charge, perhaps augmented with the hypothetical felony intent to distribute, resisting arrest and assault of a police officer, can easily add up to charges carrying a 30 years to life sentence. Faced with this, any overworked public defender would advise his client to take an offer to plead to a lesser misdemeanor charge and serve 3-5 years. This is the way the criminal justice system processes arrestees. 94% of all cases in state courts are resolved through plea deals instead of a jury trial. At the federal level, 97% of cases are resolved through plea deals. The U.S. Sentencing Commission itself has noted that “the value of a mandatory minimum sentence lies not in its imposition, but in its value as a bargaining chip to be given away in return for the resource-saving plea from the defendant to a more leniently sanctioned charge.”

This bargaining chip is not always given away, and sometimes defendants face horrific sentences. Music producer [Weldon Angelos](https://en.wikipedia.org/wiki/Weldon_Angelos_case) (https://en.wikipedia.org/wiki/Weldon_Angelos_case) was sentenced to a mandatory minimum sentence of 55 years without parole for selling \$350 worth of marijuana. He lost an appeal claiming that the sentence was cruel and unusual punishment. [Leandro Andrade](https://scholarship.law.duke.edu/cgi/viewcontent.cgi?httpsredir=1&article=2404&context=faculty_scholarship) (https://scholarship.law.duke.edu/cgi/viewcontent.cgi?httpsredir=1&article=2404&context=faculty_scholarship) was a drug addicted veteran who was sentenced under the three strikes laws to 50 years to life without parole for shoplifting a few children’s videotapes from a Kmart. His case was appealed to the Supreme Court arguing cruel and unusual punishment; in [Lockyer v Andrade](https://en.wikipedia.org/wiki/Lockyer_v._Andrade) (https://en.wikipedia.org/wiki/Lockyer_v._Andrade), the court ruled against Andrade.

There have been attempts to challenge court sentences on the basis of racial discrimination. [Yick Wu v. Hopkins](https://en.wikipedia.org/wiki/Yick_Wo_v._Hopkins) (https://en.wikipedia.org/wiki/Yick_Wo_v._Hopkins) was an 1886 Supreme Court ruling which ruled that a law that is race-neutral on its face, but is administered in a prejudicial manner, is an infringement of the Equal Protection Clause in the Fourteenth Amendment to the U.S. Constitution. The court ruled passage, “*Though the law itself be fair on its face, and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations, between persons in similar circumstances . . . the denial of equal justice is still within the prohibition of the Constitution.*”

This equal protection concept was invoked by prisoners in Georgia which issued mandatory life sentences for second drug convictions. Georgia's district attorney's invoked this 1% of the time against whites and 16% of the time against blacks; as a result 98.4% of those serving life sentences under the provision were black. The Supreme Court in [McCleskey v. Kemp](https://en.wikipedia.org/wiki/McCleskey_v._Kemp) (https://en.wikipedia.org/wiki/McCleskey_v._Kemp), ruled against the black prisoners, saying that the "racially disproportionate impact" in the Georgia death penalty indicated by a comprehensive scientific study was not enough to overturn the guilty verdict without showing a "racially discriminatory purpose." In other words, the prosecutor or judge would have to verbally admit prejudicial bias in his case for it to be overturned.

A similar case was argued by Christopher Lee Armstrong, a black crack dealer arrested in 1992. His public defender in the federal court system noticed that all their crack defendants were black or Hispanic. The public defender suspected that prosecutors were deliberately diverting crack cases involving blacks to the federal courts where sentences were much tougher, and sending white crack dealers to state courts. The federal government did issue a list of more than two thousand federal crack cases over a three year period; all but eleven of the defendants were black and none were white. The lawyers took the case to the Supreme Court which in 1996 ruled in [US v Armstrong](http://law.jrank.org/pages/24455/United-States-v-Armstrong-Significance.html) (<http://law.jrank.org/pages/24455/United-States-v-Armstrong-Significance.html>) that prosecutors did not have to divulge any information regarding which cases were diverted to state vs federal jurisdiction. In a classic catch-22, in order to show selective prosecution defendants would need to offer evidence showing that prosecutors selectively diverted cases based on race, but the ruling protected prosecutors from having to divulge such information.

With the Supreme Court blocking the door to defenses based on cruel and unusual punishment or equal protection under the law, there was one other legal avenue minority defendants could pursue to fight racial bias. Title VI of the 1964 Civil Rights Act prohibits federally funded programs or activities from discriminating on the basis of race, and the regulations employ a "disparate impact test" for discrimination—meaning that plaintiffs could prevail in claims of race discrimination without proving discriminatory intent. Under the regulations, a federally funded law enforcement program or activity is unlawful if it has a racially discriminatory impact and if that impact cannot be justified by law enforcement necessity. Because nearly all law enforcement agencies receive federal funding in the drug war, and because drug war tactics—such as pretext stops and consent searches—have a grossly discriminatory impact and are largely ineffective, plaintiffs were able to argue persuasively that the tactics could not be justified by law enforcement necessity. However in [Alexander V. Sandoval](https://en.wikipedia.org/wiki/Alexander_v._Sandoval) (https://en.wikipedia.org/wiki/Alexander_v._Sandoval) in 2001 the Supreme Court closed that protection to defendants by ruling that Title VI of the Civil Rights Act of 1964 does not allow victims of discrimination to sue under the law. Only the federal government can sue states or cities with discriminatory practices, not the victims themselves. As Michelle Alexander says, "*The Supreme Court has now closed the courthouse doors to claims of racial bias at every stage of the criminal justice process, from stops*

and searches to plea bargaining and sentencing. The system of mass incarceration is now, for all practical purposes, thoroughly immunized from claims of racial bias.”

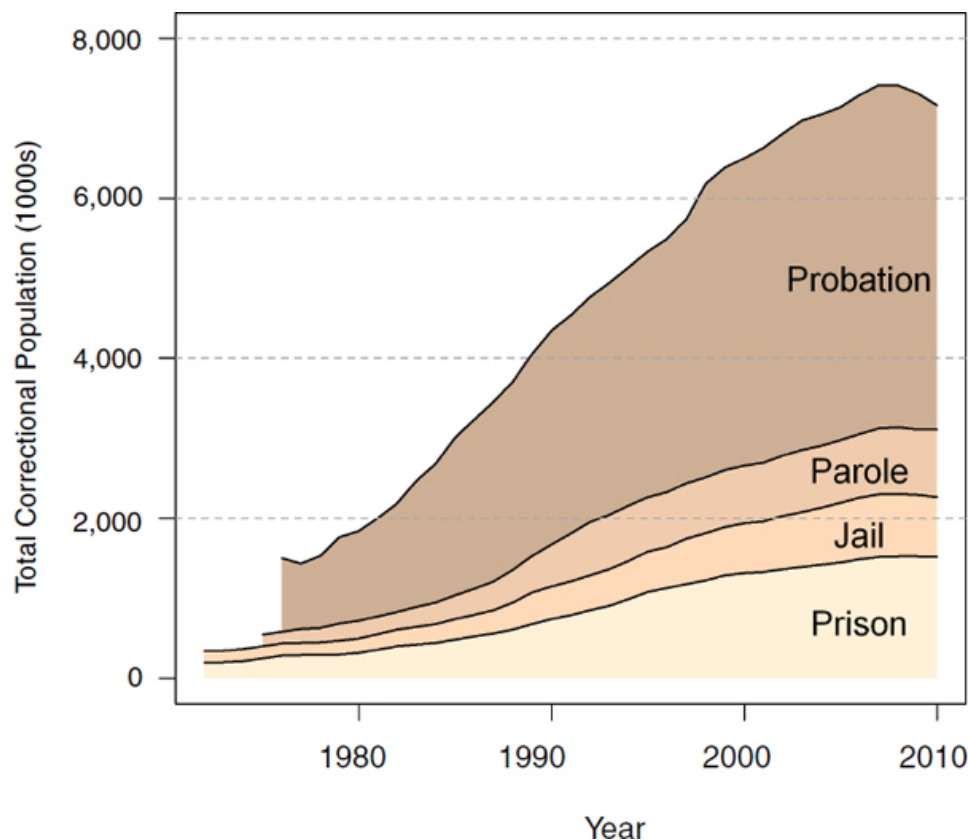
The Cruel Hand

A heavy and cruel hand has been laid upon us. As a people, we feel ourselves to be not only deeply injured, but grossly misunderstood. Our white countrymen do not know us. They are strangers to our character, ignorant of our capacity, oblivious to our history and progress, and are misinformed as to the principles and ideas that control and guide us, as a people. The great mass of American citizens estimates us as being a characterless and purposeless people; and hence we hold up our heads, if at all, against the withering influence of a nation’s scorn and contempt. Frederick Douglass, in a statement on behalf of delegates to the National Colored Convention held in Rochester, New York, in July 1853

In the past the rationale for locking people up has swung between the ideal of rehabilitation and the goal of punishment. Today’s prisons are firmly in the punishment camp. More than half of prisoners have mental health problems, sixty percent are functionally illiterate, and 65% have substance abuse problems. Inmates have a [16% chance of returning to prison if they receive literacy training](http://www.invisiblechildren.org/2010/11/18/75-of-inmates-are-illiterate-19-are-completely-illiterate-ruben-rosario/) (<http://www.invisiblechildren.org/2010/11/18/75-of-inmates-are-illiterate-19-are-completely-illiterate-ruben-rosario/>), as opposed to 70% to return if they stay illiterate. It would seem that prisons should be a fertile place to help prisoners so they can contribute and function when they return to society. Yet mental health, literacy, and substance abuse programs are seldom offered; a recent study found that of \$74 billion total spent on incarceration among federal, state and local prisons, [less than 1% of that was spent on prevention and treatment](https://en.wikipedia.org/wiki/Rehabilitation_(penology)) ([https://en.wikipedia.org/wiki/Rehabilitation_\(penology\)](https://en.wikipedia.org/wiki/Rehabilitation_(penology))). Prison is a violent place where [4% of the prisoners report being raped each year](http://www.slate.com/articles/news_and_politics/politics/2014/06/prison_crime_rate_the_u_s_violent_crime_rate_is_falling_partly_because_the.html) (http://www.slate.com/articles/news_and_politics/politics/2014/06/prison_crime_rate_the_u_s_violent_crime_rate_is_falling_partly_because_the.html), half by staff or prison guards. Sixteen percent were injured in fights since they started doing time. Across the United States there were 1.2 million violent crimes reported to police during 2012, while the same year there were [5.8 million violent crimes reported by prison inmates](http://www.slate.com/articles/news_and_politics/politics/2014/06/prison_crime_rate_the_u_s_violent_crime_rate_is_falling_partly_because_the.html) (http://www.slate.com/articles/news_and_politics/politics/2014/06/prison_crime_rate_the_u_s_violent_crime_rate_is_falling_partly_because_the.html). The causes of prison violence range from violent nature of inmates, to prison overcrowding, inadequate supervision, criminal gangs, and inhumane living conditions. The inhumanity of prison is best captured by Arizona Sheriff [Joe Arpaio’s tent city jail](https://en.wikipedia.org/wiki/Joe_Arpaio#Jail_conditions) (https://en.wikipedia.org/wiki/Joe_Arpaio#Jail_conditions), which he described as a concentration camp. Temperatures in the open air

tents ranged from 145 degrees during the summer to 45 degrees during the winter. Inmates were sent in chains to work on road cleanup projects. Over a three year period 400 sex crimes, including rapes of juveniles were not investigated. Prison guards in facilities such as these quickly lose all empathy for their charges, as demonstrated in the [Stanford Prison Experiment](https://en.wikipedia.org/wiki/Stanford_prison_experiment) (https://en.wikipedia.org/wiki/Stanford_prison_experiment). This was demonstrated in real life when an Arizona inmate, [Marcia Powell](https://www.phoenixnewtimes.com/news/marcia-powells-death-unavenged-county-attorney-passes-on-prosecuting-prison-staff-6499269) (<https://www.phoenixnewtimes.com/news/marcia-powells-death-unavenged-county-attorney-passes-on-prosecuting-prison-staff-6499269>) was punished by being placed outdoors in a metal cage in 107 degree heat. She begged for water but the guards replied with jeers and taunts. The maximum punishment period was 2 hours; she was kept there for four hours. When she was finally brought inside she was covered with burns and blisters; her internal temperature exceeded 108 degrees. An autopsy described her eyeballs as “dry as parchment”. No guards were prosecuted in her death because prosecutors couldn’t find a crime.

Parole and Probation



<https://www.nap.edu/read/18613/chapter/4#41> (<https://www.nap.edu/read/18613/chapter/4#41>)

The Cruel Hand extends beyond the prison term. When inmates are released, they often remain under control through parole or probation. Over 5 million people are on parole or probation, 80% of these are for non-violent crimes. Parolees often enter a Kafkaesque world. They may be returned to prison if they violate parole requirements such as attending monthly parole meetings and holding a steady job. Yet their driver's licenses are often rescinded, making them reliant upon public transportation. Employers routinely discriminate against people with arrest or conviction records; even though such questions are often illegal, it is routine practice to deny employment to people with a prison record. Thus it can be very difficult for parolees to find a job and maintain it especially while relying on public transportation. Thanks to Bill Clinton, people convicted of felonies are not allowed in the vicinity of public housing, nor are they eligible for food stamps or welfare, and they are typically prohibited from having contact with anyone with a criminal record. On top of all these conditions, State and local courts have increasingly attempted to supplement their funding by charging fees to people convicted of crimes, including [fees for public defenders, prosecutors, court administration, jail operation, and probation supervision](https://www.aclu.org/issues/criminal-law-reform/ending-modern-day-debtors-prisons?redirect=feature/ending-modern-day-debtors-prisons) [_ \(https://www.aclu.org/issues/criminal-law-reform/ending-modern-day-debtors-prisons?redirect=feature/ending-modern-day-debtors-prisons\)](https://www.aclu.org/issues/criminal-law-reform/ending-modern-day-debtors-prisons?redirect=feature/ending-modern-day-debtors-prisons). Parolees who can't make enough money to make these payments are routinely sent back to prison. A recent research project found [61,000 prisoners who were sent back to prison due to minor parole violations](https://www.themarshallproject.org/2017/04/23/at-least-61-000-nationwide-are-in-prison-for-minor-parole-violations) [_ \(https://www.themarshallproject.org/2017/04/23/at-least-61-000-nationwide-are-in-prison-for-minor-parole-violations\)](https://www.themarshallproject.org/2017/04/23/at-least-61-000-nationwide-are-in-prison-for-minor-parole-violations) but the authors of the study thought the actual number was probably far higher. Given all the roadblocks placed in front of parolees it is perhaps not surprising that many find the only way to make a living is to return to a life of crime. Within five years of release, [75% of released state prisoners have been rearrested](https://www.nij.gov/topics/corrections/recidivism/Pages/welcome.aspx) [_ \(https://www.nij.gov/topics/corrections/recidivism/Pages/welcome.aspx\)](https://www.nij.gov/topics/corrections/recidivism/Pages/welcome.aspx).

Those who avoid prison will [find it difficult to better themselves by going back to school](https://msu.edu/~webbsuza/115/underclassarticlegalleys.pdf) [_ \(https://msu.edu/~webbsuza/115/underclassarticlegalleys.pdf\)](https://msu.edu/~webbsuza/115/underclassarticlegalleys.pdf). Under the Drug Free Student Loans Act of 1998, students who have ever been convicted of a drug offense are either temporarily or permanently ineligible for federal college loans and grants. As to drug offenders in prison, their access to higher education had already effectively been terminated by a 1994 law that excluded all prisoners from Pell Grants, the federal college aid program that had engendered numerous college programs in prison. For thousands of prisoners these two laws have meant the end of the college dream.

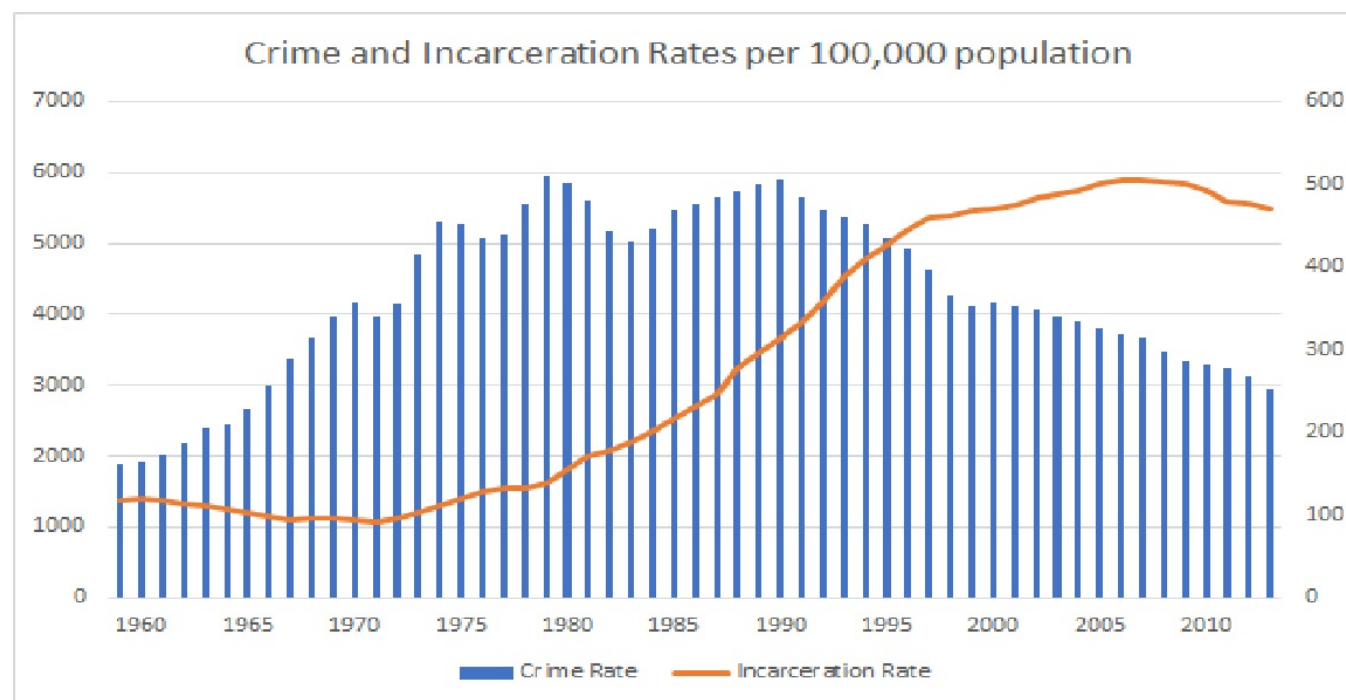
Summary by Michelle Alexander

This, in brief, is how the system works: The War on Drugs is the vehicle through which extraordinary numbers of black men are forced

into the cage. The entrapment occurs in three distinct phases, each of which has been explored earlier, but a brief review is useful here. The first stage is the roundup. Vast numbers of people are swept into the criminal justice system by the police, who conduct drug operations primarily in poor communities of color. They are rewarded in cash—through drug forfeiture laws and federal grant programs—for rounding up as many people as possible, and they operate unconstrained by constitutional rules of procedure that once were considered inviolate. Police can stop, interrogate, and search anyone they choose for drug investigations, provided they get “consent.” Because there is no meaningful check on the exercise of police discretion, racial biases are granted free rein. In fact, police are allowed to rely on race as a factor in selecting whom to stop and search (even though people of color are no more likely to be guilty of drug crimes than whites)—effectively guaranteeing that those who are swept into the system are primarily black and brown. The conviction marks the beginning of the second phase: the period of formal control. Once arrested, defendants are generally denied meaningful legal representation and pressured to plead guilty whether they are or not. Prosecutors are free to “load up” defendants with extra charges, and their decisions cannot be challenged for racial bias. Once convicted, due to the drug war’s harsh sentencing laws, drug offenders in the United States spend more time under the criminal justice system’s formal control—in jail or prison, on probation or parole—than drug offenders anywhere else in the world. While under formal control, virtually every aspect of one’s life is regulated and monitored by the system, and any form of resistance or disobedience is subject to swift sanction. This period of control may last a lifetime, even for those convicted of extremely minor, nonviolent offenses, but the vast majority of those swept into the system are eventually released. They are transferred from their prison cells to a much larger, invisible cage. The final stage has been dubbed by some advocates as the period of invisible punishment. This term, first coined by Jeremy Travis, is meant to describe the unique set of criminal sanctions that are imposed on individuals after they step outside the prison gates, a form of punishment that operates largely outside of public view and takes effect outside the traditional sentencing framework. These sanctions are imposed by operation of law rather than decisions of a sentencing judge, yet they often have a greater impact on one’s life course than the months or years one actually spends behind bars. These laws operate collectively to ensure that the vast majority of convicted offenders will never integrate into mainstream, white society. They will be discriminated against, legally, for the rest of their lives—denied employment, housing, education, and public benefits. Unable to surmount these obstacles, most will eventually return to prison and then be released again, caught in a closed circuit of perpetual marginality. In recent years, advocates and politicians have called for greater resources devoted to the problem of “prisoner re-entry,” in view of the unprecedented numbers of people who are released from prison and returned to their communities every year. While the terminology is well intentioned, it utterly fails to convey the gravity of the situation facing prisoners upon their release. People who have been convicted of felonies almost never truly reenter the society they inhabited prior to their conviction. Instead, they enter a separate society, a world hidden from public view, governed by a set of oppressive and discriminatory rules and laws that do not apply to everyone else. They become members of an undercaste—an

enormous population of predominantly black and brown people who, because of the drug war, are denied basic rights and privileges of American citizenship and are permanently relegated to an inferior status. This is the final phase, and there is no going back.

A Silver Lining?



You can see from the graph above that

as the incarceration rate grew dramatically from 1980 to 2010 (red line) the [overall crime rate](http://www.disastercenter.com/crime/uscrime.htm) (<http://www.disastercenter.com/crime/uscrime.htm>) declined dramatically from 1990 to 2010. If the drop in crime was caused by the growth in mass incarceration by locking up all the bad people then maybe all the problems with mass incarceration could be justified.

Certainly people like Rudy Giuliani have credited their tough criminal policies such as stop and frisk with causing an accompanying drop in crime. However the drop in crime has happened all across the United States and even in England, in cities that are easy on crime as well as cities with tough policing policies, so the explanation for the drop in crime is somewhat of a puzzle. One obvious suggestion is the demographic bubble of the baby boomers; crime rose as they entered their teens and twenties, and has declined as

they aged. However [this paper](http://pricetheory.uchicago.edu/levitt/Papers/LevittUnderstandingWhyCrime2004.pdf) [_ \(http://pricetheory.uchicago.edu/levitt/Papers/LevittUnderstandingWhyCrime2004.pdf\)](http://pricetheory.uchicago.edu/levitt/Papers/LevittUnderstandingWhyCrime2004.pdf) examined many factors and concluded that the following factors were not responsible for the drop in crime:

1. The strong economy of the 1990's
2. Baby boomer demographics
3. Better policing strategies
4. Gun control laws
5. Laws allowing concealed weapons carry
6. Increased use of capital punishment

The factors the authors thought were most attributable to the drop in crime were:

1. Increase in the number of police
2. Incarceration of potential offenders
3. The receding crack cocaine epidemic
4. The [legalization of abortion in 1973](https://en.wikipedia.org/wiki/Legalized_abortion_and_crime_effect) [_ \(https://en.wikipedia.org/wiki/Legalized_abortion_and_crime_effect\)](https://en.wikipedia.org/wiki/Legalized_abortion_and_crime_effect).

Another potential explanation is that violence begets violence and correspondingly, less violence creates less violence. This is the basis of [violence intervention programs](https://amp.cnn.com/cnn/2018/08/15/health/violent-crime-disease-contagious-partner/index.html) [_ \(https://amp.cnn.com/cnn/2018/08/15/health/violent-crime-disease-contagious-partner/index.html\)](https://amp.cnn.com/cnn/2018/08/15/health/violent-crime-disease-contagious-partner/index.html) that have led to dramatic drops in inner city crime. Other researchers have suggested other reasons, such as the [phase out of lead in gasoline](https://en.wikipedia.org/wiki/Lead-crime_hypothesis) [_ \(https://en.wikipedia.org/wiki/Lead-crime_hypothesis\)](https://en.wikipedia.org/wiki/Lead-crime_hypothesis), the [delay in marriage](https://www.newyorker.com/magazine/2018/02/12/the-great-crime-decline) [_ \(https://www.newyorker.com/magazine/2018/02/12/the-great-crime-decline\)](https://www.newyorker.com/magazine/2018/02/12/the-great-crime-decline) which put young people on their best behavior for a longer period of time, and restored and perhaps gentrified communities where all the inhabitants care about local issues. Some studies [dispute the correlation between higher crime and incarceration](https://abcnews.go.com/US/story?id=95580&page=1) [_ \(https://abcnews.go.com/US/story?id=95580&page=1\)](https://abcnews.go.com/US/story?id=95580&page=1), suggesting that mass incarceration might account for 20% of the effect, but that much of the incarceration of non-violent offenders has had no effect, and even violent offenders tend to become more normal human beings as they get older, and should be paroled after 10 years or so. The liberal [Sentencing Project](https://www.sentencingproject.org/wp-content/uploads/2016/01/Incarceration-and-Crime-A-Complex-Relationship.pdf) [_ \(https://www.sentencingproject.org/wp-content/uploads/2016/01/Incarceration-and-Crime-A-Complex-Relationship.pdf\)](https://www.sentencingproject.org/wp-content/uploads/2016/01/Incarceration-and-Crime-A-Complex-Relationship.pdf) admits that incarceration might account for 25% of the drop in crime but cautions that the damage caused by mass incarceration should be balanced against any crime reduction effect. In a study by the National Research Council titled [The Growth of Incarceration in the United States - Exploring Causes and Consequences](http://www.vtlex.com/wp-content/uploads/2014/06/18613.pdf) [_ \(http://www.vtlex.com/wp-content/uploads/2014/06/18613.pdf\)](http://www.vtlex.com/wp-content/uploads/2014/06/18613.pdf), the detrimental consequences of incarceration on the family are shown to be well established.

Children who grow up with a father or mother behind bars have almost uniformly worse outcomes than those who don't unless the parent had been abusive. Children of inmates have poorer education, more likelihood for arrests, and weaker relationships of their own when they grow up. Thus one can see how the trauma of mass incarceration begets [intergenerational trauma](http://atlantablackstar.com/2016/06/05/post-traumatic-slave-syndrome-and-intergenerational-trauma-slavery-is-like-a-curse-passing-through-the-dna-of-black-people/) (<http://atlantablackstar.com/2016/06/05/post-traumatic-slave-syndrome-and-intergenerational-trauma-slavery-is-like-a-curse-passing-through-the-dna-of-black-people/>) and the likelihood that children and grandchildren of convicts will become convicts themselves. At a community level, the conclusions are less certain. There should be some benefit to a community if violent offenders are removed. However, these offenders so often come from the weakest community that already has extreme levels of crime, poverty and poor education, so that the removal of any economic support from the community, even if it comes from the illegal drug economy, can lead to more deprivation. If in an ideal world, the criminal justice objective was to improve society by removing dangerous offenders, rehabilitating them, facilitating their reentry into society with jobs and education and supporting the community that they lived in, perhaps one could see an end to the endless cycles of violence and incarceration in our poorest communities. But improving society is no longer a popular political objective, and so it's hard to see a path toward enlightened criminal justice reform.

Preparation

Please read the text above and click through the hyperlinks and read whichever of them look interesting. Please email me with any questions or topics that you would like to discuss in class. Please send the email no later than the day before class, to ocurme@gmail.com (<mailto:ocurme@gmail.com>).

Additional Resources

List resources