

A kinder, gentler drug war? Race, drugs, and punishment in 21st century America

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Abstract

This article assesses whether the kinder, gentler rhetoric through which the disproportionately white opiate crisis has been framed has been accompanied by changes in drug sentencing policy and drug law enforcement that mirror this sympathetic discourse. Toward these ends, state-level drug sentencing policies enacted from 2010 to 2016 as well as recent trends in drug law enforcement and drug-related imprisonment are analyzed. The legislative findings show that policymakers are not singling out opiate violations for particularly lenient treatment. Instead, it is the user/dealer distinction that animates recent shifts in drug policy: While state lawmakers are re-thinking their approach to drug possession, they are more likely to have enhanced penalties for drug distribution than to have reduced them. In addition, although significant racial disparities in arrests and incarceration persist, the main change that has occurred is a decline in the black share of arrests and imprisonments. The discussion explores possible explanations for these unexpected findings, including the possibility that political dynamics help explain the decline of the drug war in many urban areas and, as a result, the diminution of racial disparities in it.

Keywords

drugs, mass incarceration, opioids, policing, prison, race, sentencing

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Introduction

Although the use of consciousness-altering substances has been the subject of intense governmental attention for over a century, the most recent U.S. war on drugs is characterized by an unprecedented number of arrests, record levels of incarceration, and massive racial disparities. A number of factors that help explain the unparalleled intensity of law enforcement's crackdown on those who use and/or sell drugs over the past few decades. These include bi-partisan competition among elected officials seeking to establish their tough-on-drug credentials in the 1980s and 1990s (Beckett, 1997), the provision of federal funding and the enactment of asset forfeiture laws that incentivize and/or fund drug law enforcement (Alexander, 2010), the complicity of the news media in the reproduction of information and images that engendered support for punitive drug policies (Beckett, 1997; Reinerman and Levine, 1997a), and the creation and enhancement of bureaucracies with a vested interest in the perpetuation of the drug war (Reinerman and Levine, 1997b).

Although the intensity of the most recent drug war has many causes, the most consistent theme in scholarly investigations of its causes and consequences has been the centrality of race. Studies show that the discourse surrounding the drug issue in the 1980s and 1990s was highly racialized (Beckett, 1997; Reeves and Campbell, 1994; Reinerman and Levine, 1997a). This racialization took many forms: the proliferation of media images of black and brown crack users in handcuffs under the (ostensibly necessary) control of law enforcement; the absence of any serious discussion of the need for treatment and the possibility of recovery; the lack of attention to the structural conditions that fueled the spread of crack cocaine; factually incorrect stories about the ostensibly permanent damage caused to fetuses and children as a result of in-utero exposure to drugs, and especially crack cocaine; and misleading assertions of the necessity of heightened law enforcement. Policy developments mirrored this racialized rhetoric, as criminal sanctions for those who used or sold crack cocaine were ratcheted up at the federal level and in many states (Alexander, 2010; Lynch, 2011, 2016; Provine, 2007; Reinerman and Levine, 1997b). In this context, black people bore the brunt of law enforcement's intensified campaign to punish those who used and/or sold controlled substances (Alexander, 2010; Beckett et al., 2005, 2006; Duster, 1997; Lynch, 2016; Lynch and Omori, 2018; Provine, 2007).

Although the scale and impact of the most recent war on drugs has been unique, the centrality of race to it is hardly novel (Courtwright, 2001). In fact, scholars have shown that anti-drug campaigns are often bound up with, and reinforce, efforts to control and/or denigrate non-white populations. In the 1870s, for example, concern about opiate addiction was expressed mainly through discourse and imagery that conflated that problem with the smoking of opium by Chinese immigrants. These images not only led to the adoption of laws criminalizing this particular form of opium consumption but also fueled support for anti-Chinese immigration laws, including, ultimately, the Chinese Exclusion Act in 1882

(Courtwright, 2001; Provine, 2007: 68–73; Reinerman and Levine, 1997b). Similarly, concern about marijuana grew dramatically in the Southwest in the 1930s, as the Great Depression fueled competition for jobs and heightened anti-immigrant and anti-Mexican sentiment (Provine, 2007; Reinerman and Levine, 1997b). More recently, in the 1980s, it was crack cocaine that assumed the status of “demon drug,” the response to which was profoundly shaped by race.

In recent years, however, it is not crack that has gripped America’s imagination, but rather the increased use and abuse of opiates, a trend that has disproportionately impacted white people and led to an unprecedented number of drug overdose deaths (Katz and Goodnough, 2017). Recent analyses suggest that both rhetoric and policy regarding drugs has become kinder and gentler as a result of the whiteness of this latest drug crisis. In particular, studies analyzing media imagery show that contemporary opiate users tend to be portrayed through a lens that emphasizes the possibility of recovery and humanizes those struggling with addiction (Lopez, 2016; Netherland and Hansen, 2016; Shaw, 2017; Stone, 2018). For example, media stories that describe today’s addicts are far more likely to depict opiate users as victims rather than as criminals (Netherland and Hansen, 2016; Orsini, 2017; Shaw, 2017). The contrast between this rhetoric and the way in which those entangled with crack cocaine were portrayed in the news media is especially sharp (Shaw, 2017).

Some researchers argue that the whiteness of the current drug crisis in the United States has precipitated a change not just in media representations, but in drug policy as well (Netherland and Hansen, 2017; Stone, 2018). From this perspective, the increased availability of medical responses such as medication-assisted treatment for opiate addiction and naloxone distribution aimed at preventing overdose deaths suggest that the (predominantly white) use and abuse of opiates has been medicalized and decriminalized, at least for white users. Historian Michael Eric Dyson also gave expression to this idea when he suggested, “White brothers and sisters have been medicalized in terms of their trauma and addiction. Black and brown people have been criminalized for their trauma and addiction” (quoted in McKenzie, 2017).

While the increased availability of medication-assisted treatment and medications to reverse overdose are undoubtedly important policy outcomes, trends in drug sentencing policy and drug law enforcement remain opaque. As a result, it is unclear whether the softening of the rhetoric surrounding drug use and the development of certain medical responses to the opioid crisis have occurred alongside fundamental shifts in the logic and operation of the drug war, which is fundamentally characterized by high arrest rates and the widespread use of incarceration in response to drug law violations. In short, the idea that the drug war has been significantly rolled back, and that criminal law and law enforcement are changing in ways that mirror the kinder, gentler rhetoric surrounding the opiate crisis, is an untested hypothesis.

Insofar as drug-related rhetoric and law have often been congruent in the past, the idea that drug law enforcement is mirroring shifts in discourse is

entirely reasonable. As noted previously, racist and salacious depictions of Chinese opiate smokers led not only to the nation's first drug prohibitions but also to harsh restrictions on immigration from China in the late 1800s (Courtwright, 2001; Provine, 2007). Similarly, racialized and denigrating portrayals of crack users were associated with the enactment of harsh sentencing laws, some of which created especially severe penalties for those convicted of possessing or selling crack cocaine (Alexander, 2010; Reinerman and Levine, 1997b). Other studies also find that media portrayals of consciousness-altering substances tend to correspond to subsequent legislative responses to those substances (Miller et al., 2015; Omori, 2013). History and prior scholarship thus provide support for the idea that the softer, kinder rhetoric regarding addiction that has emerged in recent years may be associated with a de-escalation of the drug war. The idea that whites may be disproportionately benefitting from such a trend is also highly plausible given the historical record.

And yet there is reason to believe that other trends may also be affecting the demographics of the justice-involved, but in a different direction. Recent studies suggest that the geography of mass incarceration in general, and the drug war in particular, are shifting. For example, jails expanded far more rapidly in small- and medium-sized counties than in large urban counties in recent decades (Kang-Brown et al., 2018; Subramanian et al., 2015; see also Pragacz, 2016; Schept, 2015). In fact, a plurality (44%) of jail inmates are now incarcerated in small counties (Kang-Brown et al., 2018; Subramanian et al., 2015). Similarly, prison admissions fell in large counties, but rose in small counties, in recent years (Beckett and Beach, 2020; Kang-Brown et al., 2018; Keller and Pearce, 2016; see also Eason, 2012; Eason et al., 2017). This geographic shift in the distribution of punishment may be altering the racial and ethnic composition of people who are sent to jail or prison, as rural areas are notably less diverse than urban areas (Housing Assistance Council, 2012).¹ In particular, any de-escalation of the drug war in urban areas, which are generally more diverse than suburban and rural areas, may actually reduce racial disparities in arrest and confinement, especially if accompanied by an intensification of drug law enforcement in non-urban areas.

In this article, we analyze new drug sentencing laws enacted in the 50 U.S. states, as well as trends in drug arrests and imprisonment, in order to ascertain whether the U.S. drug war has actually become kinder and gentler and, if so, how the demographics of the drug war are changing. The answers to these questions are substantively important: the drug war has had important consequences for the both the scale of punishment and the reproduction of racial and socio-economic inequality in the contemporary United States (Alexander, 2010; Travis et al., 2014). Exploring whether drug-related discourse and criminal law continue to mirror each other in the 21st century is also theoretically fruitful, as it provides an opportunity to consider whether and why the degree of congruence between rhetoric and law pertaining to illicit drugs may vary across different historical periods.

Below, we offer an overview of the demographics of the current opiate crisis and research findings regarding media representations of the issue. Next, we describe the data and methods we use to assess whether new drug sentencing laws and recent law enforcement patterns mirror this kinder, gentler rhetoric. We then present our empirical findings, offer a tentative account of the dynamics that appear to explain them, and consider their theoretical implications.

The opiate crisis

The opiate overdose death rate has been rising in the United States since the late 1990s, and reached unprecedented levels in the 2010s. A record number of Americans (70,237) died as a result of a drug overdose in 2017 (Scholl et al., 2019), more than perished in peak years as a result of HIV/AIDS, car accidents, or gun violence (Sanger-Katz, 2018). More than two-thirds (67.8%) of these overdose deaths involved opioids (Scholl et al., 2019). Prior to 2010, most overdose deaths involving opioids stemmed from the misuse of prescription opiates. In the 2010s, however, access to prescription opiates was restricted, and an increasing share of overdose deaths involved illicit opiates (DeWeerd, 2019). In fact, between 2010 and 2016, deaths from heroin overdoses increased almost fivefold in the United States (DeWeerd, 2019).

Although overdose death rates for blacks and Native Americans have been climbing rapidly, the white drug overdose death rate surpassed those for blacks and Native Americans in the early 2000s, and remains higher than those observed for any other demographic group (Katz and Goodnough, 2017; Scholl et al., 2019, Table 1). This pattern is largely driven by the opioid crisis. As of 2017, the opioid overdose death rate per 100,000 residents was 19.4 for non-Hispanic whites; 15.7 for American Indian/Alaska Natives; 12.9 for blacks; 6.8 for Latinx people; and 1.6 for Asians and/or Pacific Islanders (Scholl et al., 2019, Table 1). Because non-Hispanic whites comprise the largest racial/ethnic group in the country, and because drug overdose death rates have been highest among whites for years, the current crisis is often conceived as a white one.

A number of researchers have found that media coverage of the opioid problem has been comparatively sympathetic. For example, Stone (2018: 5) analyzed 200 news stories that focused on the opiate epidemic and the discussion of this issue in Congress. On the basis of this analysis, Stone draws several conclusions:

First, the present epidemic has been critical in redirecting public attention toward a more sympathetic “addict” figure who suffers from a disease; second, focus on a sympathetic figure has affected the dominant images associated with drug policy-making; third, advocates have used these changes to promote their preferred policy frame; and fourth, the ONDCP has incorporated this frame into their demand-reduction approach.

Shaw (2017: 1) draws a similar conclusion on the basis of his analysis of drug-related photo journalism:

The racial bias is inescapable: A drug crisis that is largely affecting suburban and rural whites² is being treated with a drastically different attitude and approach in words and imagery than those used to characterize heroin use in the 1970s, crack cocaine in the late 1980s, and the drug problem plaguing America's people of color and urban poor today. (see also Lopez, 2017)

Similarly, based on a content analysis of 100 popular press articles focusing on heroin and prescription opiate users published from 2001 and 2011, Netherland and Hansen (2016: 664) find

a consistent contrast between criminalized urban black and Latino heroin injectors with sympathetic portrayals of suburban white prescription opioid users. Media coverage of the suburban and rural opioid "epidemic" of the 2000s helped draw a symbolic, and then legal, distinction between (urban) heroin addiction and (suburban and rural) prescription opioid addiction that is reminiscent of the legal distinction between crack cocaine and powder cocaine of the 1980s and 90s.

The research to date thus indicates that white opiate users are depicted in a far more compassionate and humanizing manner than other drug users. Some analysts have suggested that this comparatively sympathetic portrayal of white opiate users has had important policy ramifications. Stone (2018:1), for example, argues that the reframing of the drug problem broke the gridlock in Congress and enabled reforms to occur:

This development was decades in the making, but has crystallized into policy change in the last several years because of the current opioid epidemic, a shift in the typical "drug addict" portrayed in the media and political discourse, a new policy framework put forth by "addiction recovery" advocates, and the ONDCP incorporating this framework into the national drug strategy.

Netherland and Hansen (2017) go further, arguing that a separate set of policies now governs white (i.e. prescription) drug use. Under these policies, "drug use is decriminalized, treated primarily as a biomedical disease." As a result, prescription drug users' "whiteness is preserved, leaving intact more punitive systems that govern the drug use of people of color."

However, it is not clear that opioid users, and white opioid users, are benefiting from a softer and kinder drug policy framework that protects them from punitive intervention. For one thing, "white drug use" is not synonymous with prescription drug use: many white people who use illicit drugs did not begin with prescription drugs, and many white users who originally obtained opiates through a prescription have turned to illicit street drugs (National Institute on Drug Abuse, 2018).

Thus, evidence that new medications are sometimes used to treat prescription drug abuse (and heroin dependence) does not mean that white drug users are not also governed by punitive systems. In addition, the pace of reform has been extremely slow on issues such as access to medication-assisted treatment (Ghandnoosh and Anderson, 2017).

In short, whereas some analysts see (limited) progress on medication-assisted treatment accessibility and naloxone distribution as evidence that the association of whites with opiates is leading to medicalization and decriminalization, others emphasize the fact that medication-assisted treatment remains highly restricted while naloxone remains unavailable in many parts of the country. Another very recent trend also challenges the idea that the opioid-involved are subject (only) to softer, more therapeutic interventions: the increased enactment and use of drug homicide laws. Beginning in 2016, in the face of increased conservative support for federal drug law reform, some drug reform opponents began to argue that selling drugs is an inherently violent act. As William Bennett and John Walters put it,

The Sentencing Reform and Corrections Act now before Congress is based on a lie — that drug dealing is not a violent crime. Americans have been told this lie for years even as we witness the violence and death caused by drug dealers in our communities. Now, this lie is propelling legislation through Congress that will destroy more lives. (Bennett and Walters, 2016)

In recent years, politicians and prosecutors have increasingly embraced the idea that distributing drugs constitutes violence and should be punished as such. For example, many states have reclassified drug sales as a violent crime, and a number have introduced or expanded legislation that would enable prosecutors to file homicide charges against people who supply drugs to other people who subsequently overdose (Boecker, 2015). By 2019, nearly half (24) of all U.S. state had such laws on the books (Beletsky, 2019). And in a number of states without such statutes, prosecutors still charge the offense of drug delivery resulting in death under various felony-murder, depraved heart, or manslaughter laws. In this context, the number of people charged with homicide after providing drugs to someone who overdosed appears to have increased sharply (Beletsky, 2019; Goldensohn, 2018). This trend suggests that the drug war is not in the process of de-escalating as a result of the perceived whiteness of the opiate epidemic.

Tiger (2013, 2017) offers a more conceptual critique of the idea that white people, and especially poor, rural whites, are benefitting from a kinder, gentler drug policy framework that relies on (benign) medicalization rather than criminalization. Specifically, Tiger argues that the proliferation of drug courts, and the medicalized approach they ostensibly represent, has done little to reduce the punishment of drug users. This is because drug courts fuse medicalization and punishment, and rest on the idea that drug users can only be fixed through sobriety. Moreover, the idea that addiction is a chronic, relapsing disorder means that “fixedness” is never assured and that long-term surveillance is therefore required.

In other words, medicalization and criminalization are not separate and incompatible, but rather overlapping and mutually reinforcing methods of control to which people of all races are increasingly subject (see also Kaye, 2019). Indeed, recent studies indicate that drug courts do not reduce arrests or incarceration (Lilley, 2017; Lilley et al., 2019; Walch, 2011). For example, a recent National Institute of Justice (NIJ)-funded study found no statistically significant differences between the amount of confinement time for people who entered drug court and for those who did not. In fact, the data suggest that drug court participants may end up serving more time spent behind bars (Csete, 2019; Rossman et al., 2011; Sevigny et al., 2013).

In short, although some have suggested that drug policy pertaining to (predominantly white) opiate users has become kinder and gentler, these studies have typically focused on outcomes such as the Office of National Drug Control Policy (ONDCP) policy framework (Stone, 2018), naloxone distribution, and the policies governing access to medication-assisted treatment for opiate addiction (Netherland and Hansen, 2017). Recent trends in drug sentencing policy and drug law enforcement, which govern the criminal punishment of drug law violators, have not been systematically analyzed. Below, we describe the data and methods we use to do so.

Data and analytic strategy

To ascertain whether the drug war is de-escalating, and how any changes in enforcement are differentially affecting various racial and ethnic groups, we analyze recently enacted drug sentencing laws across all 50 U.S. states and trends in drug law enforcement. We use these data to assess two related empirical claims: (1) that the U.S. drug war is being significantly ratcheted down as a result of the association between whites and opiate abuse and (2) that whites are disproportionately benefitting from this de-escalation of the drug war. Below, we provide more information about the data we analyze to assess these empirical claims.

Assessing trends in sentencing policy

In order to assess recent trends in drug sentencing policy, we identified state-level drug sentencing statutes adopted between 2010 and 2016 (the latest year for which records are available) through the National Council of State Legislatures database of Statewide Sentencing and Corrections Legislation. We focus on state law because the number of people sentenced under state law far exceeds those impacted by federal law.³ The NCLS database provides a description of each law, which we used to create a list of bills with any mention of controlled substances, drug-related crimes, or drug courts, or court supervision. Significant criminal justice reform initiatives such as omnibus crime bills were also included in this first sweep, even if controlled substances did not appear in the title or description of the legislation. This list was then cross-checked against databases compiled by researchers at the

Vera Institute of Justice, the Drug Policy Alliance, an open-access list provided by Vox journalist German Lopez, and the NCLS's synthetic reports on drug sentencing trends. The list was then further refined during the coding process as we identified substantive changes to sentencing or court supervision policies.

Once the pertinent bills were identified, the full text of each statute was accessed through state legislative websites for 2010–2014 and through the NCLS database for 2015–2016. We then coded the relevant provisions of each law as shifting drug penalties in a lenient, punitive, or mixed direction (see also Beckett et al., 2016). Provisions that reduced confinement time for drug violations were coded as lenient, while those that increased confinement sentences were coded as punitive. In a relatively small number of cases, legislative provisions modified sentencing rules in a way that reduced confinement time in cases involving relatively small quantities of drugs but increased penalties in cases involving larger amounts of the same substance. For example, Kansas House Bill 2318 (2012) added graduated weight classifications to its criminal code for sale of a controlled substance, thereby reducing the penalty for sale of less than one gram of certain substances while increasing sentence length for weights over 100 grams. We coded such provisions as “mixed.” The coding protocol did not require that the coder predict the magnitude of the impact legislative shifts would have on jail or prison populations. Instead, the results are used to enable a qualitative assessment of the direction of drug sentencing reforms adopted by U.S. states.

Separately, we also tracked laws that affect eligibility for, and requirements of, drug courts and court supervision. Insofar as drug and other therapeutic courts ostensibly seek to divert people from prison and jail, we considered coding provisions that expand access to drug courts or court-supervised treatment as “lenient.” However, as Tiger (2013, 2017) points out, drug courts, and coercive treatment more generally, rest on a unique blend of medicalization and criminalization, extend the degree to which courts retain a high degree of control over people's lives, and may actually increase incarceration in the aggregate, as noted previously. For these reasons, we do not treat efforts to expand access to drug courts as “lenient” sentencing provisions, but present these findings separately.

In the approach adopted here, the unit of analysis is the legislative provision rather than the session law, as the latter often contain multiple and distinct provisions that address different types of drug law violations and may shift sentences in opposite directions. A provision, as we define it, is a portion of a bill that substantively changes state law regarding drug sentencing, drug courts, or court supervision related to drug-offenses. Each distinct provision in each session law was coded according to the nature and direction of the change enacted, and, when available, the associated crime(s) and the substance(s). Legislative changes that applied to different levels of severity and/or substances but moved in the same direction were coded as a single provision. For example, Minnesota Senate Bill 3481 (2016) increased weight thresholds that define cocaine and methamphetamine offenses in the first and second degrees, thereby reducing the number of cases that would be eligible for more severe sanctions. We coded these changes as a single,

lenient provision pertaining to cocaine and methamphetamine. Another provision in the same law set mandatory minimum sentences for sale and possession of more than 100 grams of certain controlled substances, which we coded as a single, punitive provision for those substances. By coding multiple changes that move penalties in the same direction as one provision, we capture the direction and type of legislative change without giving undue weight to states whose criminal codes are comparatively differentiated.

Arrest and imprisonment data

We supplemented data regarding drug-sentencing trends with an analysis of recent changes in drug law enforcement and drug-related imprisonment. Specifically, we analyze trends in drug arrests by race and type of drug offense, as well as the incarceration of drug law violators in state prisons.

The arrest data were compiled from the Federal Bureau of Investigation's (FBI's) Uniform Crime Reports (UCR) for 2007 (the peak of the drug war) through 2017. These data are aggregated by the National Archive of Criminal Justice Data and are available through the UCR's online data tool. Unfortunately, arrest data do not include information about ethnicity (as opposed to race). For this reason, most Latinx arrestees are likely included in the "white" category.⁴ The majority of counties now report data to the UCR. For example, in 2012, the law enforcement agencies participating in the UCR program represented more than 270 million United States inhabitants – 85.4% of the total population. Although the UCR does provide national data that include estimates for jurisdictions that do not report their arrest data, these estimates do not include information about race for 2015 or 2016. We therefore rely on actual arrest counts rather than national estimates in which missing data are imputed.

Data regarding drug-related imprisonment was compiled from the Bureau of Justice Statistics *Prisoners* series, which summarizes findings from BJS's National Prisoner Statistics program. This program collects data from state departments of correction and the Federal Bureau of Prisons. These reports present final counts of prisoners under the jurisdiction of state and federal correctional authorities at year-end. Unfortunately, data for the federal system are not broken out by race/ethnicity and drug offense type prior to 2012; jail data are also insufficiently detailed to enable analysis of jail admissions by offense type and race/ethnicity. We therefore focus on the trend in drug-related incarceration in state prisons, where the majority of prisoners are confined.⁵

Findings

Trends in drug sentencing policy

In brief, our analysis of recently enacted state-level drug sentencing policies reveals that while many states have decreased criminal penalties for drug possession, these

measures have not been focused specifically on those who use opiates. In fact, the vast majority of the provisions that focused exclusively on opiates shifted penalties in a punitive direction. At the same time, penalties for drug distribution are more likely to have become *more* severe. These findings are described in greater detail below.

Figure 1 depicts the number of lenient, punitive, and mixed drug sentencing statutes enacted from 2010 to 2016 and shows that statutory reforms that shift sentencing policy in a lenient direction clearly outnumber those that do the opposite. At the same time, nearly four of ten (38.8%) of the drug sentencing provisions enacted during this period were either punitive or mixed. Thus, while a majority of recent statutory reforms lessen criminal penalties, drug sentences are shifting in a mixed rather than uniformly lenient direction.

Figure 2 shows that recently enacted provisions that reduce penalties for drug crimes are not specifically aimed at those who are involved with opiates. In fact, just one sentencing provision specifically reduced penalties for drug law violations involving opiates, while 18 provisions *enhanced* sentences for opiate violations in particular. More generally, sentencing provisions pertaining to comparatively serious drugs (i.e. drugs other than marijuana) shifted in both lenient and punitive ways; only those pertaining to marijuana exclusively shifted in an overwhelmingly lenient direction. The majority (51/80) of the provisions identified as lenient pertained only to marijuana. If these are removed from the analysis, the results indicate that punitive sentencing changes outnumbered lenient ones by a significant margin.

Statutory measures that reduced penalties also overwhelmingly pertained to drug possession as opposed to drug distribution or manufacture. In fact, as Figure 3 shows, nearly all provisions pertaining specifically to drug possession shifted sentences in a more lenient direction. By contrast, those that address

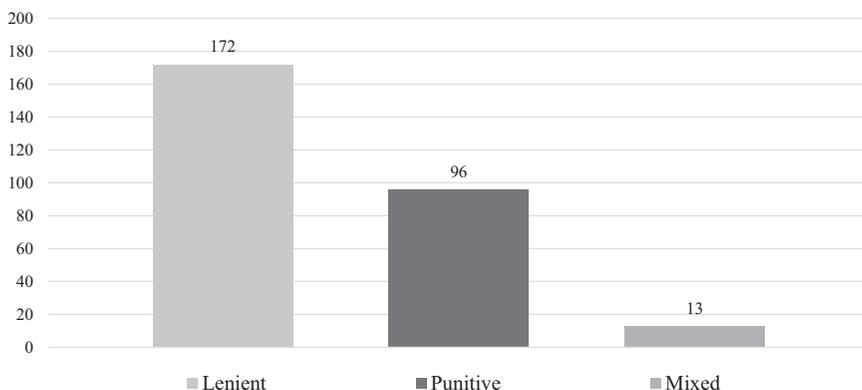


Figure 1. Nature of state drug sentencing policies enacted from 2010 to 2016. Source: Authors' analysis of legislative records taken from the National Council of State Legislatures (NCSL) database regarding Statewide Sentencing and Corrections Legislation.

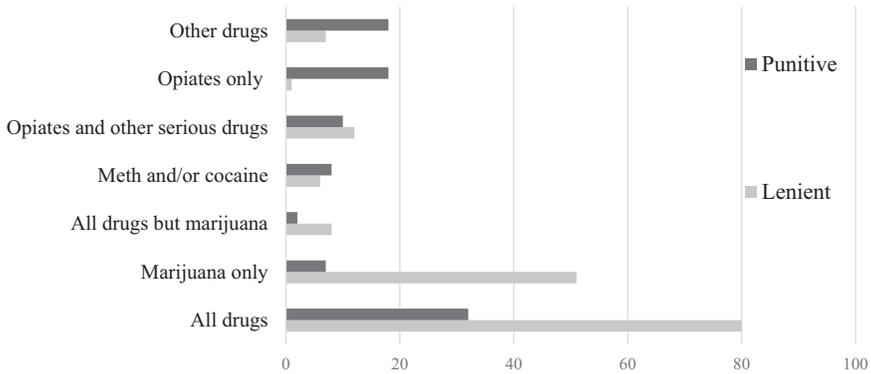


Figure 2. Nature of state drug sentencing policies enacted from 2010 to 2016 by type of drug. Source: Authors’ analysis of legislative records taken from the National Council of State Legislatures (NCSL) database regarding Statewide Sentencing and Corrections Legislation.

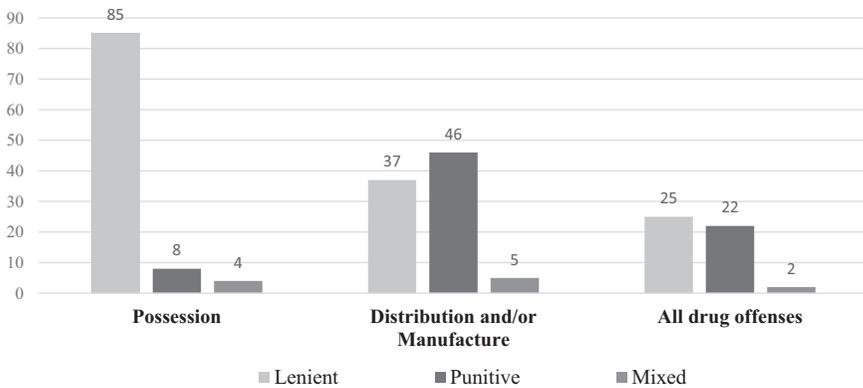


Figure 3. Nature of state drug sentencing policies enacted from 2010 to 2016 by type of drug offense. Source: Authors’ analysis of legislative records taken from the National Council of State Legislatures (NCSL) database regarding Statewide Sentencing and Corrections Legislation.

sentences for distribution and/or manufacture are decidedly more mixed, and tilt toward the punitive end of the spectrum. In short, state legislatures have recently reduced penalties for possession of nearly all types of drugs, but have often intensified penalties for drug distribution.

In addition to these changes to sentencing policy, many states have also tinkered with the rules that govern eligibility for, and the requirements of, participation in court-supervised treatment programs and drug courts in an effort to expand diversion of people arrested for drug possession. More specifically, we identified 34 provisions aimed at expanding drug courts or eligibility to participate in drug court, but only four that restricted eligibility. Similarly, we identified 38 provisions

that modified conditions for courts to enable or require drug treatment or supervision, nine that expanded the circumstances under which judges may elect *not* to revoke court-ordered treatment or probation, and another 13 that did both of these things. Clearly, then, states are attempting to increase diversion options for people arrested on drug possession charges, and to enable judges to keep them in drug court or court-supervised treatment.

In summary, our analysis of recent drug sentencing policies does not provide support for the hypothesis that state lawmakers have adopted a kinder and gentler approach to the opiate-involved specifically. The tendency of state legislatures to group substances according to their perceived seriousness, and reference to these categories in drug legislation, may partially explain why lawmakers did not single out the opiate-involved out for lenient treatment. Yet this pattern cannot fully explain our findings: of the 19 provisions in which opiates were singled out, 18 shifted penalties in a *more* punitive direction.

While we do not find evidence that lawmakers are reducing penalties specifically for opiate violations, the findings do indicate that states are increasingly shifting penalties for drug *possession* for all drugs in a more lenient direction. By contrast, recent laws that alter penalties for *distribution or manufacture* of all types of drugs are more likely to enhance than reduce sentences. Recent shifts in drug sentencing policies thus do not reflect a singular approach to the opiate-involved, but they do reveal significant differences in how state legislators are responding to drug possession versus drug distribution. Insofar as this distinction is arguably racialized (Lassiter, 2015), it is possible that the adoption of even tougher penalties for drug distribution in many states may have important implications for the racial composition of drug prisoners. This possibility, and changes in the number and racial distribution of arrests, is explored below.

Trends in drug arrests

Drug arrest rates rose considerably from 1980 through the mid-2000s and remain high by historical standards (see Figure 4). While the drug sales arrest rate peaked in 1989, the drug possession arrest rate climbed dramatically through 2006 and has fallen only modestly since that time. The total drug arrest rate declined slightly from 2006 through 2013, but ticked back up in recent years and remains comparatively high. While the drug arrest rate is slightly lower than during the peak of the drug war, it does not appear that the drug war has become notably kinder or gentler in recent years when judged by historical standards.

Our analysis of arrest trends indicates that the demographic group that has benefitted most from the modest de-escalation of the drug war that has occurred since the mid-2000s is not whites, but blacks. According to Uniform Crime Report data, 35% of all drug arrests involved black arrestees in 2007; this figure dropped to 27% in 2018. Conversely, the share of drug arrests that involved white suspects rose from 64% in 2007 to 71% in 2018 (see Figure 5). (Because arrest data do not include information about ethnicity, it is conceivable that changes in the Latinx

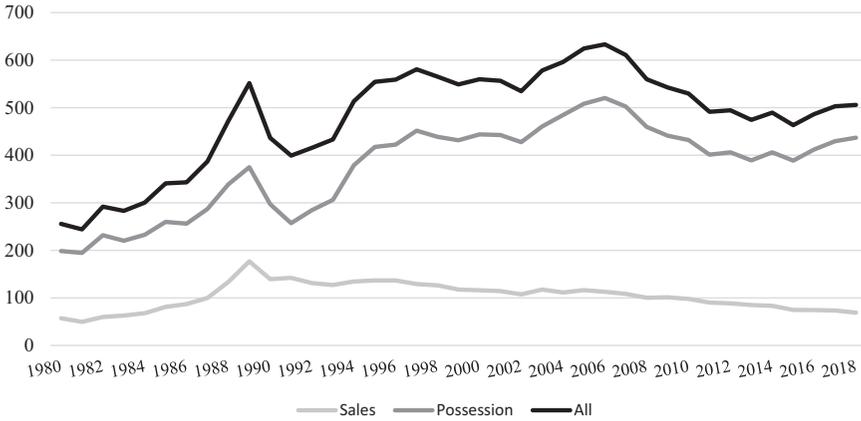


Figure 4. U.S. drug arrest rate by type of drug offense, 1980–2018. Source: Uniform Crime Report data. 1980–2014 figures retrieved through the Bureau of Justice Statistics Arrest Data Analysis Tool (available at <https://www.bjs.gov/index.cfm?ty=datool&url=/arrests/index.cfm#>); data for 2015–2018 were taken from Uniform Crime Reports for each those years (Table 30). The 2016 and 2018 UCR reports did not provide sales and possession arrest rates; these rates were estimated by multiplying the total drug arrest rate by the proportion of drug arrests for each sub-type.

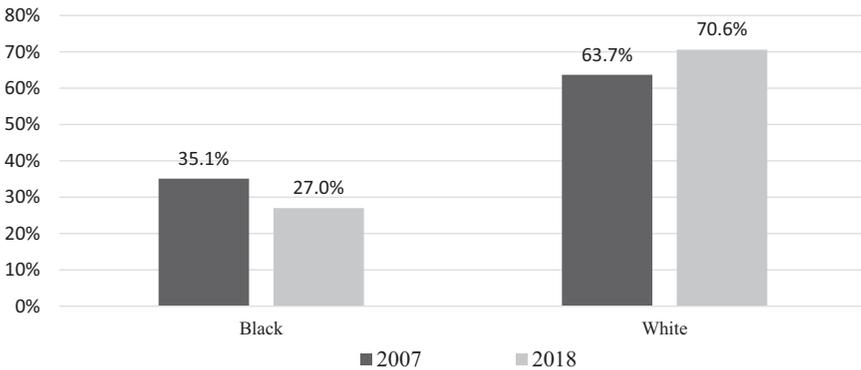


Figure 5. Share of drug arrestees identified as black or white, 2007 versus 2018. Source: Uniform Crime Report data. 2007 figures retrieved through the Bureau of Justice Statistics Arrest Data Analysis Tool (available at <https://www.bjs.gov/index.cfm?ty=datool&url=/arrests/index.cfm#>); 2018 data were taken from Uniform Crime Reports (Table 43).

arrest rate are masking changes in the white arrest rate.) While disproportionality in arrests clearly persists, the share of arrests that involve black people, and the black–white disparity, has declined notably in recent years.

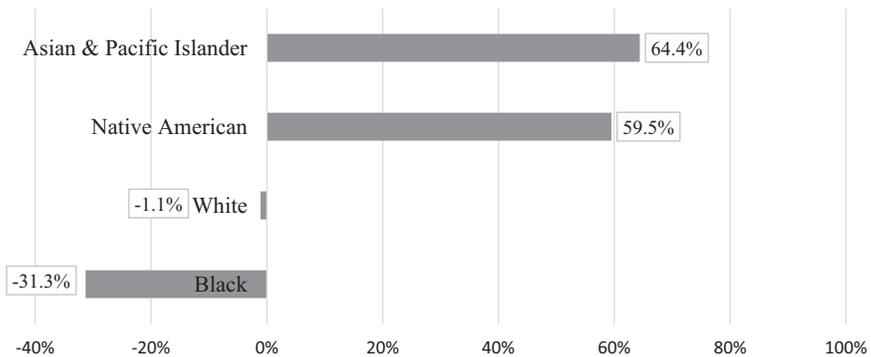


Figure 6. Percent change in number of drug arrests by racial group, 2007–2018. Source: Authors' compilations of data taken from the Uniform Crime Reports 2007–2018.

Figure 6 shows the percent change in the number of drug arrests involving people from various demographic groups. These data indicate that blacks are the only group that has experienced a meaningful decline in drug arrests in recent years. The number of drug arrests involving white people has essentially held constant. The number of drug arrests that involve Asian/Pacific Islanders and Native Americans increased by 64 and 60%, respectively, from 2007 to 2018. Although these proportional increases are quite dramatic, the share of drug arrests that involve people identified as Native American/Alaska Native or API remains quite small. In 2007, .6% of all drug arrests involved Native Americans; by 2018, that figure had increased to 1.1% (compared to roughly 2% of the U.S. population). In 2007, .6% of all drug arrests involved people identified as Asian or Pacific Islander; by 2018 that proportion had grown to 1.1% (compared to roughly 6% of the U.S. population).

In short, while black people remain notably over-represented among drug arrestees relative to the general population, this disparity is smaller today than it has been for some time. Moreover, it appears that blacks are the only demographic group that has meaningfully benefitted from the (modest) decline in drug arrests that has taken place in the past decade.

Data regarding the location in which arrests occurred provide some clues about what might explain this unexpected finding. Specifically, UCR data indicate that the drug arrest rate fell by 25% in all cities and by 55% in cities with populations of 250,000 or more. By contrast, the drug arrest rate increased by 19% in the smallest cities (with populations of 10,000 or fewer) and by 18% in non-metropolitan counties from 2007 to 2018. It thus appears that drug arrests are declining in urban areas but rising in non-urban areas. Insofar as rural America is disproportionately white, and that the black share of the population is much smaller in rural areas than urban ones, this geographic shift may help explain

why blacks rather than whites have been the main beneficiary of the decline in drug arrests that has taken place since the mid-2000s.

Trends in drug-related imprisonment

Imprisonment data tell a similar story, one of modest de-escalation of the drug war, with blacks as the main beneficiary of this trend. First, the data suggest that the decline in the use of state prisons for drug law violations is nontrivial, but does not suggest a comprehensive re-thinking of the drug war. Specifically, the total number of state prisoners serving time for a drug crime fell by 30.5% from 2007 to 2017.

Figure 7 shows that blacks have benefitted most from this decline in the use of prisons for drug law violations. Whereas the number of white and Latinx people in

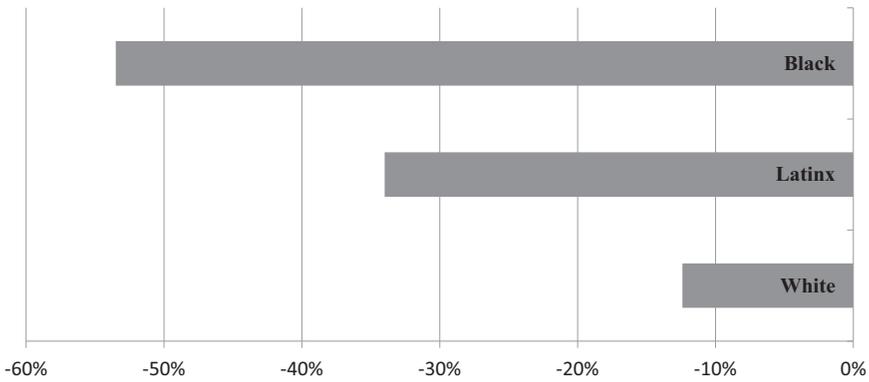


Figure 7. Percent change in state prisoners serving time for a drug offense by race/ethnicity, 2007–2017. Source: Authors’ analysis of data compiled from the Bureau of Justice’s Prisoners Series.

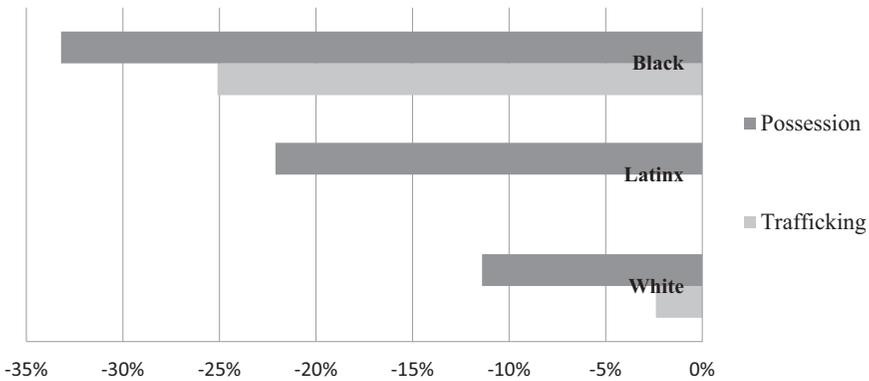


Figure 8. Percent change in state prisoners serving time for drug possession and drug trafficking by race/ethnicity, 2012–2017. Source: Authors’ analysis of data compiled from the Bureau of Justice’s Prisoners Series.

state prison for a drug charge fell by 12.4 and 34%, respectively, the number of black people in state prisons as a result of a drug conviction fell most dramatically – by 53.5% (see Figure 7).

Insofar as the framing of the distinction between people who use and people who sell illicit drugs has historically been highly racialized (Lassiter, 2015), one might suspect that this pattern would not exist when we focus on imprisonment for drug trafficking offenses specifically. Yet here, too, blacks have experienced the largest decline in drug-related imprisonment (see Figure 8). Neither the literature that emphasizes the racialized nature of the framing and response to the (disproportionately white) opioid epidemic, nor the racialized nature of the response to drug selling in particular, can account for this pattern.

Discussion and conclusion

Studies suggest that media imagery surrounding the opiate crisis has shifted in a kinder and gentler direction as a result of the whiteness of the opiate crisis (Lopez, 2016; Netherland and Hansen, 2016; Orsini, 2017; Shaw, 2017; Stone, 2018). Given the centrality of race to U.S. anti-drug campaigns, and the historical association of racialized rhetoric, punitive policy, and racially targeted outcomes, it is reasonable to expect that drug-related enforcement penalties and enforcement would also be laxer in the context of the opiate crisis, and that whites would be the primary beneficiary of these developments.

Surprisingly, the legislative findings presented here cast doubt on both of these suppositions. The shift toward more lenient penalties pertains mostly to people suspected of possessing rather than distributing (all types of) drugs. In fact, the legislative findings suggest that it is not the opiate/non-opiate distinction that animates recent drug reform, but rather the contrast between the comparatively sympathetic figure of the drug user/addict versus those who distribute or manufacture drugs. While user/dealer distinction is thus meaningful to state lawmakers, empirical research shows that there is significant overlap between these groups, as many users serve as brokers or “mules” in order to support their own habit (Casteel, 2018; Hoffer and Alam, 2013).

At first glance, the finding that it is the user/dealer distinction rather than the opiate/non-opiate distinction that animates recent drug sentencing reforms is puzzling. However, recent research on criminal justice reform dynamics provides some clues about what might explain the divergent legislative responses to drug possession versus distribution. Specifically, the “bifurcating” logic that animates contemporary criminal justice reform efforts also appears to explain the legislative findings presented here.

As socio-cultural perspectives on punishment suggest, penal practices are never solely about crime control, but are also inherently expressive and symbolic acts (Durkheim, 1984; Garfinkel, 1956; Goffman, 1956; Mead, 1918). Discussions of crime and punishment are intensely symbolic phenomena; crime-talk generally, and reassertions of the need to punish “real criminals” specifically, are highly

subject to “symbolic politics” (Edelman, 1985). Recent studies confirm that policy-makers who favor reform often feel compelled to reassert the moral boundaries that differentiate beneficiaries of reform from real “predators” and to reassure the public that they remain committed to the idea that these “real criminals” must be aggressively punished (Beckett et al., 2016; Gottschalk, 2015; Seeds, 2016). In this case, the pattern of findings suggests that lawmakers are increasingly differentiating (comparatively sympathetic) drug addicts from the “predators” who provide their drugs in order to justify reform of the laws pertaining to drug possession. This dynamic also helps to explain the widespread embrace of drug homicide laws, a trend that persists even as critics show that most of those prosecuted under those statutes are not drug “kingpins” but family members or friends who shared or consumed drugs with the overdose victim (Beletsky, 2019; Boecker, 2015; LaSalle, 2017; Shuler, 2018).

In terms of arrest and imprisonment, the findings show that drug arrests have declined meaningfully only for blacks, and that drug-related imprisonment has declined more for black people than for any other racial/ethnic groups. Below, we consider two possible explanations for these findings, the second of which we find to be more plausible given the available evidence.

Insofar as the over-representation of blacks in marijuana arrests is well-documented (American Civil Liberties Union, 2013), it seems possible that changes in the legal status of marijuana may help explain why declines in drug arrest and imprisonment have been greatest for blacks. As the data shown in Figure 2 indicate, the majority (51/80) of all drug sentencing reforms that reduce the use of confinement pertain specifically to marijuana. Moreover, parts or most of the marijuana market have been legalized in many states.

Yet there are several reasons to doubt that changes in marijuana law and enforcement account for the fact that the decline in drug imprisonment has been most significant for blacks. First, while changes in the legal status of marijuana could, in theory, help explain the changing racial composition of drug arrests, these changes do not have much explanatory power when it comes to the prison population. Of the approximately 190,000 people serving time in prison as a result of a drug conviction, only one in five (21%) violated marijuana laws specifically, and most of those serving time in prison for a marijuana offense were convicted of distribution rather than possession.⁶ Thus, it does not seem likely that changes in the legal status of marijuana explain the comparatively large decline in drug-related imprisonment for blacks. In addition, while it is true that marijuana arrests have long been characterized by significant racial disparities, recent studies indicate that whites comprise a larger share of those arrested for marijuana than for other drugs. For example, Kennedy et al.’s detailed analysis indicates that 57.7% of all drug arrestees, but 61% of marijuana arrestees, are white (2018, Figure 4).⁷ It therefore seems unlikely that changes in the legal status of marijuana, and especially large declines in marijuana arrests, explain why blacks are the only group that has experienced a dramatic decline in drug arrests.

Recent research on the changing politics surrounding drug reform and the spatial distribution of punishment suggest a more plausible explanation for the especially notable decline in black drug arrests and imprisonment. As awareness of the shortcomings of the war on drugs has grown, the politics around it also shifted. For example, whereas many black leaders and the Congressional Black Caucus initially supported expansion of the drug war (Forman, 2017), most have since recognized the devastation it causes to black families and communities. Now, the racial disparities and the injustices of the drug war are a top priority for the civil rights movement, from the NAACP to Black Lives Matter.

At the same time, a well-funded international drug policy reform movement involving high profile advocates on both the left and right has emerged. While many on the left have long been critical of the drug war and its associated inequities, a growing number of conservatives have become concerned about the fiscal and social costs associated with the drug war and mass incarceration. In this context, a number of conservative organizations such as Right on Crime emerged and began to call attention to the failures of mass incarceration and the drug war in particular (Dagan and Teles, 2016). Over time, numerous drug policy reform organizations, with more resources and more members than ever before, have begun advocating for harm reduction measures and treatment instead of incarceration (Rhodes and Hedrich, 2010; Rogeberg, 2015). The U.S. drug reform advocacy landscape is now comparatively vast and includes diverse organizations such as the Drug Policy Alliance, the American Civil Liberties Union (ACLU), the Marijuana Policy Project, DrugSense, Right on Crime, The Sentencing Project, Students for Sensible Drug Policy, and many more.

Most of these reform organizations are located in urban areas, and some have prioritized election of (comparatively) progressive prosecutors as a means of realizing reform (Miller, 2018). This strategy reflects the fact that the nation's political tensions increasingly map onto the urban/rural divide. Whereas political divisions historically fell along state and regional lines, "The new political divide is a stark division between cities and what remains of the countryside" (Kron, 2012). This split has been growing for some time: an increasing number of America's major cities have voted Democrat each year. For example, only four large cities (Phoenix, Oklahoma City, Fort Worth, and Salt Lake City) voted Republican in the 2012 presidential election; all others – including those located in famously Red states such as Texas – voted Democrat. This pattern was even more pronounced in the 2016 presidential election (Badger et al., 2016). The fact that the vast majority of prosecutors and judges are elected in the United States means that these shifts are likely to impact the ideological orientation of elected officials and influence the degree to which they are willing to embrace drug reform.

In this context, penal trends in urban and non-urban areas are increasingly distinct, as prosecutors and other officials in many urban areas embrace reform while officials in non-urban areas remain committed to penal severity (Beckett and Beach, 2020; see also Keller and Pearce, 2016). As discussed previously, UCR data show that the drug arrest rate has declined considerably in metropolitan areas but

increased outside of them. Recent studies also indicate that jails have expanded far more rapidly in small- and medium-sized counties than in large urban counties; a plurality (44%) of jail inmates are now incarcerated in small counties (Kang-Brown et al., 2018; Subramanian et al., 2015; see also Eason, 2012; Eason et al., 2017; Schept, 2015). And across the country, prison admissions fell in large counties, but rose in small counties, in recent years (Kang-Brown et al., 2018; Keller and Pearce, 2016; see also Eason et al., 2017).

In short, it appears that the embrace of the criminal justice and drug policy reform cause by an increasing number of urban judges and prosecutors – and the apparent rejection of this cause by authorities in suburban and rural areas – is altering the spatial distribution of drug arrests and prison admissions (Beckett and Beach, 2020). This pattern likely helps explain why black people, who are disproportionately concentrated in urban areas (Parker et al., 2018), have been the main beneficiaries of the modest de-escalation of the drug war that has taken place in recent years.

While additional research is needed to ascertain the validity of the tentative explanations we have offered for our surprising findings, several patterns are clear. First, it is not the opiate/non-opiate distinction that animates recent drug sentencing reforms. Instead, state lawmakers are rethinking their approach to drug possession, but not drug distribution. Second, racial disparities in drug law enforcement are shrinking rather than growing in the context of the (disproportionately white) opiate crisis. This counter-intuitive pattern suggests that the connection between media attention, drug sentencing policy, and law enforcement is complex, historically contingent, and mediated by local politics as well as police and prosecutorial practices. The expression of racial dynamics and inequities are thus not immutable, but rather subject to political dynamics and resistance.

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Notes

1. In 2010, 12.2% of the U.S. population, but just 8.2% of people living in rural areas, were identified as black. Conversely, 63.4% of the U.S. population, but 77.8% of rural residents, were identified as non-Hispanic and white (Housing Assistance Council, 2012).
2. Although rates of drug use have historically been highest in metropolitan areas, the overdose death rate in non-metropolitan areas surpassed the rate found in metropolitan counties in 2007 and has remained slightly higher since that time (Mack et al., 2017).
3. In 2016, the federal courts processed 21,387 drug cases (U.S. Sentencing Commission, 2017). By contrast, an estimated 600,000 felony drug cases were adjudicated in state courts in 2016 (Court Statistics Project, 2019).
4. The FBI has generated estimates of the ethnic distribution of drug arrests since 2015, but because these estimates are available only for very recent years they cannot be used to analyze trends over time.

5. According to the most recent data, 86% of the nation's prisoners are confined in state prisons (Sawyer and Wagner, 2019). Among people imprisoned as a result of a drug conviction, 70.1% are held in state as opposed to federal prisons (Sawyer and Wagner, 2019).
6. The number of state and federal prisoners serving time for a drug charge (190,100) is taken from Bronson and Carson (2019, Table 13). According to Mauer (2016), roughly 40,000 people are serving time in state or federal prison for a marijuana offense.
7. This finding is based on an analysis of National Incident-Based Reporting System (NIBRS) arrest data, which cover about 30% of the U.S. population.

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