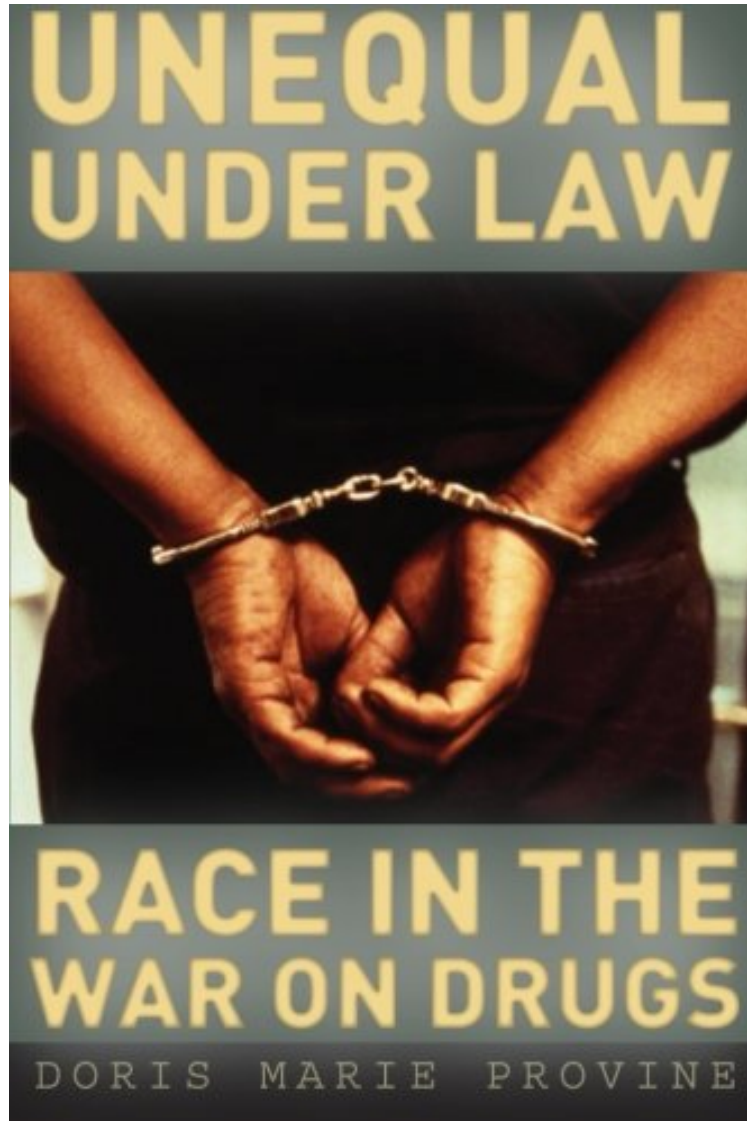


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Unequal under Law: Race in the War on Drugs

Doris Marie Provine

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Doris Marie Provine : Unequal under Law: Race in the War on Drugs before purchasing it in order to gage whether or not it would be worth my time, and all praised Unequal under Law: Race in the War on Drugs:

11 of 11 people found the following review helpful. Race and the drug war By Randall G. Sheldon Race and the Drug War Randall G. Sheldon November 8, 2009 According to the latest national figures, the incarceration rate of racial minorities continues to dwarf the rate for whites. According to the Bureau of Justice Statistics, in June, 2008 the

overall incarceration rate for black males was 4,777 (per 100,000) compared to a rate of only 727 for white males. Black females had an incarceration rate of 349 compared to 93 for white females. The rate for Hispanics fell in between at 1,760 for males and 147 the females. It reminds me of the phrase popular in the 1960s: "If you're white, you're alright; if you're brown, stick around; if you're black, stay back." When it comes to drug offenses, the rate differential is off the charts, with black offenders constituting up to 90% of prison admissions on drug convictions in states such as Illinois, Maryland, South Dakota and Utah (according to a Human Rights Watch study). Also, racial differences in the rate of drug offenders sentenced to prison are huge, with Illinois a prime example (a rate of 1146 for blacks and only 20 for whites). Nationally, the rate for black males for drugs is 482 compared to just 36 for whites. These are figures from the mid-1990s, but the most recent figures continue to show large racial disparities. For instance, a new report by the Sentencing Project (April, 2009) shows that of all the drug offenders currently in prison as of 2005, 43% were black, 32% were Hispanic and 23% were white. In the federal system 82% of all crack cocaine cases in 2006 were black. Another Sentencing Project report noted that "Between 1994 and 2003, the average time served by African Americans for a drug offense increased by 62%, compared with an increase of 17% for white drug offenders." (For more go to the following web site: [...].) As surveys repeatedly show, there are few if any differences in illegal drug usage among the different racial groups. Many scholars have noted that these racial discrepancies have been in evidence for more than 100 years, dating as far back as the crackdown on opium among the Chinese in San Francisco in the late 19th century. It has also been noted that every major piece of anti-drug legislation has targeted drugs used mostly by minorities. In effect the history of the war on drugs shows convincingly that this has been a war on racial and ethnic minorities. The structure of racism is obvious. Yet despite this neither Congress nor the courts are doing anything to correct this disparity. This has been puzzling me for several years now and I have been wondering why this is. I have finally found an answer in what I consider to be one of the best - if not the best - book ever written on the subject of race and the drug war. Doris Marie Provine provides these answers in *Unequal Under Law: Race in the War on Drugs* (University of Chicago Press, 2007). She gets the reader's attention immediately on the first page of the introductory chapter with a case against 18-year-old black male named Edward James Clary in the eastern federal District Court of Missouri. (Clary lived in East St. Louis, a city with perhaps the highest poverty rate in the country, among other glaring problems.) With no prior convictions Clary was arrested for possession of a 16-gram mixture that contained only 4 grams of "crack." The federal sentencing guidelines called for a ten year term in prison. But the judge in this case, Clyde Cahill, challenged these guidelines (based upon research he reviewed on racial disparities) and lowered the sentence to four years. Clary served his sentence, was released and became a married man and a father. The prosecutor, however, was not satisfied and filed an appeal asking the appellate court to reverse the sentence. The court did so and Clary had to return to prison to serve out the rest of the ten years. What Cahill tried to do was rare. Specifically, he looked at racism as a systemic and institutional problem, rather than a problem of individuals who intended to engage in racist or discriminatory behavior. However, in a society characterized by rugged individualism and a laissez faire free market system, problems are rarely seen as structural in origin. The tendency to see racism as a form of individual bias is clear in the Supreme Court's treatment of cases charging racism. The best case in point is the death penalty case of *McCleskey v. Kemp* where the court ruled that, despite overwhelming evidence that race plays a key role in the death penalty, there was no evidence that "any of the decisionmakers in McCleskey's case acted with discriminatory purpose." This line of reasoning says that in order to prove race is a factor you have to prove that there was intent on the part of persons in authority positions (e.g., judges, prosecutors) and that they intentionally singled out for discriminatory treatment the person filing the claim. This is almost impossible to prove. It apparently doesn't matter that the ways the laws are worded and the methods of enforcing these laws disproportionately target racial minorities. The American "free market" system does not recognize this, just as it doesn't recognize the obvious connection between social class, race and a host of life chances. Provine leaves this case for the time being and moves on to a fascinating historical journey that takes us back to the social movement that resulted in the passage of the 18th Amendment prohibiting alcohol. As many scholars have already noted, prohibition and the contemporary drug war are examples of moralistic crusades (the Temperance movement began in 1874 in the South and was organized by Christian evangelicals). But they are more than that, for all of these social movements to outlaw drugs have been racist. I never realized that this applied to Prohibition until I began to read chapter 2 in Provine's book. She begins by noting that alcohol abuse was a concern during the colonial period - but not the alcohol use by whites, for it is well known that the leaders of the American Revolution enjoyed more than a glass of port now and then. Many were described as plain drunkards. What bothered colonists was the use of alcohol by slaves, Indians and "other social inferiors" because they might become "dangerously out of control" (p. 37). The Temperance Movement of the last half of the 19th century gained momentum and this was helped in no small way by concerns among Southerners about the image of the "menacing drunken Negro and his inherent propensity to alcoholic excess" (as noted in a newspaper story). In both the North and the South the use of race "was obvious and fundamental to the entire effort" (p. 38). Native whites expressed much concern about the drinking habits of European immigrants, especially Irish, German and Italian. Provine writes that: "Prohibition served the important purpose of differentiating groups and assigning status. It marked the supremacy of small-town and rural middle class, white Protestant morality over the norms of the

foreign-born, the Catholics, the Jews, and the Blacks....Most important, these groups threatened the old order by their growing numbers and their growing economic significance in industrial society" (p. 45). In the South the image of the drunken black man who felt "secret lust" for white women was the big rallying cry. Over and over again, the news media reported exaggerated claims of drunken black men attacking white women. After the Civil War there was a movement to promote segregation and to disenfranchise Black voters, aided by increasing prosecutions and convictions against them for alcohol consumption. Ironically, after the passage of the 18th Amendment, in many Southern states arrests for whites on charges of drunkenness and possession of alcohol were so high that support for prohibition began to decline (in Alabama about half of those arrested were white middle class women). At the conclusion of this chapter Provine demonstrates some rather obvious connections between race during both Prohibition and the more recent movement directed against the use of crack cocaine and other drugs. "The underlying messages of both campaigns are remarkably similar in suggesting that already marginalized groups are extremely dangerous under the influence of drugs. Then, as now, the mainstream press uncritically amplified these ideas, even when disenfranchisement of Black citizens was clearly at stake" (p. 61). It is also important to note that the enforcement of Prohibition laws was directed mostly at the poor, while most of the wealthy were ignored, even those who benefited from the business of bootlegging. I recall reading somewhere a story about the time that New York legislators passed anti-alcohol legislation during the day and celebrated that same night by drinking whiskey, a favorite drink among the wealthy. (I am still searching for a source on this story.) The title of chapter 3 pretty much summarizes the contents: "Negro Cocaine Fiends, Mexican Marijuana Smokers, and Chinese Opium Addicts." In this chapter the author covers familiar historical ground that has been reported before by such scholars as David Musto (American Disease) and David Helmer (Drugs and Minority Oppression), among others. The nice thing about this chapter, however, is that in just a few pages she shows the role of the media (and how it is so easily manipulated by moral crusaders and government officials) and racism in the transformation of drug use and addiction from a white middle class problem (e.g., cocaine and heroin were sold over the counter and used extensively by privileged whites and the 1897 Sears catalog sold hypodermic kits for users of morphine) to a problem exclusively of the lower class and racial minorities. She notes that demographic changes in America contributed to a new population of users, some becoming addicted to drugs. These users included immigrant workers, young people who were moving into the cities for the first time, and the unemployed who began to use marijuana, cocaine and heroin as they were more readily available during the years of Prohibition. Opium use by the Chinese (the "yellow peril"), cocaine use by Blacks, and the use of marijuana by Mexicans, all led to exaggerated media accounts (e.g., the use of marijuana gave Blacks "superhuman strength" and a "lust for blood") and the increased role of the federal government to stamp out drug use. A turning point came in the 1930s with the rise of Harry Anslinger and the Bureau of Narcotic Drugs and the infamous film "Reefer Madness." Next came the most recent episode of the "war on drugs" begun at first by Richard Nixon (who ironically supported methadone maintenance and other preventive efforts) but who went on to initiate an all-out war against the Black population during the 1980s. This is the subject of chapters 4 and 5 where Provine focuses on the role of race and racism and the increasing use of "race-neutral language" that effectively camouflaged what was really going on. In these two chapters she carefully reviews the background to the legislation that ended up with hugely different penalties for crack and powder cocaine. Although everyone at the time knew what class and race used which of these drugs, no one in Congress seemed to object to drastically different penalties. The result was the most draconian laws ever passed in this country. (The infamous Rockefeller Laws in New York illustrates such legislation even better.) The Sentencing Commission did recognize the matter of race as it admitted in its 1995 report that "we have, we think, unintentionally developed the anomaly of punishing the poor and minorities more severely under the guise of trying to protect them." P. 131). However, at the same time, the Commission stated that there was no evidence that they "acted with any discriminatory intent." Yet, as many scholars have observed, they were warned by experts that the result of such harsh laws would be the filling of the prisons and the targeting of racial minorities. (See Michael Tonry, Malign Neglect and Dan Baum, Smoke and Mirrors, for a discussion of this issue). The result, told many times since then, was the filling of the prisons and jails with mostly Black and Hispanic men and increasing numbers of women (the increase in women going to prison has been much greater than for men). This fact is fully documented by Provine with some chilling charts and graphs. In the final chapter she returns to the case of Edward James Clary and how the courts have dealt with the issue of race. She begins by referencing a case in Minnesota (State v. Russell, 477 N. W. 2d 886, Minn. 1991) where the state supreme court ruled that the more severe penalties in crack cases violated that state's constitution. In this ruling it was noted that in the trial court that 97% of those convicted for possession of crack cocaine were black, while 80% of those convicted for powder cocaine were white. They upheld the trial court's decision that there was no real distinction between these two forms of cocaine. Despite this fact, the U.S. Supreme Court didn't even rule on the case. Provine writes: "The fact that a sentencing law disproportionately affects a traditionally disadvantaged group is, by itself, irrelevant under the now-prevailing interpretation of the federal constitution" (p. 140). This is amazing and leads me back to my original question concerning why such an interpretation can possibly be made. How can educated people like members of the Supreme Court and the U.S. Congress not clearly see this and act to correct the problem? Provine notes that "the current legal approach gives those

who charge racism the near-impossible burden of proving intentional discrimination, while courts avoid coming to grips with the operation of the system as a whole" (p. 142). This reminds me of a statement made by Justice Powell in the afore-mentioned McCleskey case who stated that such evidence (referring to race and the application of the death penalty) "throws into serious question the principles that underlie our entire criminal justice system...if we accepted McCleskey's claim that racial bias impermissibly tainted the capital sentencing decision, we would soon be faced with similar claims as to other types of penalty" (quoted in Randall Kennedy, *Race, Crime and the Law*, p. 336). Provine notes that constitutional challenges of the crack legislation have focused on three areas: they violate the 8th Amendment's prohibition of cruel and unusual punishment; the sentencing standards are in violation of due process standards because they are unconstitutionally vague; the 100:1 disparity violates the 14th Amendment's "equal protection" requirement. The federal courts have rejected all of these arguments. The Supreme Court has made it perfectly clear that there must be evidence of the intent to discriminate on the part of decision makers, such as prosecutors. Yet Justice Byron White commented in one case that although "an invidious discriminatory purpose may often be inferred from the totality of the relevant fact, if it is true, that the law bears more heavily on one race than another...we have not held that a law...is invalid under the Equal Protection Clause simply because it may affect a greater proportion of one race than another. Disproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination forbidden by the Constitution" (p. 156). Justice White, obviously a very educated man, seems to admit discrimination can be inferred if a law impacts "more heavily on one race" yet cannot seem to follow his own logic. Why? How can he be so contradictory in the same statement? The answer, says Provine, comes from the field of cognitive psychology. Research in this area has found that our unconscious expectations (including stereotypes) influence perception and perception is not something that is passive for it is highly selective in our attempts to make sense of the world around us. We rely on "cues" from "preexisting frameworks" or "schemas." (The work of George Lakoff and his discussion of "frames" comes to mind here. See his book *Moral Politics*, University of Chicago Press, 1996.) These schemas are often associated with race and they are, in effect, stereotypes. But we are not usually consciously aware of our own racism. Some have called his phenomenon aversive racism which is held by many white Americans who have negative stereotypes of certain minorities which in turn produces fear and uncertainty during interracial encounters. One common error in our judgments is known as "the fundamental attribution error," which is a tendency to attribute another person's behavior to their own individual character rather than social situation in which they find themselves. Thus, instead of recognizing that there are forces outside of the individual that produce a certain behavior, people instead view that behavior as "freely chosen." We rarely say "there but for the grace of God (or social circumstances) go I." We often assume that everyone else sees the world exactly like we do, which cognitive psychology calls "false consensus effect." Thus, when someone behaves in a certain way within a particular situation and that way is not something we would choose, we think "I would never do that in that situation." Provine argues that there is a "fundamental conflict with the legal approach to discrimination." She expresses it thusly: "The racism that law treats as exceptional, psychology considers mundane. Law looks to motives to discriminate, while psychology postulates that the architecture of our thinking predisposes us to racism and other forms of stereotyping by group. Were judges to acknowledge in their decisions what psychologists have established in their experiments, what would discrimination law look like?" (p. 158). I am reminded of something Elliott Currie said nearly twenty five years ago (*Confronting Crime*, 1985) when he referred to the "fallacy of autonomy," or the idea that people act totally on their own, without the influence of others and totally unaffected by their surrounding culture and social institutions. Karl Marx once commented that people do not make history just as they please, "they do not make it under circumstances chosen by themselves, but under circumstances directly encountered, given and transmitted from the past. The tradition of all the dead generations weighs like a nightmare on the brain of the living" (*The 18th Brumaire of Louis Bonaparte*, 1852). We are all products of our life experiences and environmental exposures. We all have a particular "world view" and for many of us this determines how we view people and problems, even when such views run counter to existing evidence. It seems that Congress and the courts are locked into a "world view" that fails to see race as an important factor.

1 of 1 people found the following review helpful. An excellent in depth look at race and the "war on drugs." By Old Tim This is an outstanding scholarly discussion of the racial implications of the "war on drugs" that extends to other areas of American society. This book provides what is sorely lacking in discussions of critical issues, namely context and depth. I highly recommend this book.

0 of 0 people found the following review helpful. Okay, but largely outdated By Worddancer Redux Okay....though much of it is now outdated, given changes in the law re: sentencing for crack and for powder cocaine.

Race is clearly a factor in government efforts to control dangerous drugs, but the precise ways that race affects drug laws remain difficult to pinpoint. *Unequal under Law* lays out how decades of both manifest and latent racism helped shape a punitive U.S. drug policy whose onerous impact on racial minorities has been willfully ignored by Congress and the courts. Doris Marie Provines engaging analysis traces the history of race in anti-drug efforts from the temperance movement of the early 1900s to the crack scare of the late twentieth century, showing how campaigns to criminalize drug use have always conjured images of feared minorities.

Explaining how alarm over a threatening black drug trade fueled support in the 1980s for a mandatory minimum sentencing scheme of unprecedented severity, Provine contends that while our drug laws may no longer be racist by design, they remain racist in design. Moreover, their racial origins have long been ignored by every branch of government. This dangerous denial threatens our constitutional guarantee of equal protection of law and mutes a much-needed national discussion about institutionalized racism that Unequal under Law promises to initiate.

Unequal under Law goes beyond conventional analyses of the War on Drugs and probes into the historical antecedents of current policy. The picture that emerges is one in which racial dynamics have always pervaded drug policy, from the criminalization of opium in the nineteenth century to Prohibition to the indefensible crack cocaine penalties of today. Only by understanding these basic functions can we assess the true implications of current drug policy and develop more constructive policy responses. Marc Mauer, executive director, The Sentencing Project