



# OPEN **BUFFALO**

ALARMING DISPARITIES:

The Disproportionate Number of African American  
and Hispanic People in Erie County Criminal  
Justice System

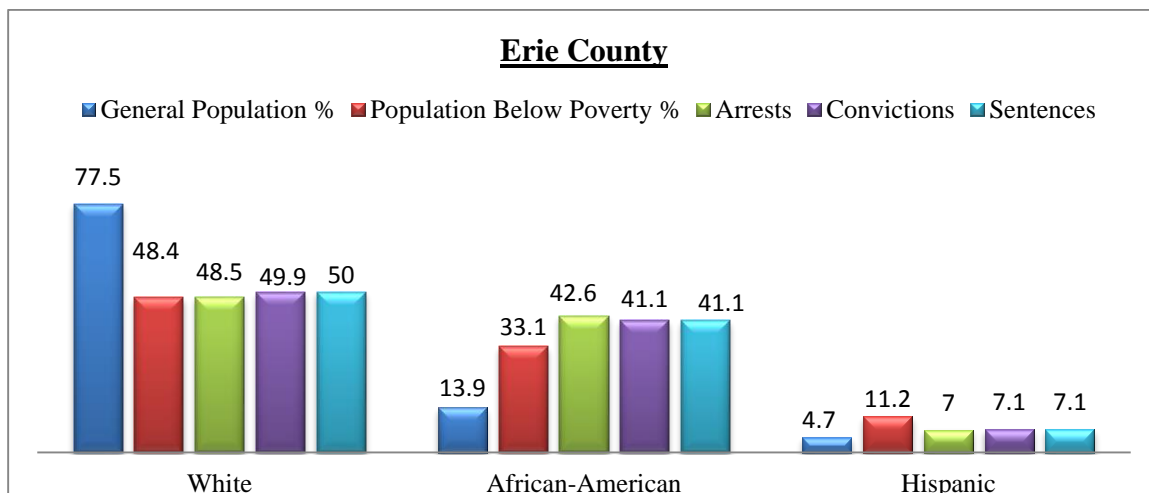
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An Open Buffalo Report

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Prepared by the Partnership for the Public Good

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Sources: U.S. Census Bureau, 2007-2011 American Community Survey; NYS Division of Criminal Justice Services, 2007-2011

## EXECUTIVE SUMMARY

This study on the disproportionate number of African-American and Hispanic people in the Erie County criminal justice system reveals four findings for further analysis.

- Representation of the African-American and Hispanic populations is disproportionately high in each stage of the criminal justice process, from arrest through sentencing. The disparities grow worse at each stage of the process.
- Violent felonies and drug felonies yield the greatest racial disparities.
- The higher poverty levels of African-Americans and Hispanics do not fully explain the disparities. Research suggests that residential segregation, implicit racial biases, and the disparate impact of various laws, policies, and practices, particularly those associated with the “War on Drugs,” play a role, especially for African-Americans.
- There are many feasible ways to change laws, policies and practices to reduce racial disparities.

## INTRODUCTION

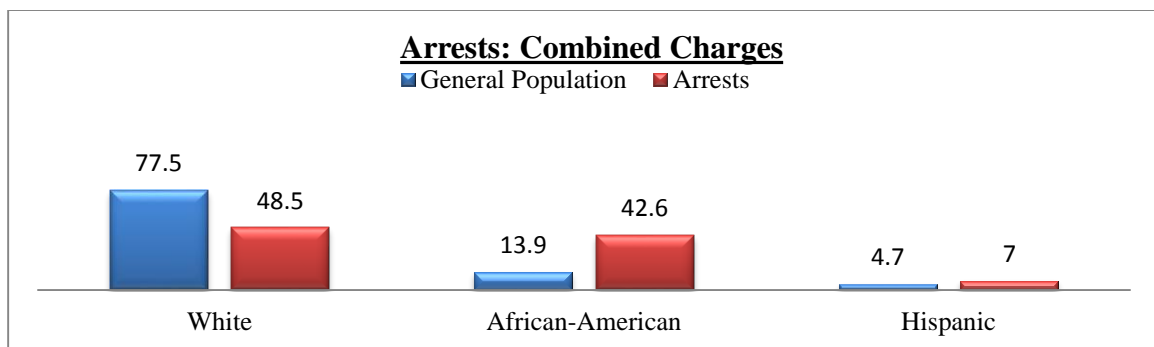
The following report analyzes the percentages of white, African-American, and Hispanic, populations at arrest, conviction, and sentencing in Erie County, compared to the percentages of each group in the general population. The charges reviewed include felony, violent felony, drug felony, and misdemeanors. Percentages reported were determined using New York State Division of Criminal Justice Services data from 2007-2011.<sup>1</sup>

There are a disproportionate number of African-Americans and Hispanics in the Erie County criminal justice system, from arrest to sentencing. Representation of the African-American population is three times greater than the general population, and for Hispanics it is two times greater.<sup>2</sup> For violent and drug felonies the disparities are even more extreme. The chart on page one compares the population living in poverty to the people at each stage of the criminal justice process, revealing that more than poverty is at work in creating the disproportion. While the percentage of whites in the criminal justice system corresponds quite closely to the percentage of whites in poverty, the portion of African-Americans in the criminal justice system is higher, and the portion of Hispanics is lower, than the portion in poverty.

## FINDINGS

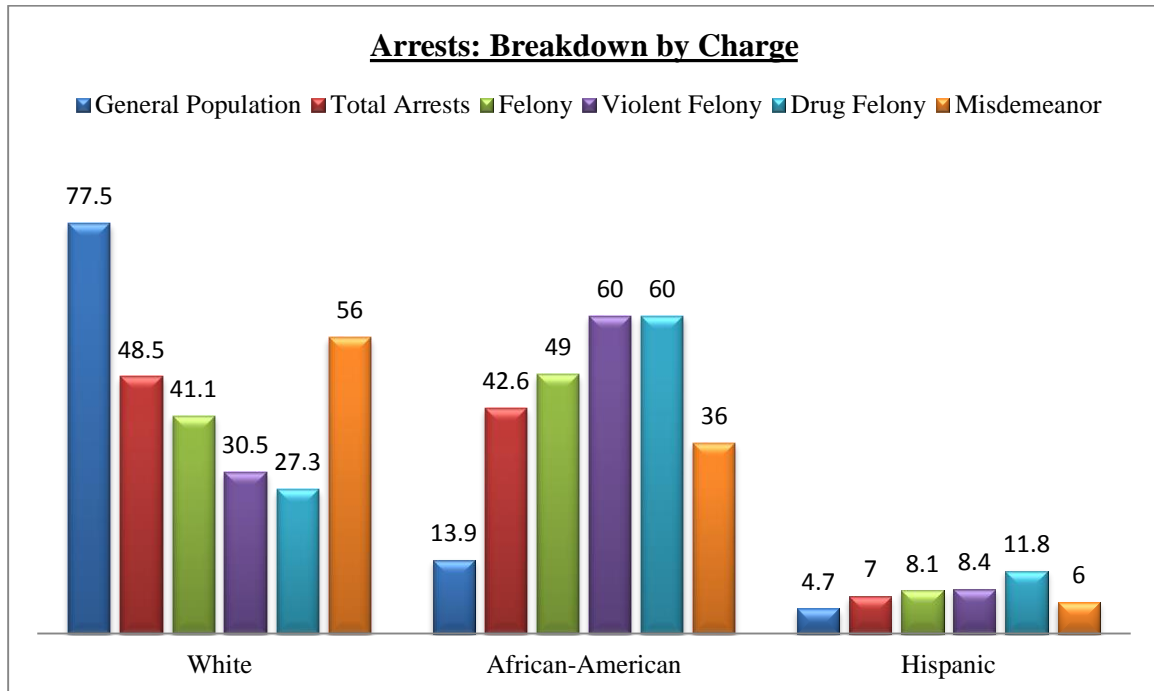
The following findings review Erie County data for juvenile and adult offenders at arrest, conviction, and sentencing from 2007-2011. The charges assessed include felony, violent felony, drug felony, and misdemeanor.

### Arrest Data



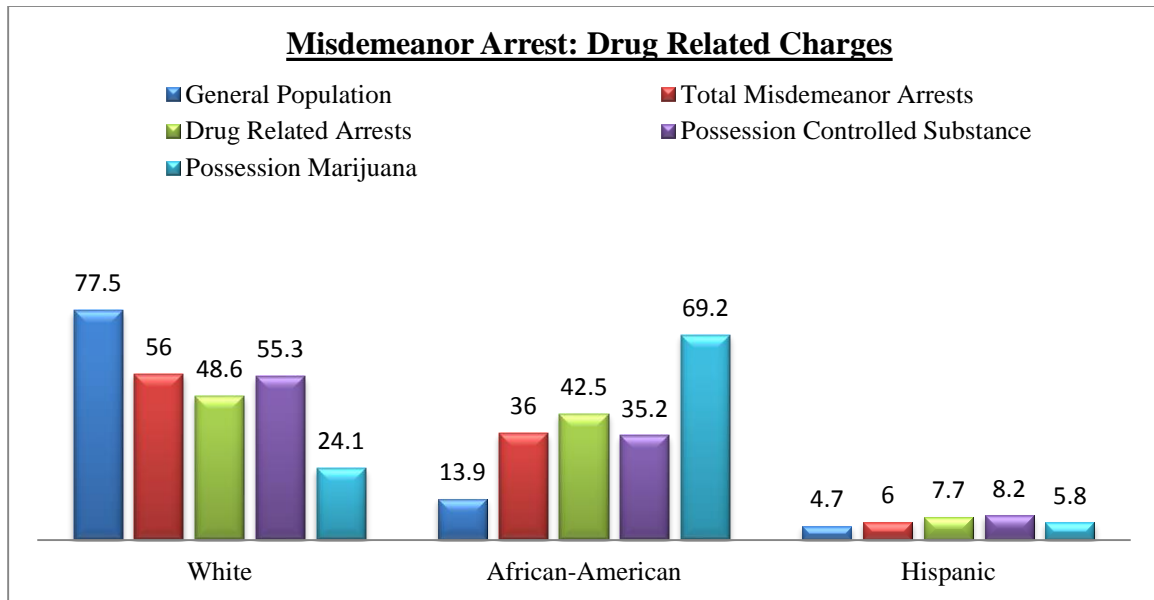
Source: NYS Division of Criminal Justice Services, 2007-2011

- Whites account for 77.5% of the population, but only 48.5% of the arrests, whereas African-Americans account for 13.9% of the population but 42.6% of the arrests, and Hispanics 4.7% of the population but 7% of the arrests.



Source: NYS Division of Criminal Justice Services, 2007-2011

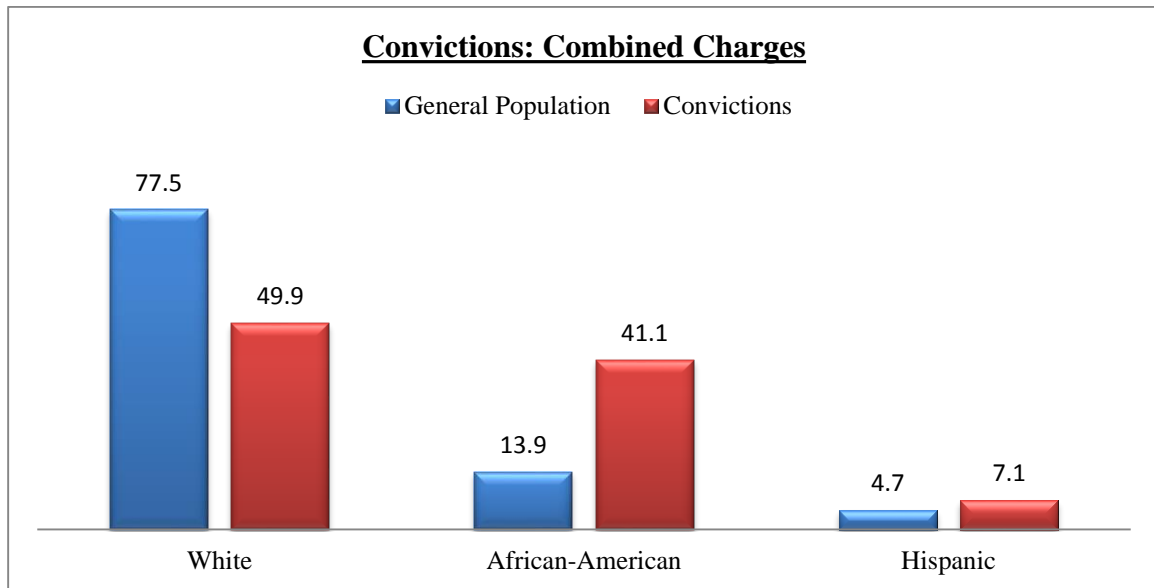
- A felony is an offense for which a sentence to a term of imprisonment in excess of one year may be imposed.
- A misdemeanor is an offense, other than traffic infraction, for which a sentence of imprisonment in excess of 15 days may be imposed, but for which a sentence to a term of imprisonment in excess of one year cannot be imposed.
- African-Americans account for 13.9% of the population but 60% of the violent felony and drug felony arrests; Hispanics account for 4.7% of the population but 8.4% of the violent felony and 11.8% of the drug felony arrests.



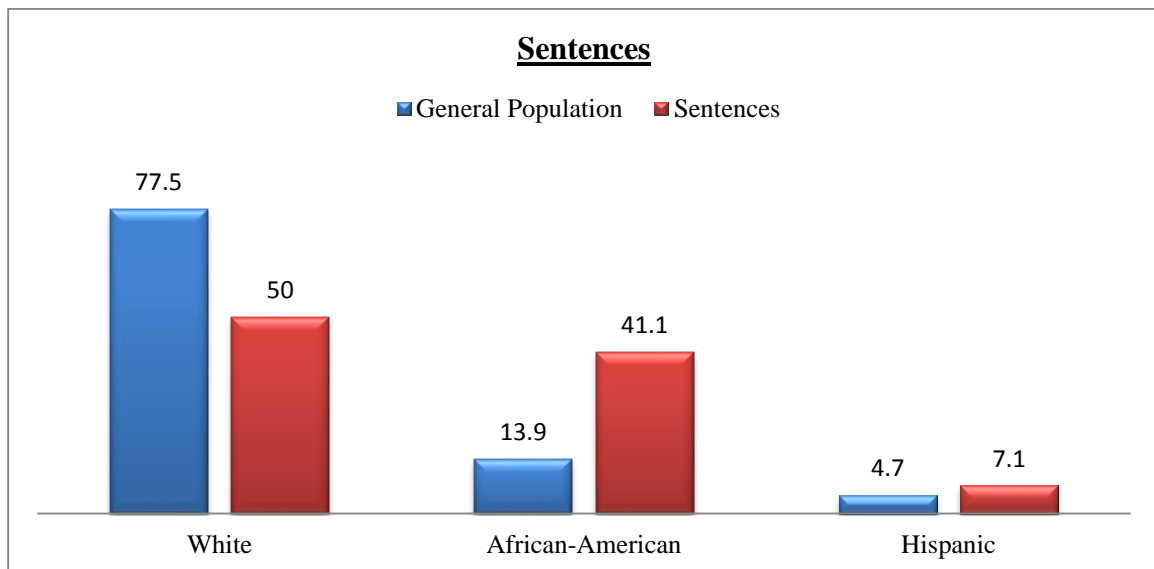
Source: NYS Division of Criminal Justice Services, 2007-2011

- 95% of drug related arrest charges in Erie County are for
  - Criminal Possession of controlled substance (74.5%)
  - Marijuana possession (20.7%)
- African-Americans account for 69.2% of marijuana arrests in Erie County.
- Recent research by the ACLU and NYCLU reveals the following:
  - On a national level, arrests for marijuana possession have increased over the last decade, but white arrests have remained constant and African-American arrests have increased.<sup>3</sup> Nationally, drug arrests decreased between 2006-2010; however, this was not the case for marijuana arrests, which continued to rise.<sup>4</sup>
  - In 2010, New York State was the jurisdiction with the second highest national rate of marijuana possession arrests (next to DC).<sup>5</sup>
  - Of large counties in the United States (those that have populations of 200,000 or greater), Erie County had the eighth largest percent increase in marijuana possession arrests between 2001-2010.<sup>6</sup>
  - Erie County was one of the 25 counties in the United States with the highest number of African-American arrests for marijuana possession in 2010.<sup>7</sup>

## Conviction and Sentencing Data

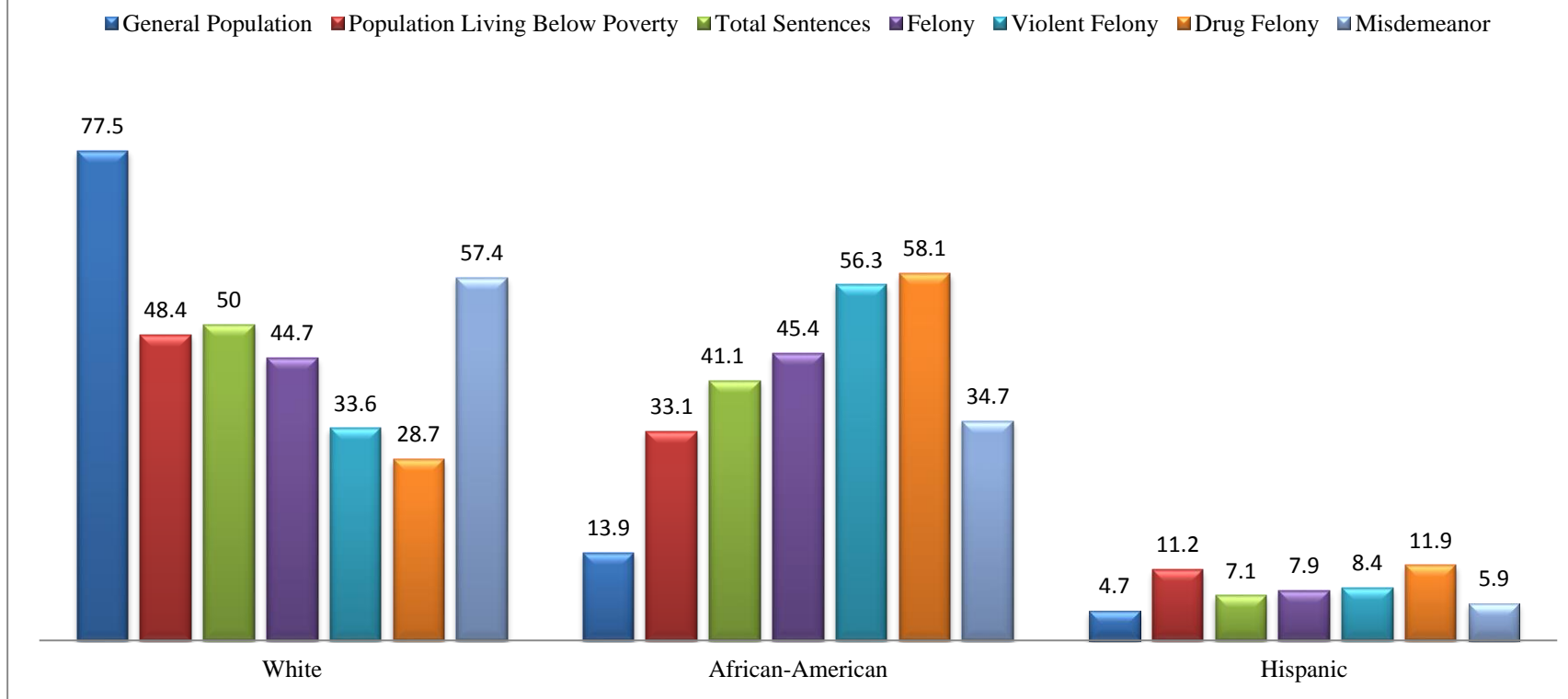


Source: NYS Division of Criminal Justice Services, 2007-2011



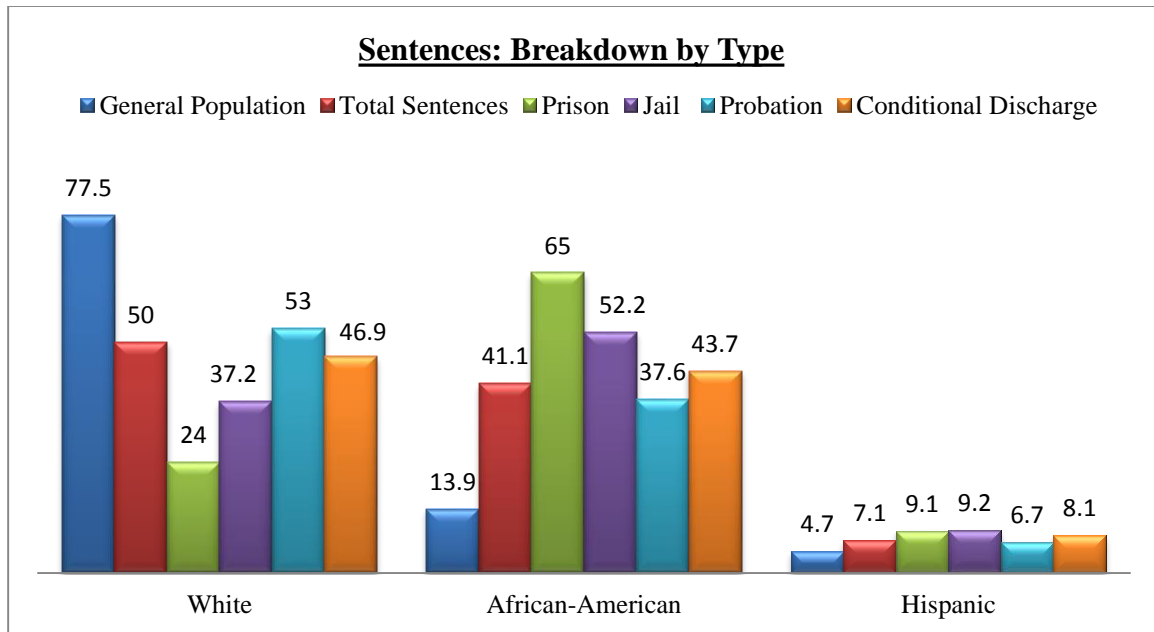
Source: NYS Division of Criminal Justice Services, 2007-2011

### Sentences: Breakdown by Charge



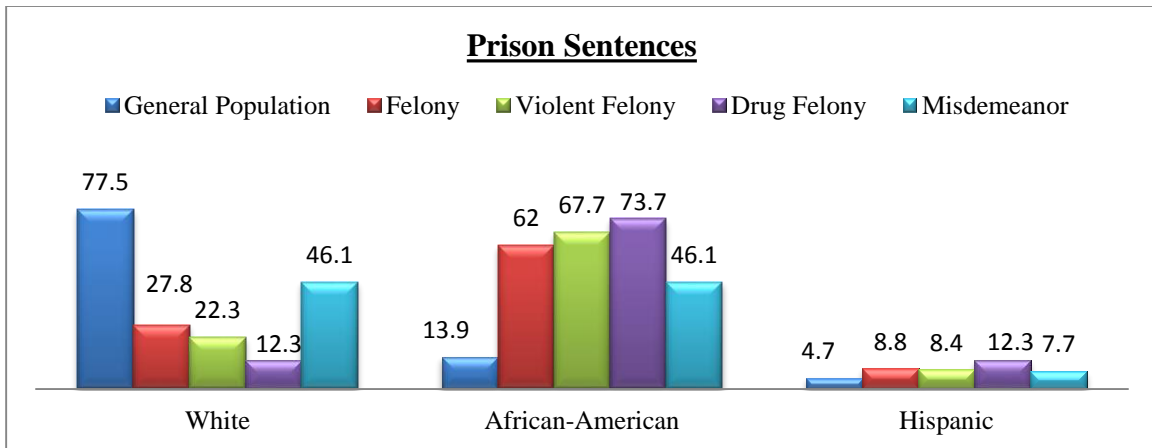
Source: NYS Division of Criminal Justice Services, 2007-2011





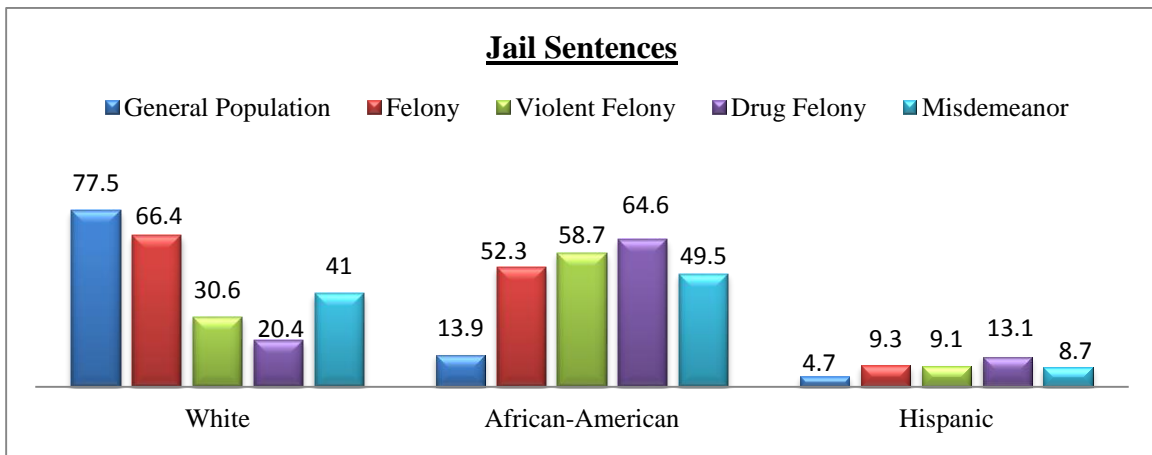
Source: NYS Division of Criminal Justice Services, 2007-2011

- **Definitions:**
  - Prisons are state or federally operated facilities that house those convicted and sentenced for greater crimes.
  - Jail is a county operated facility that typically holds offenders sentenced to crimes punishable for a sentence under one year.
  - Probation is a sentence to oversight by the criminal justice system, but outside of a facility. This is a lesser sentence than jail or prison.
  - Conditional Discharge refers to waiver of penalty on the condition that the offender does not commit some other violation. If this condition is broken, the full penalty may be reinstated.
  
- African-Americans receive harsher sentences than whites. The portion of whites in prison is 26% lower than the percentage of whites sentenced, whereas the portion of African-Americans in prison is 23.9% greater than African-Americans sentenced. Sentencing to jail is similarly disproportionate. In other words, once the sentencing stage is reached, whites are more likely to get the lesser sentences of conditional discharge or probation, whereas African-Americans are more likely to receive prison or jail time.



Source: NYS Division of Criminal Justice Services, 2007-2011

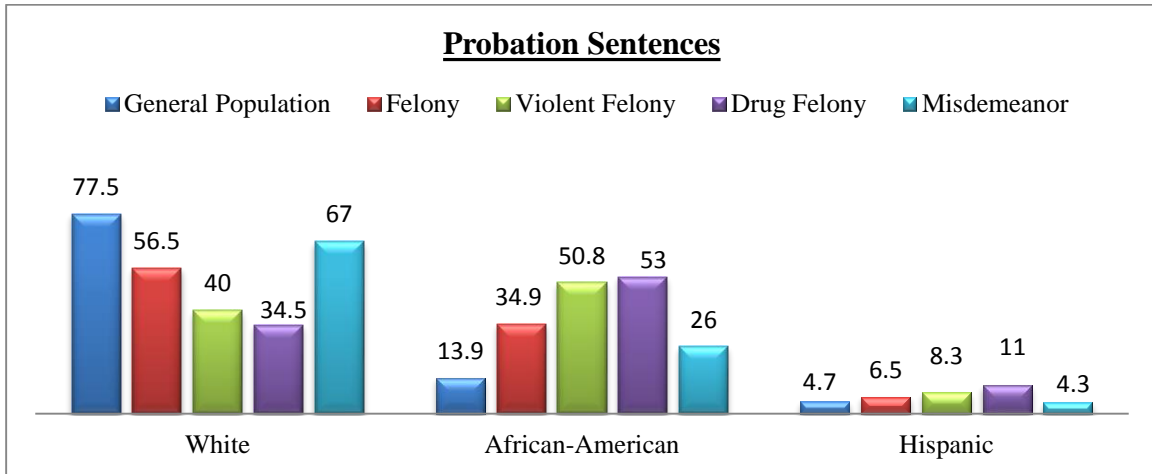
- African-Americans represent 49% of the population arrested for felonies, but 62% of the population sentenced to prison for felonies. Similarly, Hispanics are 8.1% of those arrested for felonies, but 8.8% of those sentenced to prison. By contrast, whites represent 41.1% of those arrested for felonies, but only 27.8% of those sentenced to prison for felonies.
- Whites represent 27.3% of those arrested for drug felonies, but only 12.3% of those sentenced to prison for drug felonies.



Source: NYS Division of Criminal Justice Services, 2007-2011

- African-Americans represent 36% of those arrested for misdemeanors, but 49.5% of those sentenced to jail for misdemeanors. Similarly, Hispanics are 6% of those arrested for misdemeanors, but 8.7% of

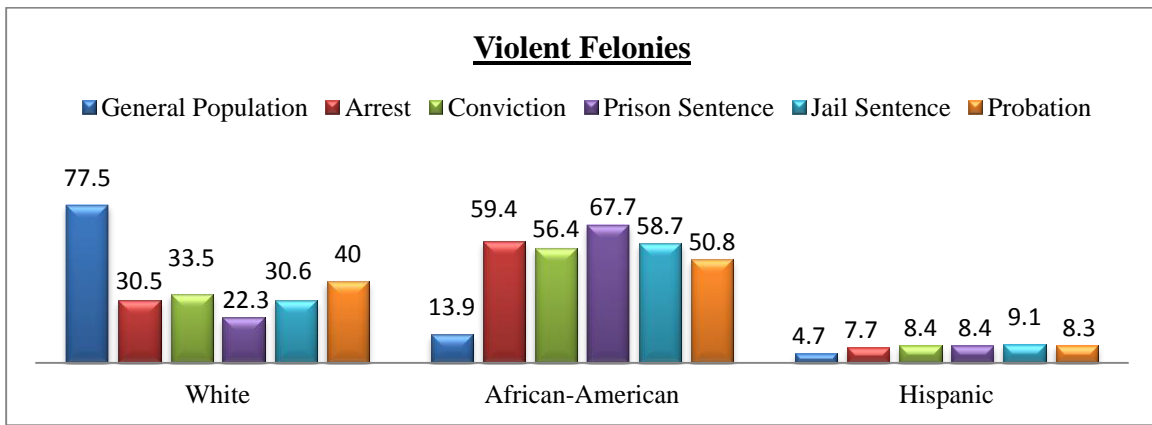
those sentenced to jail. Whites, by contrast, represent 56% of those arrested for misdemeanors, but only 41% of those sentenced to jail.



Source: NYS Division of Criminal Justice Services, 2007-2011

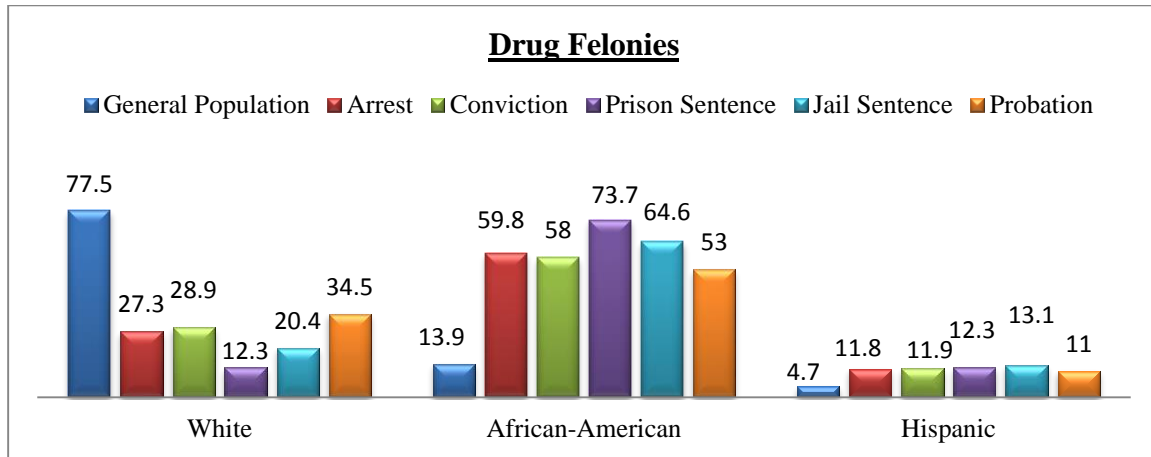
- African-Americans represent 36% of those arrested for misdemeanors, but only 26% of those who receive probation. Similarly, Hispanics are 6% of those arrested for misdemeanors, but only 4.3% of those who get probation. By contrast, whites are 56% of those arrested, but 67% of those who get probation.

### Sentencing Disparity in Violent Felony and Drug Felony Charges



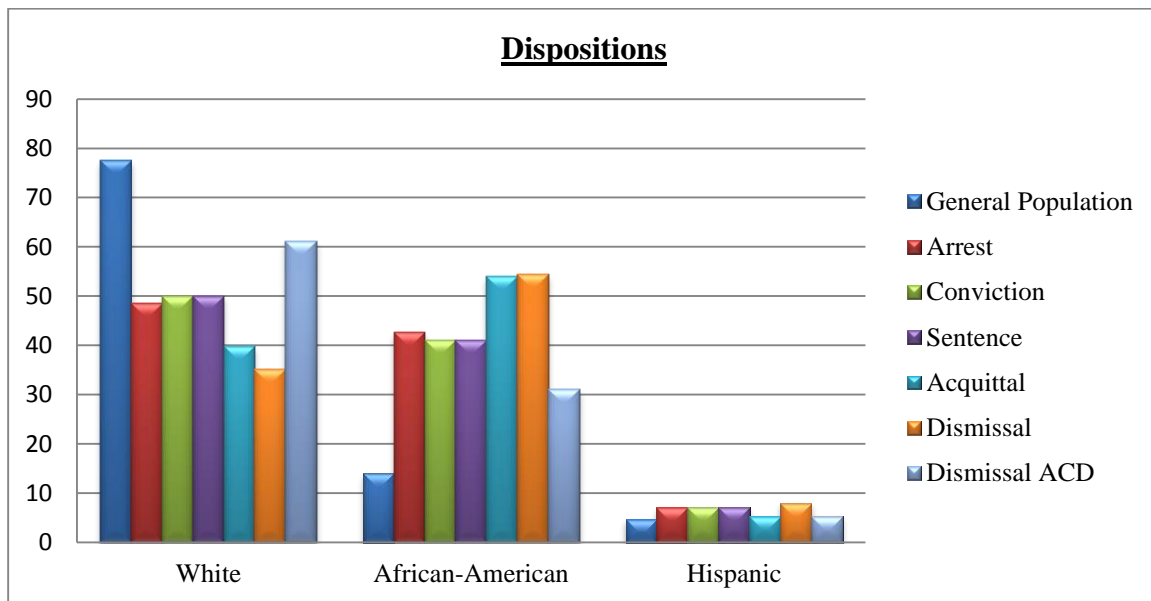
Source: NYS Division of Criminal Justice Services, 2007-2011

- Whites are 30.5% of those arrested for violent felonies, but only 22.3% of those sent to prison. African-Americans are 60% of those arrested, but 67.7% of those sent to prison.



Source: NYS Division of Criminal Justice Services, 2007-2011

- The particularly large disparities in sentencing for drug felonies may stem in part from conscious or unconscious bias of decision makers at the sentencing stage. Research has shown that whites associate African-Americans and Hispanics with illegal drugs, despite the fact that shows drug use is very similar across races – 14% among African-Americans and 12% among whites in 2010.<sup>8</sup>



Source: NYS Division of Criminal Justice Services, 2007-2011

- Definitions:<sup>9</sup>
  - Acquittal refers to the determination by a court that the accused did not commit the crime arrested for.
  - Dismissal refers to the termination of the court proceeding by a judge, prior to a verdict being reached.
  - Dismissal ACD is an Adjournment in Contemplation of Dismissal, which refers to a settlement with the court for the case to be temporarily adjourned and potentially dismissed pending behavior of the accused.

Whites are 48.5% of those arrested, but over 60% of those who receive ACDs. African-Americans, by contrast, are 42.6% of those arrested but receive only 30% of the ACD

## DISCUSSION

The expansion of the criminal justice system over the last three decades has been explosive. By 2008, 2.3 million Americans lived in prisons and another 5.1 million were on probation or parole.<sup>10</sup> Two-thirds the increase in the federal prisons and half the increase in the state prisons between 1985 to 2000 came from drug offenses.<sup>11</sup> Three-fourths of those put in prison for drug offenses have been African-American or Hispanic.<sup>12</sup>

This report was inspired by Michelle Alexander’s book, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness*.<sup>13</sup> Alexander’s book describes how American society moved from overt discrimination in law, policy, and various community systems toward our current acceptance of the concept of colorblindness as a goal. She suggests that through numerous influential Supreme Court cases, certain law enforcement policies, and the power granted to prosecution in the pre-trial process, American society has created a “new Jim Crow” with policies that are seemingly colorblind and yet result in the incarceration of people of color in extraordinary percentages. Alexander and others have identified some of the causes of disproportionate representation by race in the criminal justice system. Noted below are a few examples, not meant to provide authoritative conclusions but to spark further conversation.

One approach to these problems is to address the causes of concentrated, racialized poverty. Though the poverty rate for the Buffalo metro area (13.6%) is lower than the national average (15.1%), Buffalo suffers from an unusually sharp concentration of poverty in the city.<sup>14</sup> In 2010, about 30% of the city of Buffalo’s population had incomes below the poverty line compared to about 8% of the population living outside the city.<sup>15</sup> Poverty within city limits is especially high for African Americans (37.2%) and Hispanics (51.7%).



In the Buffalo metro area, 81.2% of African Americans live in high poverty neighborhoods, whereas 10.6% of whites live in high poverty neighborhoods.<sup>16</sup> Solutions to addressing concentrated, racialized poverty include general poverty fighting measures such as minimum and living wage laws and improved work supports such as child care assistance, along with investments in the urban core and efforts to end housing discrimination.

Another approach is to develop more varied and holistic responses to crime. A good example of a policy that can help to reduce negative impacts is Restorative Justice. The Restorative Justice model joins law enforcement, community, victim, and offender together to process the impact of the criminal act and come up with a solution as a whole community that is often a more effective and satisfying resolution than jail or prison time for the offender.<sup>17</sup>

Other approaches deal with the disparate impacts of various laws, policies, and practices. The War on Drugs has resulted in an increase in the jail and prison populations with policies such as School Zone Drug laws, three strikes laws, and mandatory minimum sentencing. School Zone Drug Laws aim to prevent sale of drugs to school-aged children through higher penalties for drug sales near a school.<sup>18</sup> Because populations are denser in cities, and people of color are more likely than whites to live in cities, people of color are more likely to live within school zones and thus to receive higher penalties for similar offenses.<sup>19</sup> Three strikes policies, which sentence three time felony offenders to life without parole, and mandatory minimum sentencing (often for drug offenses) are again facially neutral but have a disparate impact on people of color, given, among other things, the greater police presence in the denser, more impoverished neighborhoods where people of color more often live.<sup>20</sup>

Entry into the criminal justice system begins with an arrest for a reported, observed, or suspected criminal act. Once a suspect has been arrested, the prosecutor determines if charges will be filed; a bail or detention hearing is held by a judge; an arraignment process follows (the accused is informed of charges and enters a plea); next comes plea bargaining or a trial; and then finally conviction and sentencing.<sup>21</sup> Sentences of less than one year are typically served in jail, whereas longer sentences are served in prison.<sup>22</sup> Each of these stages includes racially disparate impacts.

**Law Enforcement.** Entry into the system and disparate treatment begins with law enforcement. The popular Broken Windows theory of policing has added to disparities. This theory is based on the belief that actual disorder stems from the appearance of disorder; it suggests an organized approach to low level criminal activity to prevent escalated crime.<sup>23</sup> This theory is used by local police to create aggressive models of policing with large numbers of arrests, as opposed to community-oriented policing, which aims to minimize arrests by working directly with local community organizations to resolve the problem.<sup>24</sup>

Aggressive models of policing often lead to racial profiling, heavy police presence in areas with a concentration of people of color, and prioritizing of “public” offenses that are more likely in high poverty areas.<sup>25</sup>

Funding patterns have also contributed to the disparity by race. For example, the federal Justice Assistance Grant Program requires that goals be measurable and that all arrests be quantified (including misdemeanors). Continued funding, and thus officers’ jobs, depends on proper reporting and large numbers of arrests. Use of databases such as the COMPSTAT system have helped enforce the police approach of measuring performance by number of arrests through the combining of crime data, geographic location, and police accountability.<sup>26</sup> Such systems encourage targeting neighborhoods that are disproportionately poor and comprised of people of color, again impacting the racial disparity.

***Pre-trial Processes.*** Policies and prosecutorial decision making at the pre-trial process have a direct impact on racial disparity. Disparate treatment at early stages of processing has shown to result in widening disparity at later stages through the criminal justice system.<sup>27</sup> Several influential processes include (1) access to and quality of the public defender program; (2) judicial determination of pre-trial services (to detain, post bail, or release and/or post bail); (3) the great discretion awarded to the role of prosecutor throughout the pre-trial and adjudication processes.<sup>28</sup>

The white population is more likely to access private attorneys and to get less severe sentences.<sup>29</sup> Minorities are more likely to be represented by public defenders, who, while equally or more skilled and experienced, must carry incredibly high caseloads.<sup>30</sup> The judicial determination of pre-trial services is disproportionate by race as well. Research shows African-American and Hispanic defendants are more likely to be denied release than white defendants.<sup>31</sup> Because low-income people are disproportionately people of color, high bail also results in the increased likelihood of high rates of detention for people of color.<sup>32</sup> Furthermore, white defendants tend to have lower bail than defendants of color (in particular, Hispanic defendants).<sup>33</sup>

Discretion awarded to prosecutors in pre-trial and adjudication stages also contributes to racial disparity. Discrimination in prosecution occurs through overt or unconscious bias in decision making at the charge stage and plea bargaining. About 90% of cases are resolved through negotiation of a plea instead of proceeding to trial; in this bargaining process, the prosecution obviously plays a key role.<sup>34</sup> Individuals often lack an attorney and agree to plea because they are fearful of mandatory sentencing.<sup>35</sup> Prosecutors may play on a defendant’s fear by tacking on charges to force a worse plea or to get testimony for a related case (to get a defendant to “snitch” on others).<sup>36</sup> In cases that go to trial, prosecutors have the power to strike jurors. Research has suggested that peremptory strikes of jurors tend to be biased and give too much

power based on too little information.<sup>37</sup>

**Sentencing.** People of color are disproportionately sentenced for low level crimes, violent crimes, and drug related crimes.<sup>38</sup> This may be a result of more subtle racial bias in judicial decision making, but is also a result of race-neutral policies, such as the War on Drugs laws mentioned previously, that have a disparate impact on people of color. For example, three strikes and habitual offender laws that make prior criminal record a key factor hurt people of color more because they are more likely to have a prior record due to discrimination and disparate impacts throughout all the stages of the criminal justice process.<sup>39</sup> Even beyond these policy-related effects, research shows some disparate impact that must be attributed to unconscious/ implicit biases on the part of judges.<sup>40</sup>

**Addressing Implicit Bias.** Knowledge of human brain functioning regarding implicit bias can aid in policy discussions.<sup>41</sup> Research has shown that much of racial bias takes place at an implicit or unconscious level, often among people who consider themselves and are considered by others to be unbiased. As a result of this understanding, sociologists have studied methods of “debiasing.” Research has shown that openly acknowledging and directly challenging prejudices leads to overcoming them.<sup>42</sup>



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- <sup>1</sup> <http://www.criminaljustice.ny.gov/crimnet/ojsa/crimereporting/>
- <sup>2</sup> U.S. Census Bureau, 2007-2011 American Community Survey.
- <sup>3</sup> American Civil Liberties Union, “The War on Marijuana in African-American and White: Billions of Dollars Wasted on Racially Biased Arrests” (June 2013), p. 20.
- <sup>4</sup> American Civil Liberties Union, “The War on Marijuana in African-American and White: Billions of Dollars Wasted on Racially Biased Arrests” (June 2013), p. 36.
- <sup>5</sup> American Civil Liberties Union, “The War on Marijuana in African-American and White: Billions of Dollars Wasted on Racially Biased Arrests” (June 2013), p. 15.
- <sup>6</sup> American Civil Liberties Union, “The War on Marijuana in African-American and White: Billions of Dollars Wasted on Racially Biased Arrests” (June 2013), p. 46.
- <sup>7</sup> American Civil Liberties Union, “The War on Marijuana in African-American and White: Billions of Dollars Wasted on Racially Biased Arrests” (June 2013), p. 56.
- <sup>8</sup> Id.
- <sup>9</sup> <http://www.uscourts.gov/Common/Glossary.aspx>
- <sup>10</sup> Michelle Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness*, (2010), p.94.
- <sup>11</sup> Id. at 60.
- <sup>12</sup> Id., p.98.
- <sup>13</sup> This report was also modeled on work by the Center for Law and Justice on the disparate impact of criminal justice policies on people of color in the Albany region.
- <sup>14</sup> Partnership for the Public Good, *Poverty in Buffalo-Niagara* (April 2012), p.2.
- <sup>15</sup> Id.
- <sup>16</sup> Diversity Data & Harvard School of Public Health, *Share of Population Living in High Poverty Neighborhoods by Race/ Ethnicity*, 2000.
- <sup>17</sup> <http://www.nij.gov/nij/topics/courts/restorative-justice/welcome.htm>
- <sup>18</sup> Mark Mauer, The Sentencing Project, “Addressing Racial Disparities in Incarceration” (2011), p. 9, [http://www.sentencingproject.org/detail/publication.cfm?publication\\_id=373](http://www.sentencingproject.org/detail/publication.cfm?publication_id=373).
- <sup>19</sup> Id.
- <sup>20</sup> The Sentencing Project, “Reducing Racial Disparity in the Criminal Justice System: A Manual for Practitioners and Policy Makers” (2008), p.7.
- <sup>21</sup> <http://www.bjs.gov/content/justsys.cfm#adjudication>
- <sup>22</sup> Id.
- <sup>23</sup> American Civil Liberties Union, “The War on Marijuana in African-American and White: Billions of Dollars Wasted on Racially Biased Arrests” (June 2013), p. 91.
- <sup>24</sup> Id.
- <sup>25</sup> Id.
- <sup>26</sup> American Civil Liberties Union, “The War on Marijuana in African-American and White: Billions of Dollars Wasted on Racially Biased Arrests” (June 2013), p. 100-104.
- <sup>27</sup> Mark Mauer, The Sentencing Project, “Addressing Racial Disparities in Incarceration” (2011), p. 5, [http://www.sentencingproject.org/detail/publication.cfm?publication\\_id=373](http://www.sentencingproject.org/detail/publication.cfm?publication_id=373).
- <sup>28</sup> Besiki Kutateladze, Vera Institute of Justice, “Do Race and Ethnicity Matter in Prosecution: A Review of Empirical Studies” (2012).
- <sup>29</sup> Id.
- <sup>30</sup> The Sentencing Project, “Reducing Racial Disparity in the Criminal Justice System: A Manual for Practitioners and Policy Makers” (2008).
- <sup>31</sup> Besiki Kutateladze, Vera Institute of Justice, “Do Race and Ethnicity Matter in Prosecution: A Review of Empirical Studies” (2012), p.17.
- <sup>32</sup> Id.
- <sup>33</sup> Id.
- <sup>34</sup> Mark Mauer, The Sentencing Project, “Addressing Racial Disparities in Incarceration” (2011), p. 7, [http://www.sentencingproject.org/detail/publication.cfm?publication\\_id=373](http://www.sentencingproject.org/detail/publication.cfm?publication_id=373).
- <sup>35</sup> Id.
- <sup>36</sup> Id.

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- <sup>37</sup> Michelle Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness*, (2010), p.118.
- <sup>38</sup> American Sociological Association, “Race, Ethnicity and the Criminal Justice System” (September 2007), <http://www.asanet.org/images/press/docs/pdf/ASARaceCrime.pdf>.
- <sup>39</sup> Id.
- <sup>40</sup> American Sociological Association, “Race, Ethnicity and the Criminal Justice System” (September 2007), p. 16, <http://www.asanet.org/images/press/docs/pdf/ASARaceCrime.pdf>.
- <sup>41</sup> The Ohio State University Kirwan Institute for the Study of Race and Ethnicity, “State of the Science: Implicit Bias Review” (2013), p.10, [www.kirwaninstitute.osu.edu](http://www.kirwaninstitute.osu.edu).
- <sup>42</sup> Id.