
Sharks and Minnows in the War on Drugs: A Study of Quantity, Race and Drug Type in Drug Arrests

Joseph E. Kennedy,^{†*} Isaac Unah,^{**} & Kasi Wahlers^{***}

Conventional wisdom has it that in the war on drugs you have to catch small fish in order to catch big fish. But what if the vast majority of drug arrests were for very small fish, and disproportionately brown ones at that? This Article is the first to conclusively establish that the war on drugs is being waged primarily against those possessing or selling minuscule amounts of drugs. Two out of three drug offenders arrested by non-federal law enforcement possess or sell a gram or less at the time of arrest. Furthermore, about 40% of arrests for hard drugs such as cocaine, heroin, and meth/amphetamine are for trace amounts — a quarter of a gram or less. These findings are the result of a first of its kind study of drug arrest data from National Incident-Based Reporting System (“NIBRS”) that analyzed all drug arrests reported for the years 2004, 2008, and 2012. The resulting data set contained over a million cases, and useable quantity data was found in over 700,000 cases, making this study the most comprehensive study of drug arrest quantity undertaken to date by orders of magnitude.

[†] Copyright © 2018 Joseph E. Kennedy, Isaac Unah & Kasi Wahlers. This project benefited greatly from helpful suggestions by Noah Painter Davis, Carissa Hessick, Eisha Jain, Richard Myers, Lauren Ouziel, Jocelyn Simpson, and Ron Wright. Workshop participants at the Neighborhood Criminal Law workshop at William and Mary School of Law in May of 2016 and at the AALS Criminal Law Conference in Washington D.C. in June of 2017 also gave useful feedback. Thanks also to Gyangya Liu of the Kathrine R. Everett Law Library for assistance in preparation of the graphs used.

^{*} Martha Brandis Professor of Law, University of North Carolina School of Law; J.D. UCLA School of Law; B.A. Stanford University.

^{**} Associate Professor of Political Science, University of North Carolina at Chapel Hill; Ph.D. Stony Brook University; M.A. Stony Brook University; B.S. SUNY College at Cortland.

^{***} J.D. University of North Carolina School of Law; B.A. University of North Carolina at Chapel Hill.

This Article also challenges assumptions that the disproportionate representation of offenders of color among those incarcerated for drug offenses results from their greater involvement in selling larger quantities of drugs. Offenders of color are by and large not more serious offenders in terms of quantity. They just possess and sell drugs that are the most frequent target of arrest. Blacks are disproportionately arrested overall because we arrest more for "Black drugs" than for "White drugs." Racial disparities might vanish or reverse if we were to make as many meth/amphetamine and heroin arrests as crack cocaine arrests.

After confirming that felony liability is typically triggered for selling — and in the case of hard drugs even possessing — such minuscule amounts, this Article argues that such offenses should be downgraded to misdemeanors for political, criminological and philosophical reasons. Such liability is doubly unjust in light of the racial disparities revealed in the patterns of arrest. A drug war premised on hunting great white sharks instead scoops up mostly minnows, and disproportionately ones of color. Felony liability for the two-thirds of offenders arrested for these gram-or-less amounts should be eliminated.

TABLE OF CONTENTS

INTRODUCTION	731
I. METHODOLOGY	736
A. Description of NIBRS Data	736
B. Portions of NIBRS Data Analyzed.....	738
C. Generating Drug Quantities.....	740
D. Uniquely Identifying Drug Arrestees Based on Race and Ethnicity.....	740
II. DATA ANALYSIS	742
A. Drug Arrests by Type	742
B. Drug Arrests by Race.....	745
C. Overarching Observations	749
III. LEGAL CONSEQUENCES OF GRAM-OR-LESS QUANTITIES	759
A. Cocaine and Crack Cocaine.....	760
B. Heroin	761
C. Amphetamine and Methamphetamine	762
D. Marijuana	762
E. Summary.....	764
IV. WHO ARE GRAM-OR-LESS OFFENDERS?	764
A. The Value of Gram-or-Less Quantities.....	765
B. Assessing the Role of the Gram-or-Less Offender in the Illegal Drug Trade.....	767

V. RECONSIDERING FELONY LIABILITY FOR GRAM-OR-LESS

OFFENDERS 774

A. *The Argument Against Felony Liability for Gram-or-Less*

Offenders..... 776

CONCLUSION..... 783

APPENDIX..... 785

INTRODUCTION

In the long-running television drama “Breaking Bad,” viewers watched the moral devolution of Walter White, a cancer-stricken high school chemistry teacher who tried to provide for the financial future of his family by cooking methamphetamine.¹ He changed from a good man caught in a bad situation into a sociopathic offender who ruled over a crystal meth empire in order to achieve a measure of success that had eluded him in his earlier life. In many ways, Walter White became a poster child for the sort of drug offender that justified serious punishment. He earned enormous amounts of money by producing and distributing vast amounts of very harmful drugs. He killed people in order to protect that enterprise. He freely chose to continue in the drug trade for reasons of profit and power even after having earned enough money to secure his family’s financial future.

Our drug laws are designed for offenders like Walter White. They presume drug dealers to be dedicated criminals who are motivated by the huge profits they reap from selling highly harmful substances and who readily use violence to maintain those profits.² To deter such highly motivated and blameworthy offenders, virtually all states impose felony liability and possible prison sentences for the sale of any amount of illegal drugs as well as felony liability for even the simple possession of hard drugs such as cocaine, heroin, and meth/amphetamines.³ While many recognize that those who simply use drugs should not be punished as severely as those who sell drugs, felony liability for drug possession is justified in part as a means to the end of convicting the more culpable and dangerous “drug dealers.” The thinking is that you cannot catch the big fish without catching some minnows as well.

What this Article conclusively establishes for the first time is that roughly two out of every three arrests by state and local law

¹ See generally *Breaking Bad* (AMC television broadcast Jan. 20, 2008–Sept. 29, 2013).

² See *infra* Part III.

³ See *infra* Part III.

enforcement in our ongoing war on drugs are minnows; the number of truly big fish in the remaining arrests is minuscule. Specifically, about 40% of drug arrests are for possessing or selling a quarter of a gram or less, and about 20% of arrests for possession or sale are between one-quarter of a gram and one gram.⁴ The arrests for various quantities above one gram range over the single digits with arrests for a kilogram or more being less than one percent.⁵ We do not seem to be using minnows to catch big fish. Instead, we are catching mainly minnows, occasionally slightly larger fish, and only very rarely a big fish.⁶

⁴ See *infra* Part II.

⁵ These findings are largely consistent with studies of drugs found in vehicle stops but diverge sharply from a study that relied on data from the Bureau of Justice Statistics 1997 Survey of Inmates in Federal and State Correctional Facilities. See Eric L. Sevigny & Jonathan P. Caulkins, *Kingpins or Mules: An Analysis of Drug Offenders Incarcerated in Federal and State Prisons*, 3 CRIMINOLOGY & PUB. POL'Y 401, 401 (2004); see also JOHN F. PFAFF, LOCKED IN 33-36 (2017) (referencing the Sevigny and Caulkins article to refute the "myth of the low-level, nonviolent drug offender"). Sevigny and Caulkins find that only 5.7% of state inmates can be described as "unambiguously low level." Sevigny & Caulkins, *supra* note 5, at 401. Such a finding might suggest that low quantity arrestees are rarely incarcerated, but the limitations of the survey data upon which they rely are significant. The total sample upon which they relied was slightly under 5000 and largely relied on accurate self-reporting by the inmates sampled. See *id.* at 406-07. Their findings, moreover, conflict with other studies relying on inmate surveys that reach very different conclusions. See, e.g., RYAN S. KING & MARC MAUER, THE SENTENCING PROJECT, DISTORTED PRIORITIES: DRUG OFFENDERS IN STATE PRISONS 14 (2002), <http://www.sentencingproject.org/wp-content/uploads/2016/01/Distorted-Priorities-Drug-Offenders-in-State-Prisons.pdf> (finding that 58% of all state prison inmates were minor role offenders).

Findings from studies of vehicle stop data, although limited in scope, are consistent with the small quantities found in our NIBRS data. Samuel Gross and Katherine Barnes studied vehicle stop data collected from 1995 to 2000 by the Maryland State Police pursuant to a court order in a federal civil rights class action alleging racial profiling. Samuel R. Gross & Katherine Y. Barnes, *Road Work: Racial Profiling and Drug Interdiction on the Highway*, 101 MICH. L. REV. 651, 658, 658 n.22 (2002). Their study focused particularly on stops on Interstate Highway 95, a route long believed to be a major artery for the distribution of illegal drugs. *Id.* at 658-59. Gross and Barnes found that the majority of drugs found for all racial groups were trace amounts or amounts consistent with personal use rather than sale. *Id.* at 660.

Finally, those directly studying state and local drug enforcement efforts have made observations consistent with our findings. See Kip Schlegel & Edmund F. McGarrell, *An Examination of Arrest Practices in Regions Served by Multijurisdictional Drug Task Forces*, 37 CRIME & DELINQ. 408, 409 (1992) (reporting that most law enforcement agencies do not have the resources to effectively move beyond the user level).

⁶ Quantities in federal law enforcement drug arrests are undoubtedly higher, but federal arrests are a small fraction of total drug arrests. For example, in 2012 the DEA arrested 30,476 drug offenders while state and local law enforcement arrested 1,328,457 in that same year. LISA N. SACCO, DRUG ENFORCEMENT IN THE UNITED STATES: HISTORY, POLICY, AND TRENDS 16 (2014), <https://fas.org/sgp/crs/misc/R43749.pdf>.

Furthermore, this Article also reveals something important about the nature of the racial disparities that plague the criminal justice system. The racial distribution of these small quantity arrests drives massive racial disparities in the war on drugs. Our data confirms that Blacks are disproportionately arrested for crack cocaine offenses and Whites for meth/amphetamine and heroin offenses.⁷ What has not been demonstrated until now, however, is that these racial disparities are not the result of greater involvement in the selling and distribution of drugs by Blacks and Hispanics. There are just as many minnows among Blacks as among Whites; we are just arresting a lot more of the Black minnows.

Finally, this Article makes an additional empirical contribution to our understanding of drug arrests. The vast majority of drug arrests are not for hard drugs but for marijuana. Once again, the majority of those arrests are for tiny quantities, and once again Blacks seem to be disproportionately arrested for marijuana offenses relative to their share of the overall population.

In sum, the majority of arrests for each drug individually are for very small quantities. The majority of drug arrests, in general, are for marijuana — the least harmful drug — not for cocaine, heroin, or meth/amphetamine. The majority of arrests overall are for very small quantities of marijuana, and the majority of the remaining arrests are for very small quantities of hard drugs. Racial disparities are not just preserved but magnified throughout. The overwhelming majority of drug arrestees in state court are not “great white sharks” but small brown minnows in more than one sense. Simply put, the drug war is not being waged against those who are “breaking bad” but those who are “breaking pitiful.”

One would expect that there would be more sharks than minnows in the pool of drug offenders because illegal drugs are ultimately sold in small quantities to users. But, there are far more small fish and far fewer big fish than one would expect to see in what has been sold to the public as a war on drug dealers. We are not catching small fish to catch the big fish; we are spending most of our resources catching small fish and only occasionally catching big fish.

Previous attempts to discern the quantities of drugs involved in state court drug arrests have been limited by the absence of readily available data. Police departments operate under no mandate to report drug arrest quantities. Previous studies have principally drawn on two sets of data: (1) periodic surveys of prison inmates, and (2) data collected

⁷ See *infra* Part II.B.

on traffic stops as a result of consent decrees in lawsuits for racial profiling. Both data sets are relatively small and inevitably involve certain methodological biases.⁸ The only national database collecting drug arrest quantity data is the U.S. Department of Justice's National Incident Based Reporting System ("NIBRS"), a voluntary reporting program which began in the early nineties.⁹ Initially, the number of agencies reporting was small but grew over the course of the nineties. By 2004, 6,784 agencies from twenty-nine states reported data.¹⁰

The findings in our study using this dataset with respect to the race, quantity, and drug type raise profound questions about the ongoing war on drugs. The authors draw a straightforward, albeit controversial, conclusion from these findings: given that the war on drugs is waged mostly in a racially disparate way against the most minor offenders, felony liability is not justified. Condemning someone to the status of a felon for selling or possessing an amount of drugs that range anywhere

⁸ See, e.g., Frank R. Baumgartner et al., *Targeting Young Men of Color for Search and Arrest During Traffic Stops: Evidence From North Carolina 2002-13*, 5 POL. GROUPS & IDENTITIES 107 (2016) (relying only on data from search and arrests from traffic stops in North Carolina); Gross & Barnes, *supra* note 5, at 658-59 (relying only on data from vehicle stops by Maryland State Police that was reported pursuant to a court-supervised settlement of a civil rights lawsuit); Sevigny & Caulkins, *supra* note 5, at 406-07 (relying only on self-reported data from inmates).

⁹ NIBRS Overview, FBI: UCR, <https://ucr.fbi.gov/nibrs-overview> (last visited Sept. 5, 2018).

¹⁰ See *Status of NIBRS in the States*, INCIDENT BASED REPORTING RESOURCE CTR., <http://www.jrsa.org/ibrrc/background-status/nibrs-states.html> (last visited Sept. 5, 2018) [hereinafter *Status of NIBRS*].

NIBRS data has long been used to study a variety of criminological questions. No use of the drug quantity data has previously been made, despite the fact that the data reported also includes the race and gender of the offender. Focusing on the presidential election years 2004, 2008, and 2012, the authors extracted all reported drug arrests from the data set with useable data. With over 1.2 million cases processed during the study period, there were over 700,000 cases containing useable drug quantity data. This "big data" then constitutes everything that is known about the quantities involved in reported drug cases for the three years in question.

The authors cross-checked the findings from this large data set against the smaller set of data from those fifteen states that mandated 100% reporting from law enforcement agencies in their jurisdictions in order to assess the representativeness of the data and found that the trends described were largely consistent. A comparison of data from each of the three years studied also determined that these findings were stable over time. Finally, data from large cities was separated out from the larger set to assess whether the failure of large population cities to participate skewed the results. All of these comparisons yielded negligible differences, suggesting that the large data set is a representative one despite the voluntary nature of NIBRS participation. The bottom line is that this data set of over half a million cases is the most reliable and comprehensive picture of state court drug arrests ever produced.

between \$10 and \$50 is neither efficient nor just. Such offenses should either not be prosecuted at all or should only be prosecuted as misdemeanors.

Punishing those who sell illegal drugs or possess hard drugs in even the smallest amount as felons may seem natural because it has been done for so long and to so many. It requires some imagination to consider the idea that a “drug dealer” should not be considered a felon. But the fact that two out of every three drug offenders possess a gram or less at the time of arrest, that two out of every five possess a quarter of a gram or less, and that very few are arrested with more than five grams all suggest that we are not arresting true “drug dealers” but lesser offenders who do not truly merit felony liability.¹¹ The thought that over the last few decades millions of offenders have received felony convictions who do not truly deserve them will not be an easy one to accept for those who have participated in this effort. But, in light of the tiny quantities of arrests revealed, this is a “the-emperor-does-not-have-clothes” moment: we cannot be afraid to point out the obvious, even when it is uncomfortable to do so.¹² We can no longer pretend that we are seeing serious crime deserving felony punishment in gram-or-less offenses.

Part I of this Article describes in detail the methodology used to create the data set, including links to resources through which others can validate the findings. Part II analyzes the data in terms of: (1) type of drug, (2) quantity of drug, and (3) race of the offender. Part III establishes that the legal consequences of gram-or-less possession are likely felony liability with prison time for repeat offenses. Part IV assesses the culpability of gram-or-less offenders by considering the street value of these small amounts and concludes that they are consistent with either personal consumption or very low-level involvement in the drug trade. Part IV further addresses counter-arguments to these conclusions. The Conclusion offers suggestions for additional study.

¹¹ See *infra* Part II.

¹² In Hans Christian Andersen’s story, “The Emperor’s New Clothes,” two weavers claim to have woven a suit of clothes for the Emperor that can be seen by all but the stupid. See generally HANS CHRISTIAN ANDERSON, *THE EMPEROR’S NEW CLOTHES* (1837) (illustrating that as the emperor walks around naked, everyone pretends to see the clothes to avoid being viewed as stupid, except for a small child who has the courage to point out the obvious).

I. METHODOLOGY

The research reported in this paper is based on data for crimes reported to the police from the NIBRS.¹³ For each criminal incident, NIBRS captures information on offenses, victims, offenders, property, persons arrested, and information about the incident itself. NIBRS data is compiled by the Bureau of Justice Statistics, a branch of the U.S. Department of Justice.¹⁴ NIBRS data represents a new generation of crime data, with the intent being to eventually “replace” the now nearly eighty-five-year-old Uniform Crime Reports.¹⁵

This Part describes the methodology of this study and proceeds in four sections: first, describing the NIBRS dataset; second, outlining which portion of the available NIBRS data this study analyzes; third, identifying the software used to generate meaningful insight into drug cases; and fourth, detailing how race and ethnicity variables were addressed.

A. Description of NIBRS Data

This study focused on drug arrests by non-federal law enforcement agencies. NIBRS data provides detailed information on illicit drug and other offenses, including the type and quantity of drugs involved, nature of the arrest, and the race and ethnicity of the offender. The detailed nature of this data allows us to explore the prevalence of drug

¹³ NIBRS data is publicly available for download. See *National Incident-Based Reporting System (NIBRS) Series*, NACJD, <https://www.icpsr.umich.edu/icpsrweb/NACJD/series/128> (last visited Sept. 6, 2018). All data files underlying the analysis contained in this Article are on file with the UC Davis Law Review and will be made available so that researchers may replicate our results. Joseph Kennedy & Isaac Unah, Excel Spreadsheet (unpublished manuscript) (on file with the UC Davis Law Review). Uniform Crime Report Statistics do not provide information about the quantity of drugs involved in a contact or arrest.

¹⁴ A major impetus for the creation of the NIBRS data back in the late 1980s was to provide law enforcement, the media, and academic researchers with more high quality, detailed, and timely information about the nature of offense incidents than had been provided in traditional Uniform Crime Report statistics. Howard N. Snyder, *Dissecting Crime Statistics*, 12 JUST. RES. & POL'Y 77, 79-80 (2010); FED. BUREAU OF INVESTIGATION, NATIONAL INCIDENT-BASED REPORTING SYSTEM VOLUME 1: DATA COLLECTION GUIDELINES 1 (2000), <https://www2.fbi.gov/ucr/nibrs/manuals/v1all.pdf> [hereinafter NIBRS VOLUME 1].

¹⁵ Stewart J. D'Alessio & Lisa Stolzenberg, *Race and the Probability of Arrest*, 81 SOC. FORCES 1381, 1384 (2003). For a summary of the differences between the traditional Uniform Crime Reports and NIBRS data, see *NIBRS Overview*, *supra* note 9 (unlike data reported through UCR's traditional Summary System — an aggregate monthly tally of crimes — the NIBRS data goes much deeper because of its ability to provide circumstances and context for crimes).

arrests, the quantities that lead to the arrest, and racial and ethnic differences among those involved in drug arrests. Notably, a field is included indicating whether an arrest was made. All cases in which arrests were not made were analyzed separately.

We rely on NIBRS single-incident extract files for our analysis of drug arrests. These files were created by the Inter-University Consortium for Political and Social Research (“ICPSR”) from an original and structurally more complex NIBRS database.¹⁶ The reason for creating these extract files is simply to make NIBRS data more accessible and thereby encouraging wider usage and understanding of the data. The extract files merge various NIBRS segments (e.g., arrestee, offender, value of the property involved, offense) within a limit of three records per incident (i.e., maximum of three offenses per incident, maximum of three locations, maximum of three offenders, maximum of three arrestees, etc.) The Federal Bureau of Investigation (“FBI”) defines an incident as “one or more offenses committed by the same offender or group of offenders acting in concert, at the same time and place.”¹⁷ In instances where there are more than three records, the records greater than three are not included in NIBRS. The vast majority of offenses have only one record. Indeed, for our purposes, following the lead of other researchers,¹⁸ our analysis is limited to the first record for each variable because this corresponds most closely to the Uniform Crime Report counts.¹⁹

Over the past several years, NIBRS data has been gaining in prominence as an alternative “semi-national” source of crime data — “semi-national” because not all states are certified NIBRS participants. Participating in NIBRS is entirely voluntary. States must be certified by the FBI through a lengthy process before they can participate in NIBRS.²⁰ Even within participating states, not all police departments choose to report crime data through NIBRS because of the high cost of collecting such micro-level data. As such, NIBRS tends to represent

¹⁶ See *National Incident-Based Reporting Resource Guide*, NACJD, <https://www.icpsr.umich.edu/icpsrweb/NACJD/NIBRS/> (last visited Sept. 6, 2018).

¹⁷ NIBRS VOLUME 1, *supra* note 14, at 17 (emphasis omitted).

¹⁸ See, e.g., Darrell Steffensmeier, Casey T. Harris & Noah Painter-Davis, *Gender and Arrests for Larceny, Fraud, Forgery, and Embezzlement: Conventional or Occupational Property Crime Offenders?*, 43 J. CRIM. JUST. 205, 214 (2015).

¹⁹ For a detailed review of NIBRS data, see generally Lynn A. Addington, *Studying the Crime Problem with NIBRS Data: Current Uses and Future Trends*, in HANDBOOK ON CRIME AND DEVIANCE 23 (Marvin D. Krohn et al. eds., 2007); Yoshio Akiyama & James Nolan, *Methods for Understanding and Analyzing NIBRS Data*, 15 J. QUANTITATIVE CRIMINOLOGY 225 (1999).

²⁰ See NIBRS VOLUME 1 *supra* note 14, at 4.

smaller population areas.²¹ Fortunately, participation by states is growing, even among large states and large urban jurisdictions. NIBRS now covers thirty-seven states, representing approximately 30% of the U.S. population and 28% of all reported crimes.²² Furthermore, fifteen states have mandated 100% participation for their police agencies.²³

To assess whether the voluntary nature of NIBRS participation and the failure of large cities to participate may affect our conclusions, we compared in our analysis data from the fifteen states that mandated 100% participation for their police agencies to the larger sample and found no notable differences. We also compared data from core cities to other regions within the larger data set and again found no notable differences.²⁴ We excluded from our analysis cases where no arrest was made.²⁵

B. Portions of NIBRS Data Analyzed

We limited our analysis of drug arrest data to recent presidential election years: 2004, 2008, and 2012 because of limitation in computing space.²⁶ We extracted drug cases from these three individual years and merged the resulting data into a large composite file containing over 1.1 million cases.

Drug quantity was re-coded to establish a uniform, consistent, and reliable unit of measurement.²⁷ NIBRS quantity data is measured in three ways: (1) weight, (2) capacity, and (3) unit.²⁸ Drugs that are measured in weight can appear in grams, kilograms, ounces, or pounds. Drugs that are measured in capacity can appear in milliliters,

²¹ For example, no police agency covering a population of over one million participated in NIBRS as of 2007. Addington, *supra* note 19, at 28.

²² *Id.*; *Data Collection: National Incident Based Reporting System (NIBRS)*, BUREAU OF JUSTICE STATISTICS, <http://www.bjs.gov/index.cfm?ty=dcdetail&iid=301> (last visited Sept. 5, 2018).

²³ *See Status of NIBRS*, *supra* note 10.

²⁴ Kennedy & Unah, *supra* note 13, at tab 8.

²⁵ *Id.* at tab 4.

²⁶ Although the Federal Government started collecting NIBRS data in 1991, we did not study data from the 1990s because the initial participation by states and reporting agencies was low, making the resulting data set both smaller and less representative.

²⁷ NIBRS's raw data must be "cleaned" in order to be analyzed. This process calls for re-coding most of the variables to account for circumstances where information is missing, unknown, or not applicable.

²⁸ FED. BUREAU OF INVESTIGATION, 2019 NATIONAL INCIDENT-BASED REPORTING SYSTEM USER MANUAL 112-13 (2018), <https://ucr.fbi.gov/nibrs/nibrs-user-manual/view> [hereinafter NIBRS USER MANUAL].

liters, fluid ounces, or gallons. Finally, drugs that are measured in units can appear in dosage units or number of plants. We converted the measurement units into grams since most police and media reporting of drugs seizures and arrest are done in grams.²⁹ When liquid drugs are reported in NIBRS, the density of liquid drugs is not reported.³⁰ This makes it impossible to convert liquid drugs into grams. As such, we limited our analysis to drugs measured by weight since only these can be converted into grams.³¹ Fortunately, as Table 1 shows below, most illicit drugs are indeed measured in weight.³²

Starting with our initial set of approximately 1.2 million drug cases, we excluded cases where the drug measurement type was undetermined (265 cases), unknown or missing (83,398 cases), or not applicable (241,411 cases).³³ For the remaining cases where the drug measurement type is known and reported, we excluded cases where the measurement is in capacities such as milliliter (1,123 cases), liter (161 cases), fluid ounce (1,526 cases), gallon (692 cases) and those where the measurement is in units, including dosage units (146,446 cases), and number of plants (8,435). The remaining cases totaled 705,963.³⁴

The cases in the box within the table below are the ones included in our analysis. They represent 82% of all the drug cases where a measurement type is known and available in the NIBRS database.

²⁹ See, e.g., Michelle Tsai, *How Much for All That Heroin*, SLATE (May 24, 2007, 6:40 PM), http://www.slate.com/articles/news_and_politics/explainer/2007/05/how_much_for_all_that_heroin.html.

³⁰ See NIBRS USER MANUAL *supra* note 28, at 113.

³¹ We used the following conversion protocol to convert drugs from their original measure into grams: a gram translates into a gram; an ounce translates into 28.3495 grams; a kilogram translates into 1000 grams; a pound translates into 453.592 grams.

³² See *infra* Table 1.

³³ We surmise that in these cases no quantity of drugs was seized at the time of arrest.

³⁴ See data files on file with law review. Kennedy & Unah, *supra* note 13.

Table 1. Frequency of Drug Measurement Type

	Cases	Percent
Undetermined	265	0.0%
Unknown/Missing	83,398	7.0%
Not applicable	241,411	20.3%
Gram	624,209	52.5%
Kilogram	13,943	1.2%
Ounce	62,400	5.2%
Pound	5,414	0.5%
Milliliter	1,123	0.1%
Liter	161	0.0%
Fluid Ounce	1,526	0.1%
Gallon	692	0.1%
Dosage Unit/Items	146,446	12.3%
Number of Plants	8,435	0.7%
Total	1,189,423	100.0

C. Generating Drug Quantities

To generate the drug quantities herein reported, we used SPSS statistical software to select cases that met certain specified criteria (e.g., case where an arrest was made and the race of arrestee is non-Hispanic white, etc.). The resulting cases are then displayed based on drug type. The process is repeated for each racial or ethnic group category.

D. Uniquely Identifying Drug Arrestees Based on Race and Ethnicity

NIBRS data includes separate variables for the race and ethnicity of arrestees.³⁵ One criticism of NIBRS data is that treating race and ethnicity as two separate variables complicates matters by increasing the risk of over-counting arrestees based on their race and ethnic identification. For example, a specific White arrestee may be identified as White (in the race variable) and as Hispanic (in the ethnicity

³⁵ The first is "race of arrestee" coded as 1 = White (representing 53.6% of the cases), 2 = Black (23%), 3 = American Indian/Alaskan Native (0.6%), 4 = Asian (0.4%) and Native Hawaiian/Pacific Islander (0%), with the rest of the cases coded as missing. The race of arrestee variable does not report information on Hispanic arrestees. The second is "ethnicity of arrestee", coded as 1 = Hispanic (4.9%) and 0 = not Hispanic (54.3%), with the rest of the cases coded as missing. See generally *infra* Figure 1.

variable).³⁶ This would result in these arrestees being over-counted, thereby skewing the results. To avoid over-counting, one must construct a single composite variable out of the race and ethnicity variables that uniquely identify arrestees based only on either their race or ethnicity.

We constructed such a composite variable for our analysis to avoid over-counting. This variable creates a unique racial and ethnic identification for each arrestee along the following lines: “nonHispanic whites” (49.2%); “nonHispanic blacks” (16.9%); “nonHispanic American Indian” (0.5%); “nonHispanic Asians” (0.3%); “nonHispanic native Hawaiian” (0%); “white Hispanic” (4.6%) “black Hispanics” (0.2%); “American Indian Hispanics” (0%); “Asian Hispanics” (0%).³⁷ The rest of the cases identified as missing.³⁸ All arrestees with Hispanic identifiers were then combined. The following bar graph shows the proportion of drug arrestees by race for all the valid cases (i.e., when missing cases are removed).³⁹

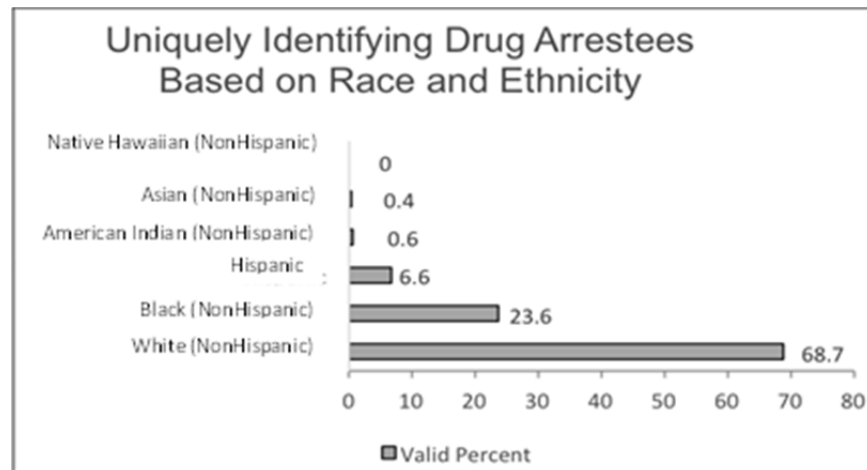
³⁶ Similarly, a hypothetical light-skinned Black arrestee may be identified as Black in the race variable and as Hispanic in the ethnicity variable. Alternatively, a dark-skinned Hispanic may be identified as Black in the race variable and as Hispanic in the ethnicity variable.

³⁷ See *infra* Figure 1.

³⁸ Note that these missing cases are included in calculating these proportions.

³⁹ Arrest data cannot be assumed to correspond directly to the actual level of offending among each race or ethnicity, obviously. Arrest data is influenced by the degree of police enforcement activity, which in turn can vary based on the racial composition of the community being policed. Further data on this variable can be found in our “Breakdown of All Arrestees Uniquely By Race and Ethnicity” files. Kennedy & Unah, *supra* note 13, at tab 5.

Figure 1.



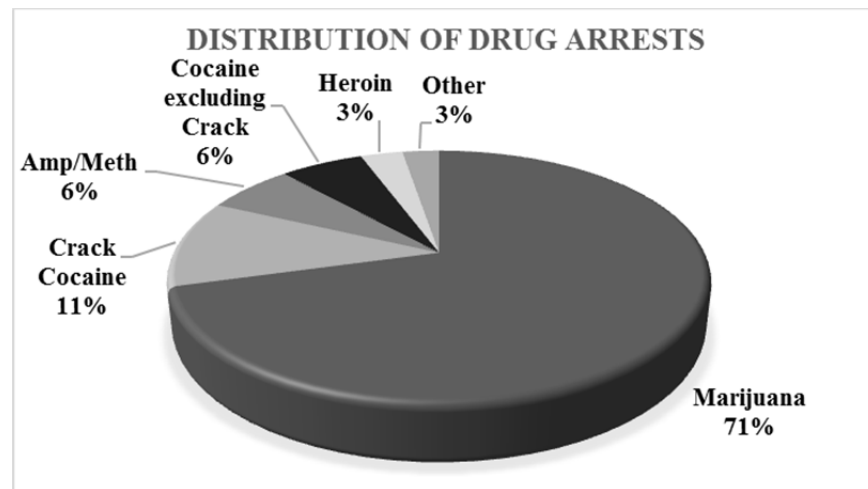
II. DATA ANALYSIS

This section proceeds in three parts: first, findings are presented as specific to drug type; second, findings are presented as specific to racial groups; and third, overarching observations are made.

A. Drug Arrests by Type

Any data set containing as rich a variety of variables as NIBRS drug arrest data can be analyzed in multiple ways. One very basic piece of data included is the type of drug involved. Understanding how often we arrest for which drug provides an overview of how law enforcement resources are allocated between drugs.

Figure 2.



As Figure 2⁴⁰ illustrates, our war on drugs is primarily a war against marijuana. Marijuana's 71% share of drug arrests dwarfs all other drugs combined. So, an important threshold point is that a typical "drug offender" is much more likely to be a marijuana offender than anything else.

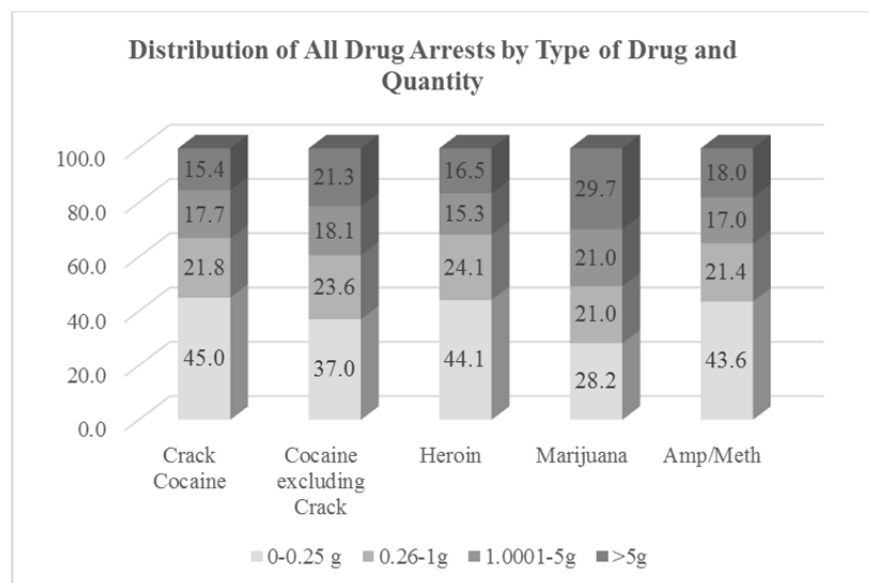
Turning our attention to the remaining "hard drugs" also reveals useful information. The different types of cocaine combined account for almost half of all remaining arrests, and crack cocaine accounts for about two-thirds of all cocaine arrests. Amphetamine (which includes methamphetamine) accounts for only 6% of all drug arrests, and heroin is only half of that.

With this overall distribution of arrests between drugs in mind, we turn next to the quantities involved in each arrest for the five leading drugs as illustrated in Figure 3.⁴¹

⁴⁰ For underlying data, see Kennedy & Unah, *supra* note 13.

⁴¹ *Id.*

Figure 3.



The most striking finding here concerns the very large percentages of arrests for very small quantities. For the hard drugs of cocaine, heroin, and meth/amphetamine, the plurality of arrests is for somewhere between a trace amount and a quarter gram. These tiny amounts constitute close to half of crack cocaine arrests (45%), heroin arrests (44.1%), meth/amphetamine arrests (43.6%), and over one-third of powder cocaine arrests (37.6%). For each of these hard drugs, arrests ranging from a quarter of a gram to a gram account for somewhere between a fifth and a quarter of remaining arrests (from 21% for crack and meth/amphetamine to 24% for heroin). Taken together, arrests for a gram or less of hard drugs accounts for somewhere between three-fifths and two-thirds of all hard drug arrests.⁴²

To be sure, the potency and psychoactive properties of these different drugs vary, as will be discussed in Part III, but the amounts involved are nonetheless very small. Understandably, the quantities involved in marijuana arrests are slightly higher since marijuana is a “bulk weight” drug in which less of the drug’s weight overall contains psychoactive properties.⁴³

⁴² See *supra* Figure 3; Kennedy and Unah, *supra* note 13.

⁴³ The primary psychoactive substance in marijuana is tetrahydrocannabinol (“THC”), which is present in fractional quantities in a marijuana bud or leaf. See Asa

With respect to all drugs, the quantities at the upper end of Figure 3 are also notably small. For marijuana, slightly less than one-third of arrests are for more than five grams but less than 2% are for a kilogram or more.⁴⁴ For the four hard drugs, the percentage of arrests for more than five grams ranges between fifteen and about twenty.⁴⁵ Quantities greater than twenty grams are between 5% and 10% for each hard drug, and quantities greater than a kilogram are generally a fraction of a percent.⁴⁶ Overall, well over 90% of hard drug arrests involve twenty grams or less, and less than 1% involve a kilogram or more.

B. Drug Arrests by Race

One way of exploring the role of race in drug arrests is through the race of offenders arrested for each category of drug. Figure 4 illustrates the racial composition of drug arrests by type of drug.

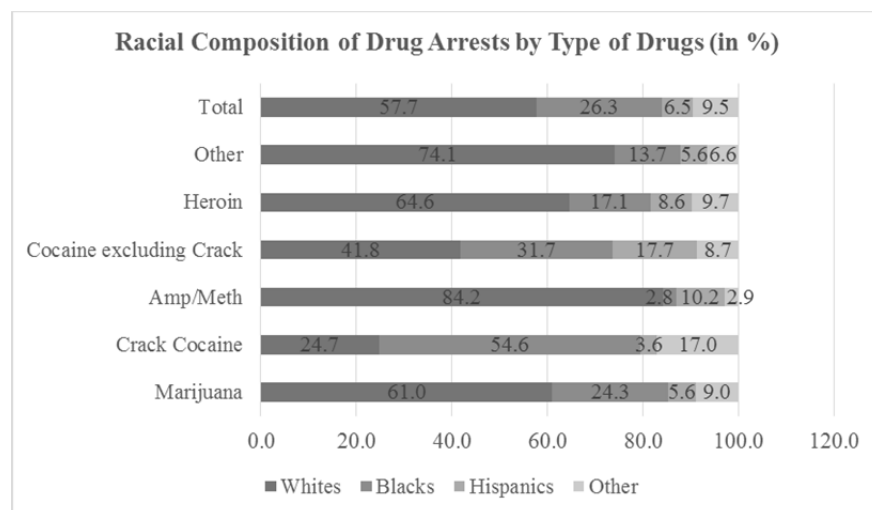
Hutchinson, *An Effective Drug Policy to Protect America's Youth and Communities*, 30 FORDHAM URB. L.J. 441, 456-57 (2003).

⁴⁴ See Excel Spreadsheet on file with UC Davis Law Review, tab 1, col. 11 (29.5%, adding 8.5% for 5-10gs, 4% for 10-15gs, 2% for 15-20gs, and 15% for all amounts greater than 20gs including 1.7% for amounts greater than or equal to 1kg).

⁴⁵ *Id.* at tab 1, col. 3 for cocaine (20.9%, adding 6.4% for 5-10gs, 3% for 10-15gs, 1.5% for 15-20gs, 10% for all amounts greater than 20gs including 1% for amounts greater than or equal to 1kg); col. 4 for crack cocaine (14.5% adding 6.1% for 5-10gs, 2.4% for 10-15gs, 1% for 15-20gs, 5% for all amounts greater than 20gs including 0.2% for amounts greater than or equal to 1kg); col. 9 for heroin (16.4%, adding 5.5% for 5-10gs, 2.5% for 10-15 grams, 1.4% for 15-20gs, 7% for all amounts greater than 20gs including 0.5% for amounts greater than or equal to 1kg); col. 6 for methamphetamine (17.7%, adding 5.7% for 5-10gs, 2.7% for 10-15gs, 1.3% for 15-20gs, 8% for all amounts greater than 20gs including 0.9% for amounts greater than or equal to 1kg).

⁴⁶ Kennedy & Unah, *supra* note 13, at tab 1.

Figure 4.



Whites clearly dominate arrests for meth/amphetamine, accounting for almost 85% of those arrests. Similarly, they account for almost two-thirds of heroin arrests. Blacks account for slightly over half of arrests for crack cocaine, and Whites account for 10% more of arrests for powder cocaine than Blacks. Hispanics, overall, account for between 5% and 6% of arrests for each drug with the exception of powder cocaine where they account for about 18% of arrests. Whites also account for about three out of five marijuana arrests, with Blacks accounting for a quarter and Hispanics much less.

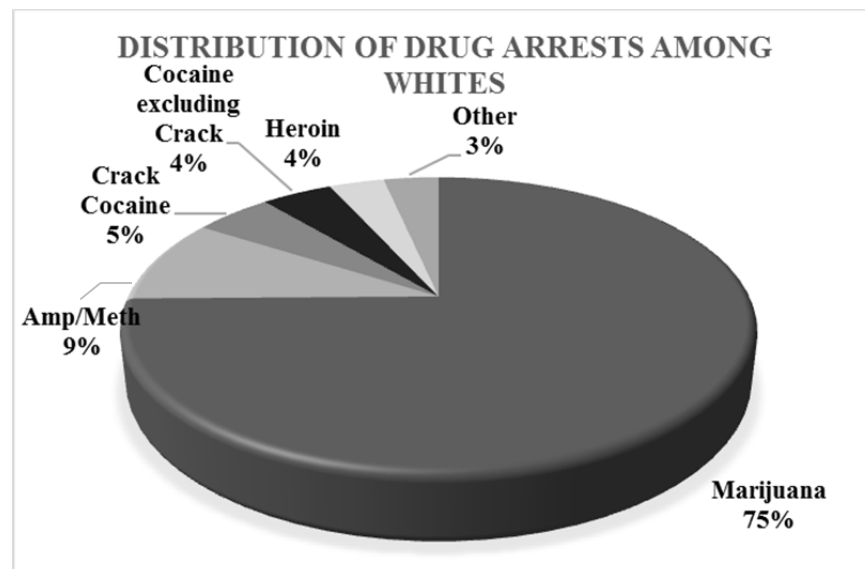
A relatively straightforward picture emerges. Overall, marijuana dominates all other types of drugs in terms of arrests. Blacks and Hispanics are arrested disproportionately in terms of their share of the overall population. The racial disparities involved are not as great as those present among arrests for hard drugs. Whites dominate heroin and meth/amphetamine arrests, but those drugs account for relatively few hard drug arrests overall. Blacks, in contrast, dominate crack cocaine arrests and are disproportionately represented in powder cocaine arrests. One racial disparity in drug arrests overall may, then, be at least partially driven by what drugs we arrest people for, with Black overrepresentation driven by crack cocaine arrests and White underrepresentation driven by the relatively low levels of heroin and meth/amphetamine arrests.

It would thus be tempting to think of crack cocaine as a “Black drug” and heroin and meth/amphetamine as “White drugs.”⁴⁷ The picture is a little more complicated than that though.

Thus far we have examined what the Black, White, and Hispanic “shares” are for each drug. A different way of exploring the connection between race and drugs is to look instead at groups separately and to examine instead what the “drug shares” are for each race. These percentages tell you which drugs a member of a racial group is most and least likely to be arrested for relative to other drugs.

Given the overwhelming number of marijuana arrests, generally, all groups are most likely to be arrested for marijuana, with marijuana constituting 75% of White arrests,⁴⁸ 65% of Black arrests,⁴⁹ and 61% of Hispanic arrests.⁵⁰ Once one moves into hard drugs, however, very different patterns emerge.

Figure 5.



⁴⁷ See generally David A. Sklansky, *Cocaine, Race and Equal Protection*, 47 STAN. L. REV. 1283 (1994) (arguing that federal mandatory minimums for possession and sale of crack cocaine are so harsh because the sentences are imposed almost exclusively on Black defendants).

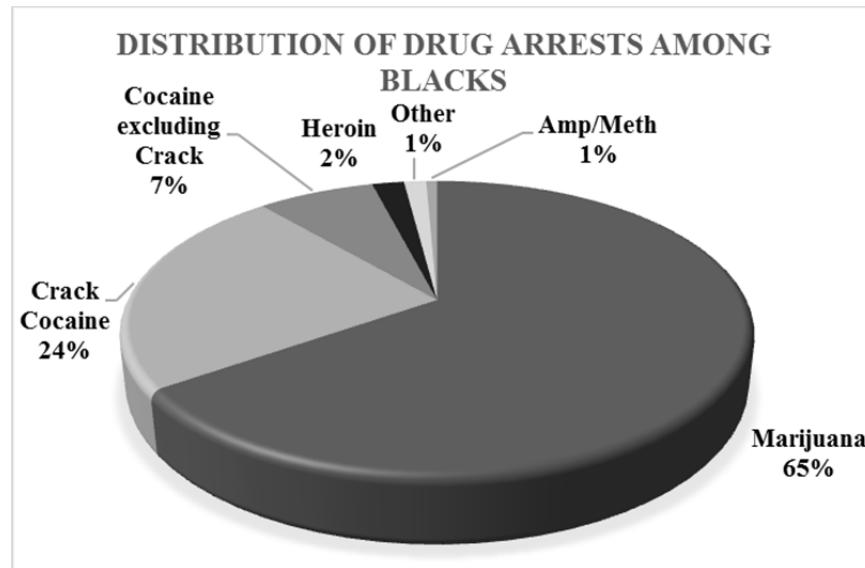
⁴⁸ See Figure 5.

⁴⁹ See Figure 6.

⁵⁰ See Figure 7.

Among the hard drugs, Whites are most likely to be arrested for meth/amphetamine but roughly equally likely to be arrested for crack, powder cocaine, and heroin. Interestingly, Whites are slightly more likely to be arrested for crack cocaine than for powder cocaine or heroin.

Figure 6.

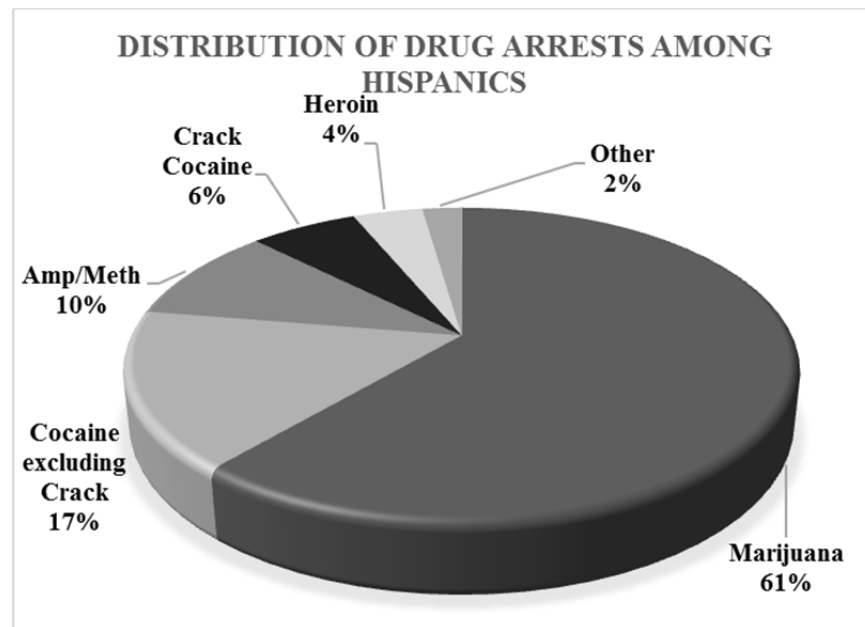


Blacks, in contrast, are twice as likely to be arrested for crack cocaine among the hard drugs than any other drug (24%: 11%).⁵¹ If one combines crack and powder cocaine, then a Black person is seven times more likely to be arrested for cocaine than for any other hard drug (31%: 4%).⁵²

⁵¹ See *supra* Figure 6.

⁵² See *id.*

Figure 7.



Hispanics are somewhere in between Whites and Blacks in terms of these patterns. They are not as likely as Blacks to be arrested for crack cocaine, somewhat more likely than Blacks to be arrested for powder cocaine, much more likely than Blacks to be arrested for meth/amphetamine, and also more likely to be arrested for heroin.⁵³ Hispanics and Whites appear to be equally likely to be arrested for meth/amphetamine and heroin relative to other drugs for which they are arrested.⁵⁴

C. Overarching Observations

Putting these two different analyses together complicates any notion of certain drugs being considered “Black drugs.” When Whites are arrested for a hard drug offense, they appear to be most likely to be arrested for meth/amphetamine. After that, Whites appear to be equally likely to be arrested for crack cocaine, powder cocaine, and heroin. So, while heroin and meth/amphetamine do seem to be White drugs any way you look at it; similarly, Whites who are arrested for

⁵³ Compare *supra* Figure 6, with *supra* Figure 7.

⁵⁴ Compare *supra* Figure 5, with *supra* Figure 6.

hard drugs are equally likely to be arrested for crack and powder cocaine. It is just that we do not arrest very many Whites for either drug, and both drugs constitute the largest chunks of all hard drug arrests. So among all Whites who are arrested for hard drugs, crack, and powder cocaine are just as much a White drug as a Black one. Since we do not arrest Whites for crack and powder cocaine nearly as often as we do Blacks, however, crack and powder cocaine appear to be “Black drugs.”⁵⁵

Given that close to half of all hard drug arrests are for a quarter of a gram or less and that almost two out of three are for a gram or less,⁵⁶ how do race and drug type relate to the quantity of arrest? Does each group’s relative share of arrests vary with quantity? The following two graphs display each race’s “share” of low quantity arrests of quarter gram or less and of arrests for five grams or less. The graph also includes the many drugs contained in the category described up to this point as “other.” As demonstrated in Figure 9, below, arrests of five grams or less constitute roughly 80% of all arrests for hard drugs and about 70% of all arrests for marijuana. Comparing them side-by-side allows a comparison between racial and ethnic patterns for quarter gram-or-less offenses and offenses involving ten or twenty times that amount.

⁵⁵ What drives this disparity cannot be determined from the data, but it should not be assumed that racial disparities in terms of how often races get arrested for each drug are driven by differing levels of use. The fact that when Whites are arrested for hard drugs they are equally likely to be arrested for crack and powder cocaine as for heroin belies such a simple assumption.

⁵⁶ See *supra* Figure 3.

Figure 8.

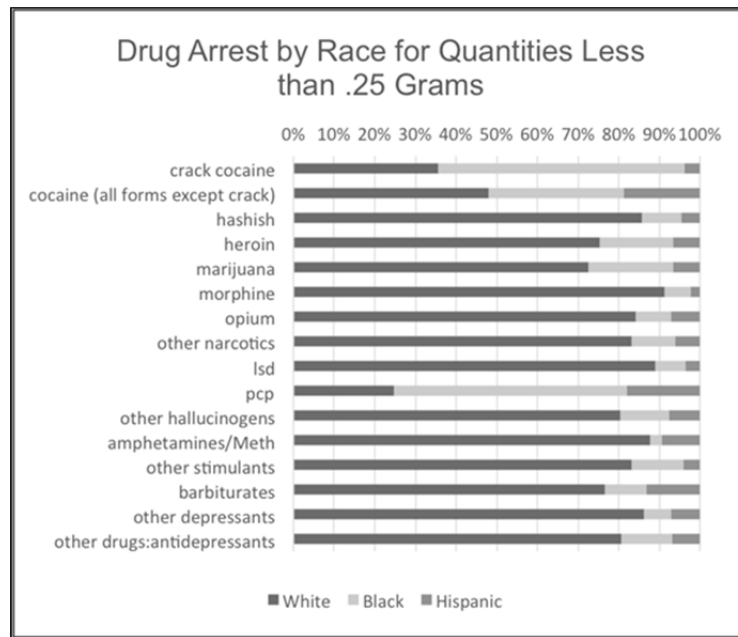
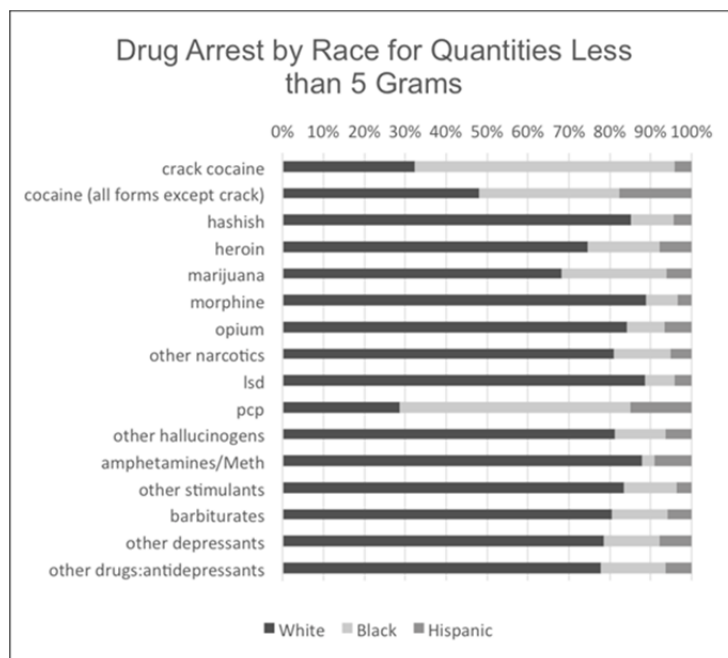


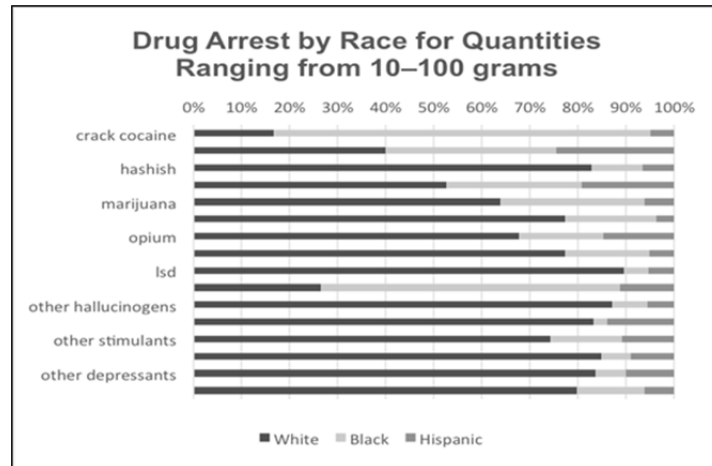
Figure 9.



This side-by-side comparison reveals two important points. First, Whites dominate at both the low and high end of quantity for arrests of the many “other” drugs that are seldom the subject of an arrest. Recall that arrests for drugs other than cocaine, heroin, marijuana, and meth/amphetamine account for only 3% of drug arrests. When those arrests are made, however, Whites constitute between 70% and 80% of offenders for all quantities except for Phencyclidine (“PCP”), where Blacks constitute about 50% of all arrested. Second, the pattern of offending described is almost identical at the high and low ends of quantity for marijuana and the remaining hard drugs. Whites constitute at both the low and high end of quantity almost 90% of arrests for meth/amphetamine, around 70% of the arrests for heroin and marijuana and slightly less than half of arrests for powder cocaine. The only area where Blacks dominate is in crack cocaine, where they constitute roughly 60% of arrests at the quarter gram level and somewhat more at a higher level. Indeed, crack cocaine arrests for Blacks is the only area where a noticeable difference seems to exist between low and high quantity arrests, with high quantity arrests being more than quarter gram arrests.

This pattern remains largely unchanged as one moves up in quantity.⁵⁷ Figure 10 shows race and drug patterns for arrests ranging from 10 to 100 grams.

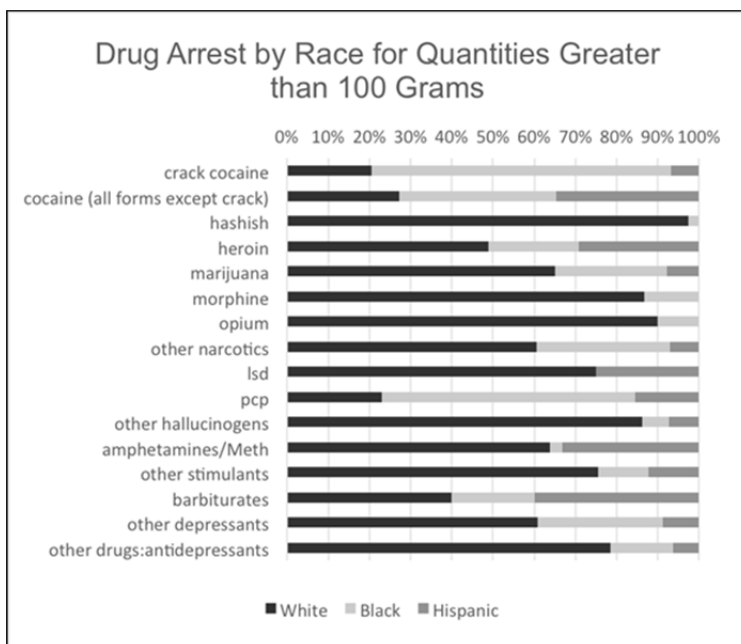
Figure 10.



It bears emphasis that arrests in this range overall constitute an even smaller slice of the overall arrest pie, even though the quantities increase from the low to the high end by almost a factor of ten. The racial patterns involved for each drug remain largely the same with the exception, once again, of crack cocaine, where Blacks increase their share of arrests markedly. Turning to the stratospheric level of arrests involving quantities greater than 100 grams, a category that constitutes a fraction of one percent, we see roughly the same pattern although the Hispanic share of hard drug arrests increases noticeably and the White share of crack cocaine arrests actually increases slightly.

⁵⁷ Compare *supra* Figure 8 and *supra* Figure 9, with *infra* Figure 10.

Figure 11.



So, the racial patterns for arrests for particular drugs do not vary significantly with drug quantity, with the exceptions of crack cocaine where Blacks increase their share of arrests noticeably as quantities increase and of the incredibly rare arrests for more than 100 grams where Hispanics increase their share of arrests across the board. To the degree that one equates multi-gram arrests with selling and not merely possessing drugs, these graphs do not suggest that Whites are not involved in selling drugs. Whites appear to be just as involved in selling the drugs for which they are arrested as Blacks and Hispanics.

The following figures illustrate this same point in a different way by illustrating the distribution of different arrest quantities of drugs for each of the five major drugs for each racial group.

Figure 12.

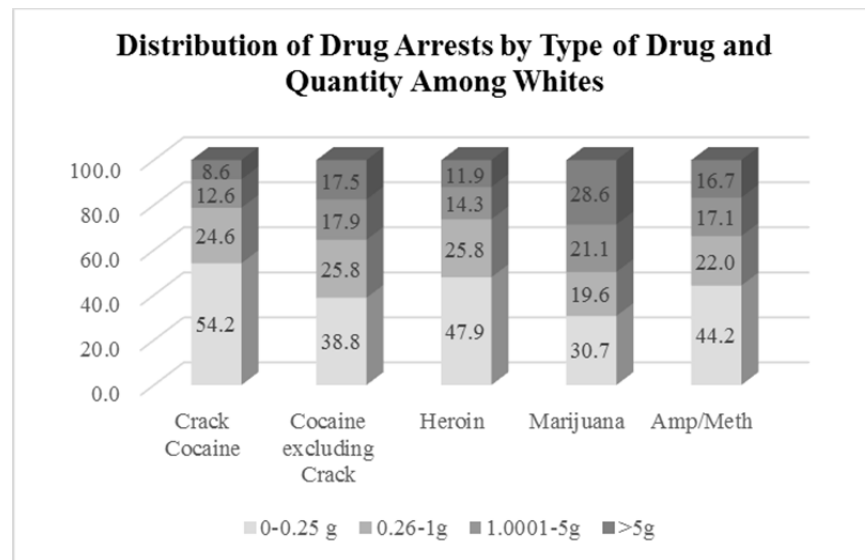


Figure 13.

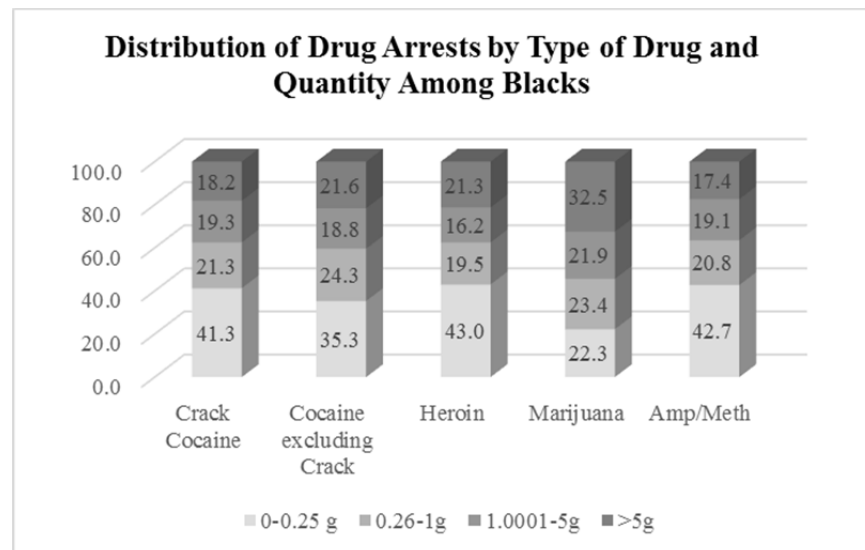
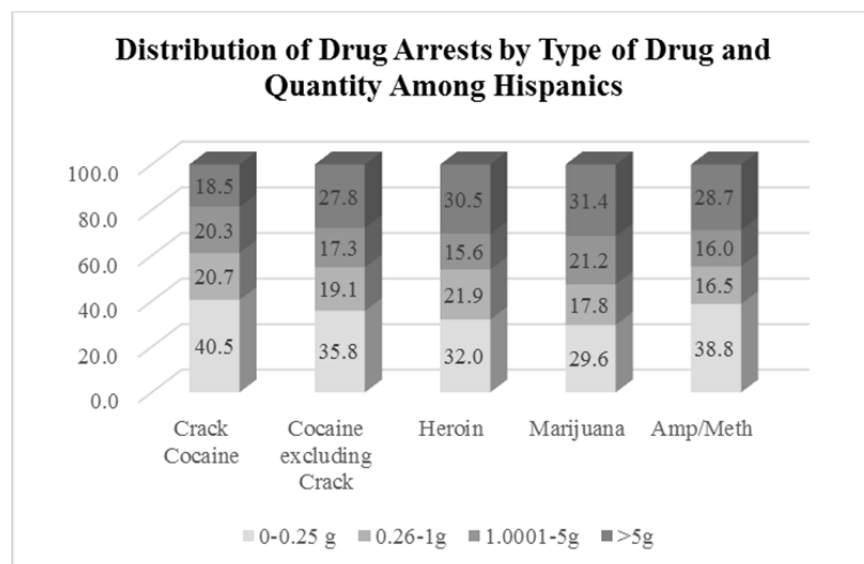


Figure 14.

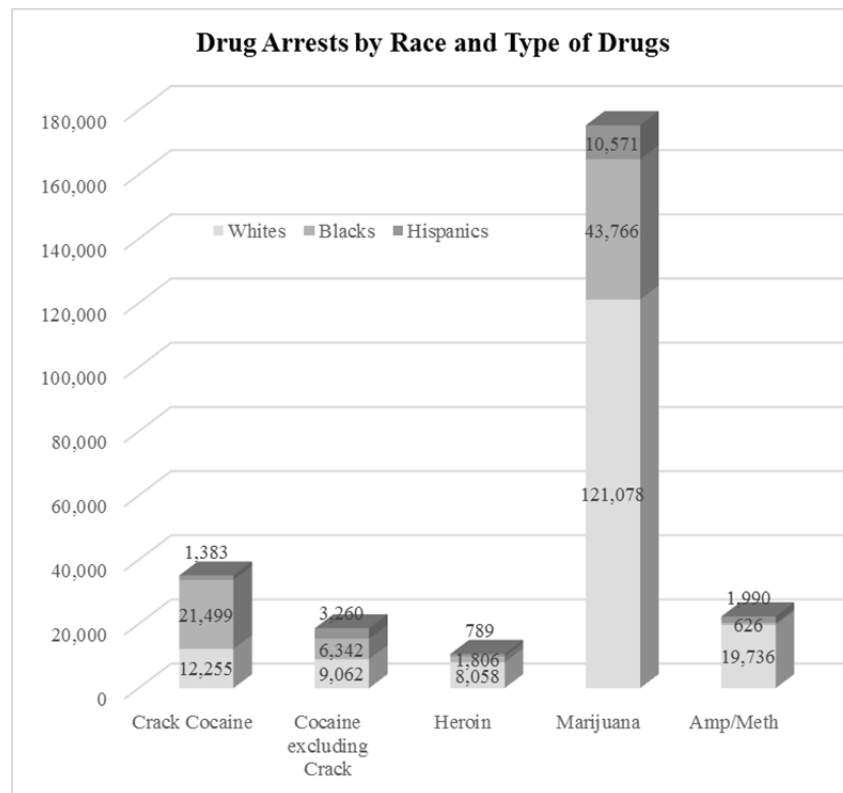


So the source of the well-noted racial disparities in arrests appears from the arrest data to be the allocation of arrests between different types of drugs. Even if one were to make the extremely dubious assumptions that arrests were made in a “color blind” way, with White crack users and sellers just as likely to suffer arrest as Black and Hispanic, one would have to make a second and equally dubious assumption that the allocation of arrests between drugs is itself color blind and reflects either differences in use of the drugs (non-Whites use their drugs more than Whites use theirs) or that the drug-type patterns of arrests are justified in terms of social harm (heroin and meth/amphetamine, and powder cocaine do not cause as much harm as crack cocaine). Suffice it to say for present purposes that such assumptions are controversial at best and are probably not supported by any available evidence.

Given that racial patterns of offending do not vary greatly with quantity, what is the racial impact of arresting so many people for such small quantities of drugs? Recall this Article’s finding that quarter gram-or-less arrests constitute a whopping 40% of hard drug arrests and that arrests between a quarter of a gram and a gram account for another 20% or more, with the percentage of gram-or-less arrests for marijuana being only slightly lower. One might not have much sympathy or concern for racial disparities between multi-gram offenders on the theory that such highly culpable offenders should be

harshly punished even if the racial allocation of such punishments might not be entirely fair. That theory does not hold up very well for possessors of truly minuscule amounts of drugs, amounts that are more consistent with personal use, shared use amongst a few people, or a very, very low level of involvement in the drug trade. Figure 15 focuses on the magnitude of the impact of low quantity arrests on racial disparities by comparing quarter gram arrests by race and type of drug in terms of absolute numbers of those arrested instead of percentages.

Figure 15.

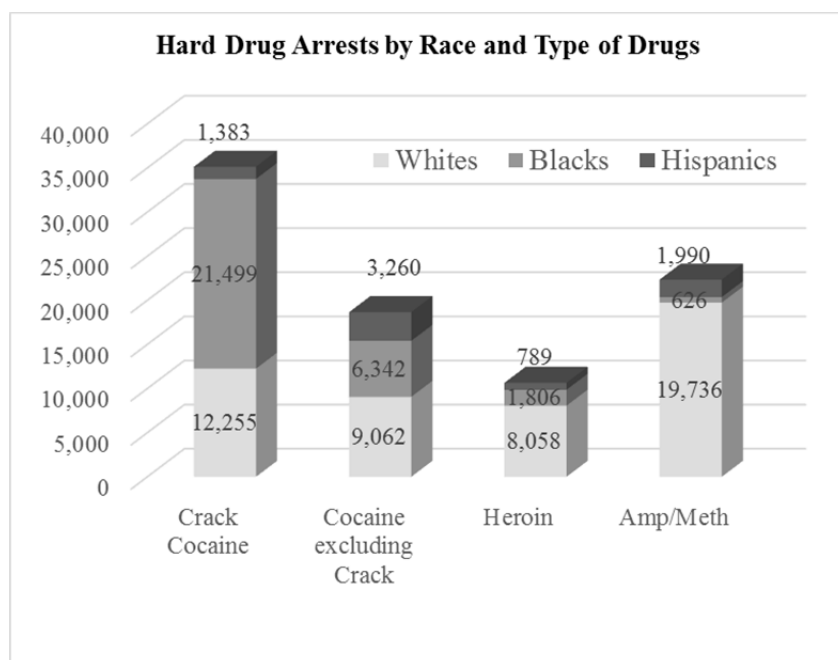


What immediately strikes the eye, of course, is the way in which marijuana arrests dwarf all others. Interestingly, the allocations of arrests between Whites and non-Whites is roughly proportionate, with Whites constituting about 70% of both the arrests and of the overall U.S. population. The allocation of quarter gram marijuana arrests between Blacks and Hispanics is less proportionate, with Blacks

accounting for roughly 13% of the U.S. population but 24% of these arrests, and Hispanics accounting for roughly 17% of the population but a little less than 6% of these arrests.

Given the greater legal consequences involved with arrests for possession of even quarter gram amounts of cocaine, heroin, and meth/amphetamine, however, it makes sense to focus more carefully on the magnitude of the racial disparities among those drugs. Figure 16 removes marijuana from the comparison and scales down the numbers to permit a more careful comparison of cocaine, heroin, and meth/amphetamine.

Figure 16.



This figure captures most fully the way in which disparities in the allocations of arrests between hard drugs magnify racial disparities for these minuscule quantity arrests. If anything, the figure understates this effect by dividing cocaine up into crack and powder cocaine. Whites account for almost 90% of quarter gram arrests for meth/amphetamine and almost 75% of quarter gram heroin arrests. Blacks account for about 60% of crack arrests and half of powder cocaine arrests. Overall, however, Whites account for only 54% of all hard drug quarter gram arrests and Blacks for almost 40%. Thus, Blacks are significantly overrepresented in the quarter gram arrest picture

because so many more people are arrested for cocaine offenses (where Blacks tend to operate) than for heroin or meth/amphetamine (where they do not). Simply put, racial disparities in drug arrests would reverse if we arrested as many people for the “White drugs” of heroin and meth/amphetamine as the “Black drug” of crack cocaine — a reasonable thought experiment given the relatively greater potency of a quarter gram of heroin and meth/amphetamine than a quarter gram of crack. As things stand, whatever injustice inheres in the practice of arresting offenders for minuscule amounts of hard drugs falls disproportionately on Blacks.

III. LEGAL CONSEQUENCES OF GRAM-OR-LESS QUANTITIES

One might assume that possessors of quantities as small as a quarter of a gram of an illegal substance might be picked up by police but not charged. NIBRS data, unfortunately, does not contain any information about charging or disposition. As discussed in Part I, this analysis is limited to those who were formally arrested. Those who were taken into custody but who were not arrested are coded as such in NIBRS but were excluded from the data analyzed in Part II. So, while one might assume that possessors of minuscule amounts of drugs would not be formally charged, the coding of the data suggests that these gram-or-less offenders were charged.

Felony liability applies to those possessing a gram or less of hard drugs or selling a gram or less of marijuana in most states.⁵⁸ As the following discussion will demonstrate, prison sentences are possible for first offenders in some states and repeat offenders in others. While a comprehensive analysis of all fifty states is beyond the scope of this Article, gram-or-less liability for the fifteen states that mandate 100% participation in NIBRS⁵⁹ data is presented and compared to the ten most populous states in the country for purposes of comparison. The gram-or-less offender who accounts for almost two-thirds of drug arrests is liable as a felon, with all of the life-changing consequences that that status entails: loss of voting rights, loss of many job opportunities, loss of access to many forms of public housing and

⁵⁸ *Infra* Part III.

⁵⁹ These states include those that report 100% of their crime through NIBRS to the FBI: Arkansas, Delaware, Idaho, Iowa, Michigan, Montana, New Hampshire, North Dakota, Rhode Island, South Carolina, South Dakota, Tennessee, Vermont, Virginia, and West Virginia. *See Status of NIBRS*, *supra* note 10.

assistance including eligibility for student loans, and the possibility of years of incarceration and thousands of dollars in fines.⁶⁰

Analysis of the laws of the fifteen states in question proceeds in four parts, divided by the illicit substance in question: (A) cocaine and crack cocaine; (B) heroin; (C) meth/amphetamine; and (D) marijuana. Overall, this Part illustrates how easily felony liability can be triggered.

A. Cocaine and Crack Cocaine

Of the fifteen states that fully report to NIBRS, only three — New Hampshire, South Carolina, and Vermont — distinguish crack cocaine from cocaine in their statutes, and only New Hampshire does so in a meaningful way.⁶¹ This section, therefore, focuses on how cocaine is sentenced with the understanding that both powder cocaine and crack cocaine would trigger identical sentences in most instances. Any instances where cocaine and crack are sentenced differently are noted accordingly.

As Table 2 shows, nine of the fifteen states impose felonies for possession of *any* amount of cocaine or crack cocaine, and six impose felonies for possession with intent to deliver any amount.⁶²

Many of the states that impose felonies for possession with intent to distribute also do so for subsequent possessory offenses or possessory offenses above a threshold amount.⁶³ In the jurisdictions that do not treat simple possession of less than one gram as a felony, all it takes is for the individual to have two or more prior offenses of the same kind or a quantity above a statutory threshold for a felony to be triggered nonetheless. While Delaware and Vermont appear to be the most lenient states within the sample by imposing a felony for simple possession only when the amount held is more than five and 2.5

⁶⁰ See Sarah B. Berson, *Beyond the Sentence — Understanding Collateral Consequences*, 272 NAT'L INST. OF JUST. 24, 26 (2013).

⁶¹ Compare N.H. REV. STAT. ANN. § 318-B:26(I)(c)(1) (2018) (punishing less than one-half ounce of cocaine with intent to distribute with a term of imprisonment of not more than seven years, a fine of not more than \$100,000, or both), with N.H. REV. STAT. ANN. § 318-B:26(I)(c)(4) (punishing possession of less than one gram of crack cocaine with intent to distribute with a term of imprisonment of not less than seven years, a fine of not more than \$100,000, or both). While South Carolina includes a different statutory sub-section for crack-cocaine, it punishes the substance identically to cocaine for low-level offenses. See S.C. CODE ANN. § 44-53-375(A) (2018). Vermont also separates out crack cocaine within the statute, but only distinguishes from cocaine for sixty grams or more. See VT. STAT. ANN. tit. 18, § 4231(c)(2) (2016).

⁶² See *infra* Table 2.

⁶³ See *id.*

grams, respectively, the overall trend is punitive.⁶⁴ On the more punitive end of the spectrum, four states — Arkansas, Tennessee, South Dakota, and West Virginia — apply mandatory minimums for possession with intent to distribute. Arkansas imposes a mandatory minimum of three years for possession of less than two grams of cocaine with intent to deliver.⁶⁵ Tennessee imposes a mandatory minimum of three years for possession of less than 0.5 grams of cocaine with intent to deliver.⁶⁶ South Dakota imposes a mandatory minimum of one year for possession of any amount of cocaine with intent to distribute.⁶⁷ West Virginia imposes a mandatory minimum of one year for possession of any amount of cocaine with intent to deliver.⁶⁸

B. Heroin

Nine states impose felony liability for possession of *any* amount of heroin while the remaining six impose felonies for subsequent offenders, those over a threshold amount, and those with intent to distribute.⁶⁹ The more punitive states are Arkansas, Montana, North Dakota, South Carolina, South Dakota, and West Virginia. Four of these states apply mandatory minimums for first-time possession of any amount of heroin with intent to distribute: Arkansas has a three-year minimum,⁷⁰ Montana a two-year minimum,⁷¹ South Dakota a one-year minimum,⁷² Tennessee has an eight-month minimum,⁷³ and West Virginia a one-year minimum.⁷⁴ Two states, on the other hand, begin applying mandatory minimums on second-time offenders who

⁶⁴ *See id.*

⁶⁵ ARK. CODE ANN. §§ 5-64-420(b)(1), 5-4-401(a)(4) (2018) (classifying the offense as a class C felony, the sentence for which shall be not less than three years nor more than ten years).

⁶⁶ TENN. CODE ANN. §§ 39-17-417(c)(2)(A), 40-35-112(a)(3) (2018) (classifying the offense as a class C felony, punishable by not less than three years but not more than sixty years incarceration and an optional fine of up to \$10,000).

⁶⁷ S.D. CODIFIED LAWS § 22-42-2 (2018) (imposing a mandatory minimum of one year on a first time possession with intent to distribute offender).

⁶⁸ W. VA. CODE § 60A-4-401(a)(i) (2018) (classifying the offense as a felony punishable by not less than one but not more than fifteen years, a fine of up to \$25,000, or both).

⁶⁹ *See infra* Table 3.

⁷⁰ ARK. CODE ANN. §§ 5-64-424(b)(1), 5-4-401(a)(4) (2018).

⁷¹ MONT. CODE ANN. § 45-9-103(2) (2016).

⁷² S.D. CODIFIED LAWS § 22-42-2 (2018).

⁷³ TENN. CODE ANN. §§ 39-17-417(b); 40-35-112(a)(2) (2018).

⁷⁴ W. VA. CODE § 60A-4-401(a)(i) (2018).

possess any amount of heroin with intent to distribute. Both North Dakota and South Carolina give a second-time possession with intent offender a minimum of three years.⁷⁵ Interestingly, while the legal consequences for heroin use remain severe, public health assistance is significantly more robust than what was seen in response to increased cocaine use in the 1980s or heroin use in the 1960s.⁷⁶

C. Amphetamine and Methamphetamine

The breakdown among states punishing possession of any amount of amphetamine or methamphetamine is the same as with cocaine and heroin offenses, suggesting that jurisdictions often group the three drugs together.⁷⁷ Among the more punitive states are Arkansas, North Dakota, South Carolina, South Dakota, and Tennessee. Three impose mandatory minimums for first-time possession with intent to distribute offenders: Arkansas triggers a three-year minimum,⁷⁸ South Dakota one year,⁷⁹ and Tennessee three years.⁸⁰ Both South Carolina and North Dakota impose three-year mandatory minimums for second-time possession with intent offenders.⁸¹ As emphasized before, these consequences can stem from one single act and yet manage to follow the individual for the rest of his or her life, making even the most normal tasks difficult.

D. Marijuana

Marijuana presents a different story. It is a more complicated story because many cities and towns provide their own punishments under local ordinances.⁸² This section outlines the penalties available under

⁷⁵ N.D. CENT. CODE § 19-03.1-23 (1)(a)(1) (2018); S.C. CODE ANN. § 44-53-370(b)(1) (2016).

⁷⁶ See Andrew Cohen, *How White Users Made Heroin a Public-Health Problem*, ATLANTIC (Aug. 12, 2015), <http://www.theatlantic.com/politics/archive/2015/08/crack-heroin-and-race/401015/> (noting the radicalized nature of the occurrence of public health intervention). For a more in-depth discussion of the different public approach to heroin usage as compared to other drugs, see generally SAM QUINONES, DREAMLAND: THE TRUE TALE OF AMERICA'S OPIATE EPIDEMIC (2015).

⁷⁷ Compare *infra* Figure 4, with *infra* Figure 3, and *infra* Figure 2.

⁷⁸ ARK. CODE ANN. §§ 5-64-420(b)(1), 5-4-401(a)(4) (2018).

⁷⁹ S.D. CODIFIED LAWS § 22-42-2 (2018).

⁸⁰ TENN. CODE ANN. §§ 39-17-417(c)(2)(A); 40-35-112(a)(3) (2018).

⁸¹ N.D. CENT. CODE § 19-03.1-23(1)(a)(1) (2017); S.C. CODE ANN. § 44-53-375(B)(2) (2018).

⁸² See, e.g., CITY OF ANN ARBOR MICH. CITY CHARTER § 16.2(b) (2011), <http://annarborchronicle.com/wp-content/uploads/2012/05/CharterNovember2011.pdf>

state law. Overall, the legal consequences and punishment for small quantity offenders are less serious although still substantial in many states; a function perhaps of the relatively recent shift in public opinion regarding marijuana.⁸³

Outside of possessory offenses, which are largely not subject to felony liability except in instances of repeated offenses or especially large amounts, more severe consequences become a possibility once an individual possesses marijuana with intent to distribute.⁸⁴ Punishment can become quite severe in South Carolina, where a third-time possession with intent to distribute offender is subject to a five-year mandatory minimum,⁸⁵ and in Tennessee where possession of more than one-half ounce with intent to distribute triggers a one-year mandatory minimum.⁸⁶ Still imposing a mandatory minimum, but a comparatively lighter one is South Dakota, which applies mandatory thirty-day confinement — which cannot be suspended — for possession of one ounce or less with intent to sell.⁸⁷ Because possession with intent to deliver is often established through circumstantial evidence such as having a large amount of cash on hand, having a weapon, or by simply being in an “area of high narcotic trafficking” these charges are often highly subjective and determined on a case-by-case basis.⁸⁸ NIBRS data does not include final court dispositions. It is likely that some of the recorded incidents — even those involving smaller quantities — resulted in possession with intent charges if the factors described above were found to exist.⁸⁹ Ultimately, although individuals included in the NIBRS data who merely possessed small amounts of marijuana and nothing more may

(imposing civil infractions and low-level fees for possession and distribution of marijuana in certain circumstances).

⁸³ See Abigail Geiger, *Support for Marijuana Legalization Continues to Rise*, PEW RES. CTR. (Oct. 12, 2016), <http://www.pewresearch.org/fact-tank/2016/10/12/support-for-marijuana-legalization-continues-to-rise/>.

⁸⁴ See *infra* Table 5.

⁸⁵ S.C. CODE ANN. § 44-53-370(b)(2) (2018).

⁸⁶ TENN. CODE ANN. §§ 39-17-417(g); 40-35-112(a)(5) (2018) (stating the penalty as “not less than one (1) nor more than two (2) years”).

⁸⁷ S.D. CODIFIED LAWS § 22-42-7 (2018).

⁸⁸ See 28A C.J.S. *Drugs and Narcotics* § 474 (2018).

⁸⁹ This conjecture seems consistent with explanations that other scholars have offered for increased prison growth in the United States: felony filings per arrest have increased. See, e.g., John F. Pfaff, *The Micro and Macro Causes of Prison Growth*, 28 GA. ST. U. L. REV. 1237, 1248 (2013) (explaining the surge in U.S. prison population across the past few decades in part by increased felony filings per arrest).

not be subject to a felony charge, a finding of an intent to sell can often trigger felony liability.

E. Summary

While this section's analysis has been limited to the fifteen states that currently mandate 100% NIBRS participation, a summary analysis of felony liability in the ten most populous states suggests that the felony liability for gram-or-less offenders is the norm. Table 6 below describes such felony liability for first-time possession with intent to sell.⁹⁰

In sum, many of the gram-or-less drug offenders that appear most frequently in the NIBRS dataset are subject to felony liability for their acts and those arrested with hard drugs, such as cocaine, heroin, and meth/amphetamine often face possible prison sentences. While one might assume these charges were plea bargained, the very existence of felony liability and the possibility of a prison sentence obviously creates substantial leverage for the prosecution to obtain a plea on favorable terms. So, the possibility of prison for such a small amount could be expected to result in a plea to a felony charge and at least a probationary sentence, assuming that mandatory minimums did not require incarceration. That felony conviction, would, in some of the jurisdictions described above, mandate prison for a second offense, even a second offense involving an equally minuscule amount. Felony liability for gram-or-less offenders, therefore, can be reasonably presumed to often result in felony convictions. Felony convictions both exclude offenders from normal participation in civic and economic life and make eventual incarceration much more probable.⁹¹

IV. WHO ARE GRAM-OR-LESS OFFENDERS?

Who are these gram-or-less offenders who constitute roughly two-thirds of drug arrestees and who suffer felony liability in most jurisdictions? The first section of this Part estimates the dollar value of a gram or less of the various drugs involved. The following section uses ethnographies and other social science evidence about the illegal drug trade to determine what role a gram-or-less offender likely plays in the illegal drug trade overall. The evidence considered strongly

⁹⁰ See *infra* Table 6.

⁹¹ See Joseph E. Kennedy, *The Jena Six, Mass Incarceration, and the Remoralization of Civil Rights*, 44 HARV. C.R.-C.L. L. REV. 477, 482-87 (2009) (summarizing research on disintegrative effects of felony conviction).

suggests that gram-or-less offenders are either simple users or low level, poorly paid employees of small groups selling illegal drugs.

A. *The Value of Gram-or-Less Quantities*

Evaluating the culpability of possessing a gram or a quarter of a gram of an illegal drug requires assessing the value of the drugs in question. The higher the dollar value of the quantity, the greater the justification for serious punishment. Just as we distinguish misdemeanor from felony theft in part by the amount stolen so, too, does it make sense to take drug value into account. A person possessing or selling drugs that are worth a lot of money is more likely to be deeply involved in the drug trade and would need a greater punishment to deter him. Value can also be understood in terms of potency. An offender selling a quantity sufficient for multiple “hits” or “highs” by either one user or a group of users is more criminally responsible than an offender selling a quantity sufficient for only a single use by a single person.

Reliable information about the dollar value of illegal drugs at the retail level is hard to calculate for multiple reasons. There is no “commodity market” for illegal drugs whose prices one can check in the morning paper. Illegal markets do not advertise their prices for obvious reasons. The purity and quality of illegal drugs vary widely in the absence of legal regulation; prices also vary widely over time and geography.⁹²

The best source of information on the pricing of illegal drugs is the President’s Office of National Drug Control Policy (“ONDCP”). Fortunately for our purposes, the ONDCP issued a report providing specific information about local drug markets in 2002, just before the beginning of our period of study.⁹³ That report was based on a national survey of law enforcement officers, drug treatment personnel, ethnographers, and epidemiologists that provides the basis for the following discussion.⁹⁴

Prices for drugs varied more for some drugs than for others. Heroin varied the most. Generally speaking, the most common street unit for heroin seemed to be between 0.1 gram and a quarter gram, with the

⁹² See MARCIA METH & REBECCA CHALMERS, OFF. NAT’L DRUG CONTROL POL’Y, PULSE CHECK: TRENDS IN DRUG ABUSE JANUARY–JUNE 2002 REPORTING PERIOD. SPECIAL TOPIC: A LOOK AT LOCAL DRUG MARKETS 27, 37, 44, 51, 59 (2002), <https://files.eric.ed.gov/fulltext/ED473558.pdf>.

⁹³ *Id.* at 1.

⁹⁴ *Id.* at 7.

price averaging between \$10 and \$50 depending on purity, although doses of that amount went for as little as \$4 and as much as \$120.⁹⁵ “Crack” was commonly sold by the rock — typically 0.1 to 0.2 grams — for \$10 per 0.1 gram.⁹⁶ Powder cocaine purity varied widely from 40% to 90% in various areas.⁹⁷ Powder cocaine prices also varied widely with most gram prices hovering around \$100.⁹⁸ Methamphetamine gram prices were most commonly reported at about \$100, but they ranged from \$20 to \$60 in Seattle to \$330 in Chicago.⁹⁹

Prices for marijuana ranged even more widely depending on both type and potency. Common street units ranged from a gram to a joint or blunt to a quarter or a third of an ounce. Prices for a gram ranged from \$10 to \$20, for a joint \$5 to \$10, and \$25 for a quarter of an ounce was a common price for a quarter of an ounce, which equates to about seven grams.¹⁰⁰

Overall, a quarter of a gram of a drug seems to be an amount appropriate for personal consumption by a single user for marijuana, cocaine, and methamphetamine. The value of quarter gram amounts seems to range from \$10 to \$50 depending on the drug, with powder cocaine and methamphetamine being worth more and crack and marijuana being worth less.

Ironically, heroin, the drug that constitutes the smallest share of hard drug arrest overall is distinctly more valuable and potent. Depending on purity, 0.08 to 0.1 gram of heroin could be enough for a single use, although heavy users might require more. A gram of the drug would seem to be enough to supply several “hits” lasting several days or to a small group of people with a single dose. The duration of the heroin high also seems to be longer so a single hit might last a user an entire day.

One cannot help but notice that the most expensive and most potent of the hard drugs is both the “Whitest drug” in terms of the race of those arrested as well as the drug for which offenders are least often arrested among the five major drugs discussed. Conversely, crack cocaine, the “blackest” drug in terms of the race of those arrested (but not necessarily in terms of the race of those who use the drug as discussed above) is the cheapest and least potent of the hard drugs.

⁹⁵ See *id.* at 27.

⁹⁶ *Id.* at 36.

⁹⁷ *Id.* at 44.

⁹⁸ *Id.* at 44.

⁹⁹ See *id.* at 59.

¹⁰⁰ See *id.* at 51.

The quarter gram crack offender basically has a single rock that is worth \$10 or \$20 and whose effect will last less than an hour, but he or she suffers the same felony liability as the quarter gram heroin offender whose amount is worth two or three times that and which will last even a heavy user a day or more. Yet crack is both a much more common drug of arrest relative to other drugs and a principal cause of the racial disparity in felony drug arrests between Whites and Blacks.

B. Assessing the Role of the Gram-or-Less Offender in the Illegal Drug Trade

Assessing the role that the gram-or-less offender plays in the illegal drug trade depends on understanding how that trade works. Two types of social evidence will be discussed: macro-level social science evidence that uses anonymous surveys and micro-level accounts of drug markets at specific places and times given by ethnographers who have embedded themselves with drug trade participants. The ONDCP study provides no support for the proposition that gram-or-less offenders are significant players in the drug trade in terms of the dollar value of that amount of drug.¹⁰¹ As is discussed below, leading ethnographic accounts suggest to the contrary that gram-or-less offenders are either heavy drug users themselves, the lowest-level employee of a very small group of drug offenders or both and are arrested simply because they are the drug trade participants easiest to arrest.

In general, the ONDCP suggested that the distinction between users and sellers was blurry. Users sell, and sellers use, although this varied somewhat from drug to drug. “Marijuana sellers are very likely to use their own drugs, much more so than sellers of other drugs.”¹⁰² Crack sellers are also very likely to use their drug.¹⁰³ Powder cocaine sellers often use their drug, and about one-third are very likely to use the drug.¹⁰⁴ Powder cocaine sellers were “more likely to use their own drug than heroin or crack sellers.”¹⁰⁵ More than half of respondents believed that methamphetamine sellers were very likely to use their drug.¹⁰⁶

¹⁰¹ See generally *id.*

¹⁰² *Id.* at 5.

¹⁰³ *Id.* at 36.

¹⁰⁴ *Id.* at 45.

¹⁰⁵ *Id.* at 4.

¹⁰⁶ *Id.* at 59.

It is true that the amount of drugs seized at the time of arrest does not necessarily correlate perfectly with the seriousness of the offense or the offender. A high-level offender might be arrested on a conspiracy charge, for example, but he might have never actually possessed drugs. Similarly, an offender found with a small amount of drugs might actually be a serious offender who was simply careful not to be caught carrying large amounts of drugs.

That said, there is little reason to assume that everyone arrested is a mid-level dealer, much less a kingpin. Ultimately, the assumption that the person arrested is more than a casual user must be supported by some sort of evidence, and the quantity of drugs seized is the most objective of the level of involvement that a person has in the drug trade. As discussed below, what is known about the drug trade does not support the assumption that a person caught with a small amount of drugs is a serious offender whose participation warrants serious punishment. The sociological and ethnographic literature describes a diversity of arrangements and practices at various points in time and various types of community.

The likelihood that a gram-or-less offender is a serious criminal depends in part on how illegal drug markets are organized. TV shows such as “The Wire,” and other staples of popular culture tend to focus on highly structured drug organizations. To be sure, such organizations exist, but overall the available social science evidence suggests that many drug markets are very loosely organized. In such markets, numerous small groups are an entrepreneurial free for all. Two types of social science evidence describe how illegal drug markets work: national surveys and ethnographic accounts of drug markets written by social scientists who spent years “embedded” with drug dealers, and users. The picture that emerges from both is that while some drug markets are highly organized (“Walmart” operations), many others resemble ad hoc flea markets more than anything else.

Mark Kleinman describes prevailing beliefs in highly organized drug markets as the “drug cartel” myth.

Popular lore speaks of cartels “controlling” the trade and dealers operating drug-selling “monopolies.” . . . However, the drug distribution system is not a centrally controlled hierarchy Rather, markets for the major established drugs . . . are highly competitive, with many tens, if not

hundreds, of thousands of individuals and small dealing organizations.¹⁰⁷

Drug kingpins do exist, Kleinman notes, but they generally do not run organizations that control distribution and sales from wholesale to retail.¹⁰⁸ Gram-or-less offenders are obviously unlikely to be kingpins, but the loosely organized structure of illegal drug markets makes it unlikely that kingpins even employ them.

At the ground level, Kleinman describes three settings for drug transactions: individual transactions between individuals who are friends or otherwise acquainted, the “pizza delivery” model where a buyer calls or texts and the drugs are delivered to an agreed-upon place where payment is made, and “flagrant drug markets,” where buyers and sellers openly exchange money for drugs in public spaces.¹⁰⁹ While public attention has focused heavily on flagrant drug markets, it bears emphasis that many drug sales take place between users and not between “employees” of any groups as the following discussion shows.

A similar picture emerged from a large-scale study of powder cocaine users in the nineteen eighties.

The cocaine sellers we met were not from a different gene pool, not very different from the rest of the users we talked to, who were not very different from ordinary citizens struggling through daily life. If our interviews are any guide, then beneath every big-time dealer who may approximate the stereotype are hundreds of small-time sellers who do not. In large part what we found were people buying from and selling to friends, usually in relatively small quantities, and often for little or no profit.¹¹⁰

This study found that such transactions were largely incidental to use and were exchanges between acquaintances, not arms-length transactions between “buyers and sellers.”¹¹¹

¹⁰⁷ MARK A. R. KLEIMAN, JONATHAN P. CAULKINS & ANGELA HAWKEN, *DRUGS AND DRUG POLICY* 55 (2011).

¹⁰⁸ *Id.* (“Cocaine and heroin might pass through as many as half a dozen distribution layers just within the United States. Dealers at the higher market levels sell large quantities while reaping enormous incomes, so they might fairly be called kingpins.”).

¹⁰⁹ *Id.* at 63-64.

¹¹⁰ DAN WALDORF, CRAIG REINARMAN & SHEIGLA MURPHY, *COCAINE CHANGES: THE EXPERIENCE OF USING AND QUITTING* 75 (1991).

¹¹¹ “Almost anyone who uses cocaine with any regularity becomes involved in sales

By their very nature, such transactions blur the line between possession for use and possession for sale. Even those selling multiple grams of cocaine often “dealed for stash.”¹¹²

This type of seller would buy small supplies — a sixteenth or an eighth of an ounce (1.75 grams to 3.5 grams) — and sell grams or parts of grams to friends for small profits. By adding \$10 or \$20 to the cost of a gram or \$5 and \$10 to parts of grams whenever they sold it, they would cover or subsidize the costs of their own supplies.”¹¹³

Indeed, the study revealed “gram dealers” to be the most common type of sellers who made very little money off their sales.¹¹⁴

While Reinerman’s interview subjects were largely White and middle class, the distinction between drug user and seller seems to be equally blurry in low-income communities of color. Terry Williams studied crack houses and crack dealers in low-income New York neighborhoods for a number of years. He described heavy users as “going on missions” to earn money to buy drugs, missions that often involved acting as an intermediary between an inexperienced buyer and an organized seller.¹¹⁵

These ethnographic accounts of fragmented and loosely organized drug markets are consistent with more systematic social science surveys. The ONDCP’s 2002 survey constitutes a comprehensive attempt to collect information about the structure of illegal drug markets on a country-wide basis. According to that report, drug market structures vary from city to city and from drug to drug. For example, the market for heroin in some cities was decentralizing as “users increasingly support their habits by selling heroin.”¹¹⁶ For

or distribution to some degree. Users often sell to defray the costs of their own supplies, to get better quality drugs, or to assist friends and associates in buying higher quality drugs at quantity prices We heard several accounts of waiters and waitresses in bars and restaurants who each put \$10 or \$15 into a common fund to buy small quantities to be shared. The member who had a good connection made the buy as a favor for the group and more often than not took no profit.” *Id.* at 76.

¹¹² See *id.* at 77.

¹¹³ *Id.*

¹¹⁴ “In general, they bought quarters and eights of ounces (known as eightballs) and sold grams and multiple grams. Most worked out of their homes or places of work, selling cocaine to pay for their own stash and realizing only small profits.” *Id.* at 90. Individuals dealing in such small amounts made little real profit. “Profits at this level are usually quite small, \$5 or \$10 a sale, and it is usually not worth a person’s time or effort to sell these amounts if he or she has any profit motive.” *Id.* at 93.

¹¹⁵ TERRY WILLIAMS, CRACKHOUSE: NOTES FROM THE END OF THE LINE 63-72 (1992).

¹¹⁶ METH & CHALMERS, *supra* note 92, at 3.

heroin generally, the market structure ranged from highly organized groups to small autonomous street cells to independent dealers.¹¹⁷ Sources in one city reported heroin addicts acting as “go-betweens” who would work between the buyer and a driver.¹¹⁸ Street-level crack dealers were found to be equally likely to operate independently than as part of organized sales structures — unlike sellers of other illicit drugs, who were more likely to operate independently.¹¹⁹ “Law enforcement and epidemiological/ethnographic sources identify powder cocaine sellers as independent twice as often as they identify them as organized.”¹²⁰ Methamphetamine sellers were predominantly independent operators.¹²¹ Marijuana sellers were more likely to operate independently than as part of organized operations.

The ONDCP’s 2002 survey reported that even those who work regularly selling drugs often also use the drugs that they sell. “Marijuana sellers were very likely to use their own drugs, much more so than sellers of other drugs.”¹²² Crack sellers are also very likely to use their drug.¹²³ Powder cocaine sellers were “more likely to use their own drug than heroin or crack sellers.”¹²⁴ More than half of respondents believed that methamphetamine sellers were very likely to use their drug.¹²⁵

Putting aside the possibility that the gram-or-less offender who sells drugs may be little more than a “go-between” user himself, even offenders who work regularly in the drug trade make far less money than most people might imagine and fit only poorly the public’s conception of a “drug dealer.” One study found that the “majority of the arrested lower-level crack dealers . . . were employed in full-time legitimate jobs but moonlighted as dealers to supplement their incomes.”¹²⁶ As the following discussion shows, open-air drug markets in urban areas employ teams of workers who play various roles ranging from lookout, to runner, to the person who actually hands the

¹¹⁷ *Id.* at 29.

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 4.

¹²⁰ *Id.* at 44.

¹²¹ *Id.* at 58.

¹²² *Id.* at 5.

¹²³ *Id.* at 36.

¹²⁴ *Id.* at 4.

¹²⁵ *Id.* at 59.

¹²⁶ See PETER REUTER, ROBERT MACCOUN & PATRICK MURPHY, *MONEY FROM CRIME: A STUDY OF THE ECONOMICS OF DRUG DEALING IN WASHINGTON, D.C.* 63-64 (1990), cited in PATRICIA A. ADLER, *WHEELING & DEALING: AN ETHNOGRAPHY OF AN UPPER-LEVEL DRUG DEALING AND SMUGGLING COMMUNITY* (1993).

drug to the buyer. These workers by and large earn a salary that ranges from minimum wage to that which might be paid an entry-level worker in a low-paying, non-union factory job.

As numerous ethnographic accounts describe, the drug trade is simply not that profitable for those most likely to be arrested. Sudhir Venkatesh studied a Chicago drug gang over a long period of time and earned sufficient trust to be allowed to examine a series of spiral bound notebooks that contained the gang's finances. He was stunned to learn how little the gang members most likely to be arrested earned.

[T]he most surprising fact . . . was the incredibly low wage paid to the young members who did the dirtiest and most dangerous work: selling drugs on the street. According to [the gang's] records, they barely earned minimum wage. . . . [E]ven [senior members of the gang], it turned out, made only about thirty thousand dollars a year.¹²⁷

Even highly successful drug rings pay those who run the greatest risk of being arrested relatively little. The journalist Sam Quinones described one such Mexican heroin ring that used the "pizza delivery" model to great success but paid its drivers only a little more than an actual pizza delivery driver might earn. Drivers carry balloons of heroin in their mouth and are directed to buyers by dispatchers who receive calls and texts. The money and drugs are exchanged in the car. Each driver is paid \$1,200 a week for seven twelve hour days, a wage that works out to just over \$14 an hour.¹²⁸

Terry Williams reported similar findings among crack dealers in New York. Even street distributors often struggled to make money.

[T]hey can easily owe more money than they can actually make. The process of wheeling and dealing, learning how to make money — and how to control one's own consumption — is an ongoing one. Some street dealers make no money at all one year and are bringing in "crazy dollars" the next.¹²⁹

The sociologist Victor Rios described his own experience "dealing drugs" as a youth. He bought a lump of heroin with a friend for \$50.¹³⁰

¹²⁷ SUDHIR VENKATESH, *GANG LEADER FOR A DAY: A ROGUE SOCIOLOGIST TAKES TO THE STREETS* 256 (2008).

¹²⁸ SAM QUINONES, *DREAMLAND: THE TRUE TALE OF AMERICA'S OPIATE EPIDEMIC* 43-45 (2015).

¹²⁹ TERRY WILLIAMS, *THE COCAINE KIDS: THE INSIDE STORY OF A TEENAGE DRUG RING* 37-38 (1989).

¹³⁰ VICTOR M. RIOS, *HUMAN TARGETS: SCHOOLS, POLICE, AND THE CRIMINALIZATION OF*

He and his friend broke it into ten smaller chunks, which they sold on the street. After putting in two fourteen-hour days, they sold all ten bags for \$100. Rios reasoned at the time that they had doubled their money, but two fourteen-hour days by two workers adds up to fifty-six person hours, which means that each ended up earning less than a dollar an hour.

The criminologist David Kennedy recalls TV viewers' reactions to a drug sweep in Seattle. People wrote in arguing that the people depicted could not be drug dealers because they looked homeless.

Guess what. Street dealers and gang members *do* look homeless. They don't work steadily, they get robbed, they get arrested and can't sell, they're addicted and that's where all the money goes, it rains and nobody's out buying drugs, the cops are all over and nobody's out, their connection gets busted and things dry up.¹³¹

While the public attention focuses on those higher up in drug organizations who do make large amounts of money, those most likely to be arrested are those who make the actual sales on the street, and they make very little.¹³² All in all, the ethnographic literature strongly suggests that a person arrested for selling a small amount of drugs is either the lowest level offender in an organized drug selling group or simply a repeat user himself operating opportunistically as an intermediary between an inexperienced buyer and someone who works more regularly as a seller.

LATINO YOUTH 1-3 (2017).

¹³¹ DAVID KENNEDY, *DON'T SHOOT: ONE MAN, A STREET FELLOWSHIP, AND THE END OF VIOLENCE IN INNER-CITY AMERICA* 279 (2011).

¹³² And it bears emphasis once again, that many gram-or-less offenders caught selling drugs or participating in drug sales might not even be regular employees. Terry Williams described such "hangers-on" in one crackhouse he studied. *See WILLIAMS, supra* note 115, at 83. Terry Williams studied crackhouses in the late eighties and described the thin distinction between user and seller.

The stairwells are hideouts for many crackheads . . . They are waiting for a buyer to beg from, a stranger to steer, a scale boy who wants someone to run an errand, a friend to complain to. Some are working as lookouts, pulling in thirty dollars, two meals, and a gram of crack for a twelve-hour shift, but most are "volunteer" lookouts, hangers-on waiting to seize some chance that will reward them with enough crack to continue what one crackhead calls "pleasurable suicide."

Id.

V. RECONSIDERING FELONY LIABILITY FOR GRAM-OR-LESS OFFENDERS

Proposals to legalize drugs garner attention because they are dramatic. Marijuana has been legalized to various degrees in a number of states, but neither the federal government nor any of the states have seriously considered legalizing any of the four major hard drugs discussed in this Article.¹³³ What has received much less attention, however, is a reasonable, middle ground position: reducing the possession or sale of very small amounts of these drugs to misdemeanor status.¹³⁴

Where we draw the line between felony and misdemeanor liability with respect to possessing and selling illegal drugs is important for three reasons. First, felony liability carries life-changing consequences. To brand someone a felon is to greatly reduce the chance that the offender will ever successfully integrate his or herself back into the economic, political, and social life of their community.¹³⁵ Second, the racial disparities evident in drug arrests and convictions make drawing

¹³³ See generally Peter Reuter, *Why Has U.S. Drug Policy Changed so Little over 30 Years?*, 42 CRIME & JUST. 75, 78 (2013); Testimony of Jonathan P. Caulkins, Committee on Homeland Security and Governmental Affairs 9 (April 13, 2016), <https://www.hsgac.senate.gov/imo/media/doc/Testimony-Caulkins-2016-04-13.pdf> (“[L]egalizing hard drugs does not at present appear to be a viable option politically within the U.S.”).

¹³⁴ It should be acknowledged that misdemeanor liability itself has serious — albeit lesser — consequences for many individuals. See generally ALEXANDRA NATAPOFF, PUNISHMENT WITHOUT CRIME: HOW OUR MASSIVE MISDEMEANOR SYSTEM TRAPS THE INNOCENT AND MAKES AMERICA MORE UNEQUAL (2018); Eisha Jain, *Proportionality and Other Misdemeanor Myths*, 98 B.U. L. REV. 953 (2018) (arguing that minor misdemeanors trigger massive collateral consequences without adequate notice or process).

¹³⁵ See Joseph E. Kennedy, *The Jena Six, Mass Incarceration, and the Remoralization of Civil Rights*, 44 HARV. C.R.-C.L. L. REV. 477, 482-87 (2009), and authorities cited therein. When Philippe Bourgois returned in 2002 to the drug neighborhood he had studied in the early nineties, he discovered that slightly less than half of the dealers he studied got legal employment when the economy in New York picked up.

One dealer was a unionized doorman, another a home health-care attendant, another a plumber’s assistant. Three others were construction workers for small-time unlicensed contractors. One was a cashier in a discount tourist souvenir store. Two of the sisters of the crack dealers depicted in this book were nurses aides and another was a secretary. One of the women companions of one of the crack dealers was a bank teller, another was a security guard, and a third sold Avon products. One of the sons of the dealers was a cashier in a fast food restaurant

PHILIPPE BOURGOIS, IN SEARCH OF RESPECT: SELLING CRACK IN EL BARRIO, at xix (2d ed. 2003).

the felony versus misdemeanor divide fairly all the more important.¹³⁶ Third, felony liability creates perverse incentives for prosecution and incarceration at the local level. Misdemeanants are ordinarily punished in the city or county jail at the expense of the local political entity to which the prosecutor, and in some cases the judge, are politically accountable.¹³⁷ Incarcerated felons, in contrast, are typically sent to the state prison at the expense of the state government.¹³⁸ So, local prosecutors and judges do not need to worry as much about the cost of incarceration when charging and sentencing drug offenders who qualify as felons. The same could be said, of course, of all felonies. But the problem of perverse incentives is particularly acute in the area of drug crime where local prosecutors and judges may be tempted to offload to the state prison system repeat drug offenders who constitute not a threat to public safety but a costly public order nuisance. Reducing gram-or-less offenses to misdemeanor status might encourage more serious consideration of whether a particular gram-or-less offender truly required incarceration at all, much less incarceration in state prison with serious criminals.

The arguments against felony liability for gram-or-less offenders are relatively straightforward. The possession or even the sale of such a small quantity does not cause any significant social harm and the consensual nature of illegal drug use makes the blameworthiness involved more suitable for misdemeanor liability. Moreover, felony liability for such small quantities amplifies the discriminatory effects of our racially disparate prosecution of drug crime.

The arguments in favor of felony liability for gram-or-less offenders are more complex. One could argue that gram-or-less offenders are indirectly responsible for the significant social harms that the illegal drug trade creates in the aggregate. Such indirect responsibility arguments assume that the gram-or-less offender is part of a larger group that sells large quantities of drugs on an ongoing basis and hold

¹³⁶ See generally MICHAEL TONRY, *PUNISHING RACE: A CONTINUING AMERICAN DILEMMA* (2011) (describing the racially disproportionate effects of drug enforcement on people of color).

¹³⁷ See FRANKLIN E. ZIMRING & GORDON HAWKINS, *THE SCALE OF IMPRISONMENT* 140 (1991) ("It is likely that some tension is generated by the fact that the level of government that is responsible for paying the bills for the upkeep of prisons does not make decisions about the numbers of persons sent to prison or the length of their stay there. To judges and prosecutors imprisonment may seem to be available as a free good or service or at least may be viewed as the subject of a major state government subsidy. This phenomenon . . . we call the 'correctional free lunch'. . ."), cited in W. David Ball, *Why State Prison?*, 33 *YALE L. & POL'Y REV.* 75, 77 (2014).

¹³⁸ See *id.*

each member of the group responsible for all the drugs sold. Similarly, one might hold the gram-or-less offender indirectly responsible for the violence that attends the illegal drug trade, even if the gram-or-less offender does not participate directly in it. In a similar vein, one might also argue that arresting on felony charges the “small fish,” gram-or-less offender might be a necessary means to the end of catching the “big fish” offender who does merit felony liability. Finally, one might argue along similar lines that the social harms of the crack cocaine trade in low-income communities justifies the disparate attention that the drug receives from law enforcement and the racial disparities that result.

This section considers these arguments in turn and concludes that felony liability for the gram-or-less offender is not justified. Their arrest does not decrease and may increase drug trade violence. Their arrests are not part of a grand strategy to prosecute more serious offenders. The resulting racial disparities are most likely simply a function of how differently upscale and downscale drug markets are policed.

A. The Argument Against Felony Liability for Gram-or-Less Offenders

Given that gram-or-less amounts are consistent with small-scale personal consumption, felony liability for possession or even sale of such an amount cannot be justified in terms of the harm caused by that single transaction or the blameworthiness involved. With respect to blameworthiness, the offender is selling his drug to a willing buyer in a society that worships both consumer choice generally and the use of mood-altering substances more specifically. Illegal drugs are, of course, deemed by society to be harmful, but so are many legal mind-altering substances such as alcohol and nicotine products. Some illegal drugs may conceivably involve harms that are greater than those of some legal drugs, but those harms are presumably known to the willing buyer.

Switching to a utilitarian perspective, one might argue that selling hard drugs is so harmful to society that serious punishment is justified for selling even very small amounts. Small amounts of illegal drugs are simply not sufficiently harmful to merit felony status or state prison incarceration for an extended period with truly serious criminal offenders. Hard drugs are harmful substances, but they are not weapons of mass destruction. The amount of ricin that can be extracted from a single castor bean can kill a thousand people.¹³⁹ Hard

¹³⁹ See Deborah Blum, *About Ricin*, WIRED (Apr. 17, 2013, 2:54 PM),

drugs, on the other hand, are used to alter people's moods, not to harm them, and the incidence of a fatal reaction to a single small dose is extremely low. For marijuana it is non-existent, and for cocaine and methamphetamine, it is incredibly rare.¹⁴⁰ Once again, the "White drug" of heroin is the exception. A user with either a low tolerance or a purer quality of heroin could overdose from a quarter of a gram and certainly would from a gram.¹⁴¹ Heroin aside, however, the health effects of a single small dose of the remaining hard drugs are usually not fatal.¹⁴² Overall, the harmful health effects of illegal drugs come from sustained use, just as they do with alcohol and nicotine products.

One might argue, however, that even a single dose of an illegal drug is sufficiently harmful for felony liability to attach because even a single use can lead to addiction, a condition that involves serious harm for the user over time and great costs for society in the aggregate. An instantly addicting substance would be akin to ricin in the sense that even a tiny amount could seriously harm the user. Even hard drugs such as heroin, cocaine, and methamphetamine, however, are not instantly addicting.¹⁴³ To the contrary, the nature of a person's experience of a drug — including whether they become addicted — depends upon a number of factors other than the chemical properties of the substance itself, most notably the mindset of the user and circumstances of use.¹⁴⁴ Those who become profoundly addicted most

<https://www.wired.com/2013/04/about-ricin> ("The purified toxin from a single castor bean, according to some accounts, is lethal enough to kill at least a thousand people given an effective delivery system."). See generally *Ricin Toxin From Ricinus Communis* (Castor Beans), CTR. FOR DISEASE CONTROL & PREVENTION, <https://emergency.cdc.gov/agent/ricin/qa.asp> (last updated Apr. 17, 2013).

¹⁴⁰ See generally CYNTHIA KUHN, SCOTT SWARTZWELDER & WILKIE WILSON, BUZZED: THE STRAIGHT FACTS ABOUT THE MOST USED AND ABUSED DRUGS 135, 210-11 (2d ed. 2003).

¹⁴¹ See generally HOLLY HEDEGAARD, LI-HUI CHEN & MARGARET WARNER, DRUG-POISONING DEATHS INVOLVING HEROIN: UNITED STATES, 2000–2013, CTRS. FOR DISEASE CONTROL & PREVENTION (Mar. 2015), <https://www.cdc.gov/nchs/data/databriefs/db190.pdf>; Heroin Overdose, MEDLINE PLUS, <https://medlineplus.gov/ency/article/002861.htm> (last updated Nov. 13, 2018) (explaining that most people who overdose are already addicted, but some people overdose the very first time they try it).

¹⁴² See KUHN, SWARTZWELDER & WILSON, *supra* note 140, at 135, 228.

¹⁴³ See *id.* at 196 ("People who take opiates for a while (weeks) can develop significant dependence and addiction, and undergo withdrawal when they stop"); *id.* at 238 ("There are thousands of people . . . who regularly use psychomotor stimulants but never develop a compulsive pattern of use [although] . . . [t]here is no question that psychomotor stimulants are addictive.").

¹⁴⁴ "[I]n addition to the interaction between the molecules of the substance and the cells of the human body, drug effects are shaped by the psychological mind-set of the user — his or her expectations, mood, mental health, purposes, and personality —

often do so because they use repeatedly under circumstances where they are prone to addiction.¹⁴⁵ Holding the gram-or-less offender criminally responsible for the eventual or ongoing addiction of his buyer is like holding a snowflake responsible for a blizzard.

Finally, comparisons of the blameworthiness and harmfulness of gram-or-less offenders with other misdemeanor offenses suggests that felony liability is not warranted for possession or sale of such small amounts — even arguably for heroin. No one should sell harmful mood-altering substances, even in small amounts, but there are many activities that the law forbids which it does not criminalize and still many more offenses that are formally criminalized but weakly enforced and yet still other offenses that are simply prosecuted as misdemeanors. Illegally downloading a copyrighted song violates civil law, for example, but one must illegally download more than one thousand dollars of copyrighted material within a six-month period of time before one commits a criminal violation of the federal copyright statute.¹⁴⁶ Speeding in the aggregate costs thousands of dollars and lives each year, but speeding alone is ordinarily punished as an infraction. Even driving while impaired, an activity widely recognized as both highly blameworthy and dangerous, is punishable only as a misdemeanor as a first — and often even as a second — offense.

The unfairness of prosecuting the possession or sale of a gram or less of an illegal drug is even more noticeable when compared to *malum in se* offenses. Stealing property worth less than \$1,000 is routinely prosecuted as a misdemeanor in most jurisdictions¹⁴⁷ yet selling \$25 worth of a mood-altering substance to a willing buyer can result in a felony arrest in the vast majority of jurisdictions.¹⁴⁸ In the case of larceny, a person deliberately takes something from another that he or she knows is not theirs and receives a misdemeanor. The gram-or-less offender sells a mood-altering substance of relatively little value as part of a consensual transaction and receives a felony.

Likewise, simple assault and battery is also a misdemeanor.¹⁴⁹ Even simple assault and battery against a domestic partner can be a

and by *the social setting of use* — . . . the social conditions that shape such situations and impinge upon the users, and the historically and culturally specific meanings and motives used to interpret drug effects.” CRAIG REINARMAN & HARRY G. LEVINE, *CRACK IN AMERICA: DEMON DRUGS & SOCIAL JUSTICE* 9 (1997).

¹⁴⁵ *Id.* at 9-10.

¹⁴⁶ 17 U.S.C. 506(a)(1)(B) (2018).

¹⁴⁷ See WAYNE R. LEFAVE, 3 *SUBSTANTIVE CRIMINAL LAW* § 19.4(b) (3d ed. 2018).

¹⁴⁸ See *infra* Part III.

¹⁴⁹ WAYNE R. LEFAVE, 2 *SUBSTANTIVE CRIMINAL LAW* § 16.1 (3d ed. 2018) (“Assault

misdemeanor.¹⁵⁰ So one could punch the next person one sees in the face for no good reason and receive a misdemeanor, but if one sold that person a single dose of a mood-altering substance one would receive a felony. Once again, the single dose sold might not produce a harmful effect in and of itself although it may contribute to cumulative harm if the buyer continues to use. A punch, in contrast, produces immediate harm and one that may also entail cumulative effects in the case of a victim who suffers repeated assaults. That harm, moreover, is not chosen by the victim, unlike the willing buyer in a drug transaction.

There are, of course, sound reasons why we do not ordinarily impose felony liability for larceny or simple battery, even though many thieves and batterers are recidivists.¹⁵¹ Felony liability marks a person as a serious criminal and effectively sets them apart from others in society in ways that are significant and lasting.¹⁵² For those reasons, felony liability is reserved for more serious crimes. The point is that a single incident of gram-or-less possession or sale of an illegal drug is no more deserving of felony liability — and arguably is less deserving — than one who commits a misdemeanor act of violence or theft.

Given that those arrested with gram-or-less amounts of drugs are most likely addicts or very low-level employees of a drug group, felony liability for such low-level involvement cannot be justified. Felony liability “dis-integrates” the offender from family, community, and ultimately society by marking the offender as a serious criminal.¹⁵³ The imposition of a felony conviction carries many serious collateral consequences which greatly reduce the chance that the offender will ever again be a productive member of society. Actual incarceration further dis-integrates the offender by removing them from family and community life and by marking them as and socializing them with more serious criminal offenders.

and battery, which were common-law misdemeanors, today exist as statutory crimes in all American jurisdictions. Simple assault and simple battery are punishable (generally as misdemeanors) under all the American criminal codes.”).

¹⁵⁰ CECILY FUHR ET AL., 42 CORPIS JURIS SECUNDUM INDICTMENTS § 342 (2018) (“[M]isdemeanor domestic battery is a lesser included offense of felony domestic battery.”).

¹⁵¹ See OFFICE OF JUSTICE PROGRAMS, U.S. DEP’T OF JUSTICE, 2018 UPDATE ON PRISONER RECIDIVISM: A 9-YEAR FOLLOW-UP PERIOD (2005–2014), 10 tbl.6 (May 2018), <https://www.bjs.gov/content/pub/pdf/18upr9yfup0514.pdf>.

¹⁵² See generally Kennedy, *supra* note 91 (describing obstacles to employment education and participation in family life resulting from felony conviction).

¹⁵³ See *id.* at 482.

One could argue that all people who participate in selling illegal drugs are sufficiently culpable and harmful to society to merit serious punishment. But felony liability should be reserved for drug offenders who are deeply enmeshed in a life of crime, who profit greatly from the drug trade or who use violence. Such offenders do exist, to be sure, and they may occasionally be arrested for possessing or selling gram-or-less amounts, but the research discussed in Part IV suggests that they are far less numerous than the low-level workers and addicts who are routinely arrested.¹⁵⁴ An offender who sells two doses of a drug so that they can consume a third or who works long hours for the same salary that they would obtain stocking shelves at Walmart (if a Walmart job were available in their community) does not merit felony liability.

One might justify serious punishment for sellers of small amounts of drugs on the grounds that the drug trade generates substantial amounts of violence. There are two problems with such a justification. First, violence is incidental to the drug trade. Violence is not a primary goal of the drug trade. Like any other money-making enterprise, the primary goal of the drug trade is presumably to generate profits by selling harmful illegal drugs to willing buyers. Violence is incidental to that profit-making goal. In contrast, violence is central to a terrorist operation. It makes sense to punish any participant in a terrorist enterprise for violence committed by that organization because a principal goal of such an organization is to perpetrate violent acts of terror. It makes less sense to harshly punish peripheral or low-level participants in a drug enterprise for violence they themselves do not commit because while violence may be a frequent part of the drug trade as currently practiced, it is nonetheless incidental to the purpose of that activity. If those who ran drug enterprises could sell drugs without committing violent acts, they presumably would do so.

Some measure of violence does seem to be an inherent part of the illegal drug. Most of the violence seems to be low-level assaults and batteries against customers or employees who are not paying or earning what is owed or expected.¹⁵⁵ More serious violence including homicides results from robberies of drugs or money or territorial disputes over drug markets. Finally, some of the violence resulting

¹⁵⁴ See *supra* Part IV.B.

¹⁵⁵ See, e.g., BOURGOIS, *supra* note 135, at 24 ("Regular displays of violence are essential for preventing rip-offs by colleagues, customers, and professional holdup artists. Indeed, upward mobility in the underground economy of the street-dealing world requires a systematic and effective use of violence against one's colleagues, one's neighbors, and, to a certain extent, against oneself.").

from the drug trade could be characterized as not just incidental, but accidental in nature. It comes as no surprise that arming young low-status, easily offended young men with firearms to protect the drugs or money involved in drug transactions results in these armed young men getting into lethal conflicts, especially with one another. This is especially true when one considers that those working in the drug trade in many areas are often poorly educated young men of low social status who generally constitute a relatively high proportion of homicide rate as both offenders and victims.¹⁵⁶ Serious violence should, of course, be seriously punished, but punishing sellers of small amounts of drugs as a proxy for violence is not efficient from a utilitarian point of view. Rather than dispersing police and prosecutorial time over violent and non-violent participants in the drug trade alike, concentrated efforts to target violent offenders may yield a far better return on the investment of limited time and resources.¹⁵⁷

Harshly punishing addict-sellers or street-sellers in a drug organization on account of violence also violates basic notions of fairness and has perverse, confounding effects. Much of the violence of the drug trade results from the fact that we punish drug activity as harshly or more harshly than violence.¹⁵⁸ A drug trade worker who has been robbed cannot report the event to the police without fear of exposing himself to felony liability. Even if the police and prosecutor promised not to arrest or charge for the transaction that precipitated the robbery, the seller would have identified himself to the police, a serious cost when felony liability is on the line. So, workers in the drug trade who handle large amounts of drugs or money arm themselves to protect against robberies since would be robbers do not have to worry about their robberies being reported to the police.

¹⁵⁶ See, e.g., DANIELLE SERED, *YOUNG MEN OF COLOR AND THE OTHER SIDE OF HARM* (2014), <https://www.vera.org/publications/young-men-of-color-and-the-other-side-of-harm-addressing-disparities-in-our-responses-to-violence> (noting that homicide is the leading cause of death for young black men aged 10 to 24).

¹⁵⁷ See generally KENNEDY, *supra* note 131.

¹⁵⁸ See ALEX ALVAREZ & RONET BACHMAN, *MURDER AMERICAN STYLE* 154 (2002) (“[T]here is no conclusive evidence that any illicit drug directly increases an individual’s propensity to become violent.”); *id.* at 155 (explaining that most of those addicted to hard drugs do not commit crimes to sustain their addictions); *id.* at 156 (“[M]any people have experimented with drugs, sometimes often, and do not go on to become addicts and perpetrate further criminality Drug trafficking is by all accounts an extremely violent business enterprise, in large part due to the illegal nature of the venture.”); *id.* at 158 (“[T]he penalties for dealing and using drugs may be so extreme that offenders may become desperate to avoid capture and, thus, more likely to resort to lethal violence.”).

One further justification remains for arresting low-level drug offenders. Such offenders might cooperate in the investigation and prosecution of more serious offenders in the drug trade. There are two problems with such a theory. First, many such offenders would presumably not be formally arrested after being apprehended since their formal arrest might signal a risk that they have been compromised by police pressure to cooperate, a risk that would rise to the level of certainty once the arrest did not result in the expected prosecution. Second, there are nowhere near enough mid-level and high-level drug offenders being arrested to justify either the assumption that such a strategy is being pursued or that the strategy is worth the cost. As Part II demonstrates, about 40% of arrests for hard drugs involve the minuscule amount of a quarter of a gram, and another 20% of arrests involve between a quarter of a gram to a gram. Just under two-thirds of arrests then are either consistent with merely personal consumption, a sale incidental to securing drugs for personal consumption, or employment at the lowest level of a drug organization.¹⁵⁹ We do not seem to be catching minnows in order to get sharks. We just seem to be scooping up minnows in the great majority of the cases.

If the arrest of small offenders were part of a strategy to pursue more serious offenders one would expect to see a substantial number of offenders in the mid-level range as police seek to work their way up the chain of command, yet the decrease in the percentage of those arrested decreases precipitously as one moves up to larger quantities.

Applying Ockham's razor,¹⁶⁰ a simpler explanation emerges. Gram-or-less offenders are arrested most likely because they are simply "targets of opportunity." Police arrest those at the bottom of the food chain because they are the easiest offenders to catch and because the law makes little meaningful distinction between the smaller and larger offender for policing purposes.

Indeed, absent either an exceptionally dedicated officer or carefully constructed institutional incentives to the contrary, catching the small fish makes the most sense. An arrest by an undercover officer of someone selling drugs on the street is easy and relatively safe because the transaction can be covertly witnessed by nearby plain clothes officers. After paying for and seeing the drugs, the arresting officer has

¹⁵⁹ See *supra* Part IV.A.

¹⁶⁰ The term "Ockham's razor" generally refers to the idea that the simplest possible explanation for something is to be preferred over more complex explanations. Brian Duigan, *Occam's Razor*, *ENCYCLOPEDIA BRITANNICA*, <https://www.britannica.com/topic/Occams-razor> (last visited Oct. 31 2018).

an open and shut case. Alternately, if they find a small amount of drugs on someone they stop and frisk, they have an almost equally strong case with the caveat that the stop and search may raise Fourth Amendment issues. Buying the drugs outside minimizes the risk. A team of police officers can easily make such an arrest each day and accumulate dozens of arrests in a single month. In contrast, cultivating informants, developing probable cause for search warrants, and building a case against those who operate the next level up might take weeks for a single arrest. Yet the law treats each arrest as a felony arrest for sale. The amount involved has little effect on the charge.

In sum, the best available evidence suggests that most gram-or-less felony arrests are not part of a calculated effort to prosecute more serious offenders but either a matter of happenstance at best or malfeasance at worst.

CONCLUSION

The findings presented in this Article afford a starting place for serious discussion of a major reform of our nation's drug laws. Raising the bar for felony liability above the gram-or-less offenses would be a state-by-state project, however. Generating support for such a reform would best be accomplished through the use of data specific to each state, a goal easily achieved for any state that participates in NIBRS reporting.

As discussed above, states have ample incentives to raise the bar for felony liability in order to create a more functional set of incentives for state and local law enforcement and prosecutors to make more judicious use of the state's correctional resources. In the absence of action by a state government, however, local governments and law enforcement agencies could exercise their discretion by simply not charging such small amounts under felony statutes or by forgoing such arrests altogether. Fortunately, NIBRS data permits the generation of not just state-by-state data but even more localized findings down to the level of each participating law enforcement agency. As the consensus for more rationale and proportionate drug enforcement policies grow, such granular data provides the necessary fuel to energize these efforts on a city-by-city and county-by-county level.

Such efforts require participation in NIBRS reporting by both the state and by local law enforcement agencies. Such participation should be mandated by each state. Tracking and publishing drug type, drug quantity, and race in arrests should become standard practice for state and local governments. Whether one views it as a utilitarian measure

to measure the effectiveness of drug enforcement efforts or a human rights effort to ensure that felony liability is reserved for the seriously blameworthy, the time for requiring the use of such big data is long overdue.

Ending felony liability for gram-or-less offenders may also be merely the tip of the iceberg in terms of rational drug enforcement reforms that NIBRS data could reveal. NIBRS data also contains variables for the age and gender of the offender, for example, and some jurisdictions code for whether a weapon was recovered in connection with the crime. Moreover, NIBRS data could also be correlated with information about the reporting law enforcement agency contained in Law Enforcement Management and Administrative Statistics ("LEMAS").¹⁶¹ Such correlations might reveal which sorts of law enforcement agency structures and programs result in higher quantity arrests or less racially disparate patterns of arrest.

Exactly how and why we have spent billions of dollars prosecuting drug crime and incarcerated hundreds of thousands of offenders for millions of hours without keeping more careful track of whom we were arresting and for what quantity is a question that may someday puzzle future, more enlightened, generations. For now, using such data to end gram-or-less felony liability is a good place to start.

¹⁶¹ *Law Enforcement Management and Administrative Statistics (LEMAS) Series*, ICPSR, <https://www.icpsr.umich.edu/icpsrweb/ICPSR/series/92> (last visited Nov. 5, 2018) (describing the LEMAS series data collection, which contains information from over 3000 state and local law enforcement agencies dating back to 1987).

APPENDIX

Table 2. Cocaine and Crack Cocaine Felony Liability for Low-Level Offenders¹⁶²

Possession of <u>any</u> amount:	Possession with intent to deliver:	Possession of <u>any</u> amount with a threshold number of prior offenses:	Possession of a threshold amount:
Arkansas	Delaware (any amount)	Iowa (\geq two priors)	Delaware (≥ 5 g.)
Idaho	Iowa (any amount)	South Carolina (\geq two priors)	South Carolina (> 1 g.)
Michigan	Tennessee [†] (any amount)	North Dakota (\geq two priors)	Vermont (> 2.5 g.)
Montana	Vermont (any amount)		
New Hampshire	South Carolina (any amount)		
Rhode Island	West Virginia [†] (any amount)		
South Dakota			
Virginia			

[†] mandatory minimum applies

¹⁶² See *infra* Table 9. The only jurisdictions that do not impose strict felony liability for possession of any amount are represented in the “possession of a threshold amount” and “possession with intent to deliver” columns, due to the understanding that the strict liability jurisdictions would impose felony liability in these two scenarios as well.

Table 3. Heroin Felony Liability for Low-Level Offenders¹⁶³

Possession of <u>any</u> amount:	Possession with intent to deliver:	Possession of <u>any</u> amount with a threshold number of prior offenses:	Possession of a threshold amount:
Arkansas	Delaware (any amount)	Iowa (\geq two priors)	Delaware (≥ 1 g.)
Idaho	Iowa (any amount)	Tennessee (\geq two priors)	South Carolina (> 2 g.)
Michigan	Tennessee [†] (any amount)	South Carolina (\geq two priors)	Vermont ($> .2$ g.)
Montana	South Carolina (any amount)	North Dakota (\geq two priors)	
New Hampshire	West Virginia [†] (any amount)		
Rhode Island			
South Dakota			
Virginia			

[†] mandatory minimum applies

¹⁶³ See *infra* Table 10. The only jurisdictions that do not impose strict felony liability for possession of any amount are represented in the “possession of a threshold amount” and “possession with intent to deliver” columns, due to the understanding that the strict liability jurisdictions would impose felony liability in these two scenarios as well.

Table 4. Methamphetamine Felony Liability for Low-Level Offenders¹⁶⁴

Possession of <u>any</u> amount:	Possession with intent to deliver:	Possession of <u>any</u> amount with a threshold number of prior offenses:	Possession of a threshold amount:
Arkansas	Delaware (any amount)	Iowa (\geq two priors)	Delaware (≥ 5 g.)
Idaho	Iowa (any amount)	South Carolina (\geq two priors)	South Carolina (> 1 g.)
Michigan	South Carolina (any amount)	North Dakota (\geq two priors)	Vermont (> 2.5 g.)
Montana	Tennessee [†] (any amount)		
New Hampshire	Vermont (any amount)		
Rhode Island	West Virginia [†] (any amount)		
South Dakota			
Virginia			

[†] mandatory minimum applies

¹⁶⁴ See *infra* Table 11. The only jurisdictions that do not impose strict felony liability for possession of any amount are represented in the “possession of a threshold amount” and “possession with intent to deliver” columns, due to the understanding that the strict liability jurisdictions would impose felony liability in these two scenarios as well.

Table 5. Marijuana Felony Liability for Low-Level Offenders¹⁶⁵

Possession with intent to deliver:	Possession of <u>any</u> amount with a threshold number of prior offenses:	Possession of a threshold amount:
Arkansas (> 14 g.)	Rhode Island (> 1 prior)	Idaho (> 85 g.)
Delaware (any)		North Dakota (> 28 g.)
Idaho (any)		South Carolina (>28 g.)
Iowa (any)		South Dakota (> 56.7 g.)
Michigan (any)		Vermont (\geq 56.7 g.)
Montana (any)		
New Hampshire (any)		
Rhode Island (any)		
South Dakota (any)		
Tennessee (>14 g.)		
Vermont (> 28 g.)		
Virginia (> 14 g.)		
West Virginia (any)		

¹⁶⁵ See *infra* Table 12. For consistency purposes, this table was converted to grams, although the underlying statutes use ounces as a unit of measurement.

Table 6. Possession with Intent to Sell in the Ten Most Populous States

State	Cocaine (Including Crack):	Heroin:	Methamphetamine:	Marijuana:
California	Felony ¹⁶⁶	Felony ¹⁶⁷	Felony ¹⁶⁸	Misdemeanor ¹⁶⁹
Texas	State Jail Felony ¹⁷⁰	State Jail Felony ¹⁷¹	State Jail Felony ¹⁷²	Misdemeanor ¹⁷³
Florida	Felony ¹⁷⁴	Felony ¹⁷⁵	Felony ¹⁷⁶	Felony ¹⁷⁷
New York	Felony ¹⁷⁸	Felony ¹⁷⁹	Felony ¹⁸⁰	Misdemeanor ¹⁸¹
Illinois	Felony ¹⁸²	Felony ¹⁸³	Felony ¹⁸⁴	Misdemeanor ¹⁸⁵
Pennsylvania	Felony ¹⁸⁶	Felony ¹⁸⁷	Felony ¹⁸⁸	Misdemeanor ¹⁸⁹

¹⁶⁶ See CAL. HEALTH & SAFETY CODE § 11351.5 (2018); CAL. PENAL CODE § 1170(h) (2018).

¹⁶⁷ See CAL. HEALTH & SAFETY CODE § 11351 (2018); PENAL § 1170(h).

¹⁶⁸ HEALTH & SAFETY §§ 11055(d)(2), 11378(5); PENAL § 1170(h).

¹⁶⁹ See CAL. HEALTH & SAFETY CODE § 11359 (2018) (not defining the offense as a misdemeanor but stating that the offense is punishable by county jail confinement for up to six months, a fine of up to \$500, or both); CAL. PENAL CODE § 17(a) (2018) (distinguishing felonies from misdemeanors).

¹⁷⁰ TEX. HEALTH & SAFETY CODE ANN. § 481.112(b) (2018); TEX. PENAL CODE ANN. § 12.32 (2018).

¹⁷¹ HEALTH & SAFETY § 481.112(b); PENAL § 12.32.

¹⁷² HEALTH & SAFETY § 481.112(b); PENAL § 12.32.

¹⁷³ TEX. HEALTH & SAFETY CODE ANN. § 481.120(b)(1)-(2) (2018); TEX. PENAL CODE ANN. §§ 12.21, 12.22 (2018).

¹⁷⁴ See FLA. STAT. ANN. §§ 893.13(1)(a)(2), 893.03(2)(a)(4) (2018).

¹⁷⁵ See *id.* §§ 893.13(1)(a)(1), 893.03(1)(b)(11).

¹⁷⁶ *Id.* §§ 893.13(1)(a)(1), 893.03(2)(c)(5).

¹⁷⁷ *Id.* §§ 893.13(1)(a)(2); 893.03(1)(c)(7).

¹⁷⁸ See N.Y. PENAL LAW § 220.16 (2018).

¹⁷⁹ See *id.*

¹⁸⁰ *Id.*

¹⁸¹ *Id.* § 221.10.

¹⁸² 720 ILL. COMP. STAT. § 570/401(a)(2) (2018).

¹⁸³ *Id.* § 570/401(a)(1).

¹⁸⁴ *Id.* § 646/55 (a)(2)(A).

¹⁸⁵ *Id.* § 550/5(a).

¹⁸⁶ See 35 PA. STAT. AND CONS. STAT. ANN. §§ 780-113(a)(30), (f)(2) (2018).

¹⁸⁷ See *id.*

¹⁸⁸ See *id.*

¹⁸⁹ *Id.* §§ 780-113(a)(31), (g).

Ohio	Felony ¹⁹⁰	Felony ¹⁹¹	Felony ¹⁹²	Felony ¹⁹³
Georgia	Felony ¹⁹⁴	Felony ¹⁹⁵	Felony ¹⁹⁶	Felony ¹⁹⁷
North Carolina	Felony ¹⁹⁸	Felony ¹⁹⁹	Felony ²⁰⁰	Felony ²⁰¹
Michigan	Felony ²⁰²	Felony ²⁰³	Felony ²⁰⁴	Felony ²⁰⁵

¹⁹⁰ OHIO REV. CODE ANN. § 2925.03(C)(4)(a) (2018).

¹⁹¹ *Id.* § 2925.03(C)(6)(a).

¹⁹² *See id.* § 2925.03(C)(1)(a).

¹⁹³ *Id.* § 2925.03(C)(3)(a); OHIO REV. CODE ANN. § 2929.13(B) (2018).

¹⁹⁴ *See* GA. CODE ANN. §§ 16-13-30(b), (d) (2018).

¹⁹⁵ *See id.*

¹⁹⁶ *See id.*

¹⁹⁷ *See id.*

¹⁹⁸ *See* N.C. GEN. STAT. §§ 15A-1340.17, 90-95(a)(1), (b)(1) (2018).

¹⁹⁹ *See id.*

²⁰⁰ *See id.* § 90-95(a)(1), (b)(1).

²⁰¹ *Id.* § 90-95(b)(2) (stating that this punishment does not apply to the transfer of less than five grams of marijuana for no remuneration).

²⁰² *See* MICH. COMP. LAWS ANN. § 333.7401(2)(a)(iv) (2018).

²⁰³ *See id.*

²⁰⁴ *See id.* § 333.7401(2)(b)(i).

²⁰⁵ *See id.* § 333.7401(2)(d)(iii) (not defining the offense as a felony but stating it is subject to up to four years confinement), § 761.1 (defining a felony as “a violation of a penal law of this state for which the offender, upon conviction, may be punished by imprisonment for more than 1 year or an offense expressly designated by law to be a felony”).

Table 7. Breakdown of All Arrestees Uniquely Identified by Race and Ethnicity

	Frequency	Percent	Valid Percent	Cumulative Percent
White nonHispanic	585,718	49.2	68.7	68.7
Black nonHispanic	201,304	16.9	23.6	92.4
American Indian nonHispanic	5,476	0.5	0.6	93.0
Asian nonHispanic	3,739	0.3	0.4	93.4
Native Hawaiian nonHispanic	4	0.0	0.0	93.4
Hispanic White	53,723	4.5	6.3	99.7
Hispanic Black	1,868	0.2	0.2	100.0
Hispanic American Indian	206	0.0	0.0	100.0
Hispanic Asian	129	0.0	0.0	100.0
Total	852,167	71.6	100.0	
Missing cases	337,256	28.4		
Grand total	1,189,423	100.0		

Table 8. Breakdown of All Arrestees Uniquely Identified by Race and Ethnicity with Hispanics Combined

	Frequency	Percent	Valid Percent	Cumulative Percent
White nonHispanic	585,718	49.2	68.7	68.7
Black nonHispanic	201,304	16.9	23.6	92.4
American Indian nonHispanic	5,476	0.5	0.6	93.0
Asian nonHispanic	3,739	0.3	0.4	93.4
Native Hawaiian nonHispanic	4	0.0	0.0	93.4
Hispanic	55,926	4.7	6.6	100.0
Total	852,167	71.6	100.0	100.0
Missing cases	337,256	28.4		
Grand total	1,189,423	100.0		

Table 9. Cocaine (including Crack Cocaine) Laws

Jurisdiction	Quantity and Circumstances for Felony Liability
Arkansas	Possession of any amount ²⁰⁶
Delaware	Possession of five grams or more ²⁰⁷ <i>or</i> possession with intent to deliver any amount ²⁰⁸
Idaho	Possession of any amount ²⁰⁹
Iowa	Possession of any amount with two or more prior offenses ²¹⁰ <i>or</i> possession of any amount with intent to deliver ²¹¹
Michigan	Possession of any amount ²¹²
Montana	Possession of any amount ²¹³
New Hampshire	Possession of less than 0.5 ounces of cocaine ²¹⁴ <i>or</i> less than one gram crack cocaine ²¹⁵

²⁰⁶ See ARK. CODE ANN. §§ 5-4-401(a)(5), 5-64-419(b)(1)(a) (2018) (noting that possession of less than two grams is considered a class D felony, the sentence for which shall not exceed six years).

²⁰⁷ DEL. CODE ANN. tit. 16, § 4756 (2018) (defining possession of a controlled substance in a Tier 2 quantity as a class F felony); *id.* tit. 16, § 4751C(5)(a) (categorizing five grams or more of a mixture containing cocaine as a Tier 2 quantity).

²⁰⁸ *Id.* tit. 11, § 4205(b)(3); tit. 16, § 4753(1) (considered a class C felony, with a sentence of up to fifteen years).

²⁰⁹ IDAHO CODE ANN. §§ 37-2707(b)(6), 37-2732(c)(1) (2018) (punishing possession of any amount of a schedule II drug as a felony punishable by up to seven years, a fine of \$15,000, or both).

²¹⁰ IOWA CODE §§ 124.401(5), 902.9(1)(e) (2018) (punishing the offense as a class D felony, which is punishable by up to five years incarceration and a fine of \$750–\$7,500).

²¹¹ *Id.* § 124.401(1)(a)(2)(b) (punishing possession of 500 grams or more as a class B felony, which is punishable by incarceration of up to fifty years and a fine of up to one million dollars).

²¹² MICH. COMP. LAWS ANN. § 333.7403(2)(a)(v) (2018) (classifying possession of any amount less than twenty-five grams as a felony punishable by not more than four years confinement, a fine of \$25,000, or both).

²¹³ MONT. CODE ANN. §§ 45-9-102(6), 50-32-101(3) (2018) (punishing possession of a dangerous drug with a prison term of up to five years, a fine of up to \$5,000, or both). Offenses in which the sentence imposed upon conviction is death or a state prison term exceeding one year are classified as felonies in Montana. *Id.* § 45-2-101(23).

²¹⁴ N.H. REV. STAT. ANN. § 318-B:26(II)(a) (2018) (classifying simple possession as a class B felony, punishable by confinement up to seven years, a \$25,000 fine, or both); N.H. CODE ADMIN. R. ANN. HE-C 501.03 (2018) (adhering to the federal controlled substance schedules for classifying drugs).

²¹⁵ N.H. REV. STAT. ANN. § 318-B:26(I)(c)(4) (2018) (classifying simple possession as a class B felony, punishable by confinement up to seven years, a maximum fine of \$100,000, or both).

North Dakota	Possession of any amount for a second or subsequent offense ²¹⁶
Rhode Island	Possession of any amount ²¹⁷
South Carolina	First offense possessing more than one gram ²¹⁸ <u>or</u> second offense possessing any amount ²¹⁹ <u>or</u> possession of any amount with intent to deliver ²²⁰
South Dakota	Possession of any amount ²²¹
Tennessee	Possession with intent to deliver any amount ²²²
Vermont	Possession of 2.5 grams or more ²²³ <u>or</u> selling any amount ²²⁴
Virginia	Possession of any amount ²²⁵
West Virginia	Possession of any amount with intent to deliver ²²⁶

²¹⁶ N.D. CENT. CODE § 19-03.1-23(8)(b) (2018) (classifying a second or subsequent possessory offense as a class C felony, punishable by a maximum penalty of five years imprisonment, a \$10,000 fine, or both).

²¹⁷ 21 R.I. GEN. LAWS ANN. §§ 11-1-2, 21-28-4.01(c)(2)(i) (2018) (punishing possession of less than one ounce with imprisonment for up to three years, a fine of \$500–\$5000, or both).

²¹⁸ S.C. CODE ANN. § 44-53-370(a)-(b), (d)(4) (2018) (treating possession of more than one gram as prima facie evidence of intent to deliver, which is a felony punished by up to fifteen years imprisonment, a fine of up to \$25,000, or both).

²¹⁹ *Id.* § 44-53-370(d)(3) (punishable by imprisonment for up to five years, a fine of up to \$7,500, or both).

²²⁰ *Id.* § 44-53-370(b)(1) (punishable by imprisonment for up to fifteen years, a fine of \$25,000, or both).

²²¹ S.D. CODIFIED LAWS §§ 22-6-1, 22-42-5 (2018) (classifying simple possession as a class 5 felony, which is punishable with five years in the state penitentiary and an optional fine of \$10,000).

²²² TENN. CODE ANN. §§ 39-17-417(c)(2)(A), 40-35-112(a)(3) (2018) (classifying the offense as a class C felony, punishable by not less than three years but not more than six years incarceration and an optional fine of up to \$100,000).

²²³ VT. STAT. ANN. tit. 13, § 1 (2018) (classifying any offense whose maximum term of imprisonment is more than two years as a felony); *id.* tit. 18, § 4231(a)(2) (2018) (punishing this offense with imprisonment for up to five years, a fine of up to \$100,000, or both).

²²⁴ *Id.* tit. 18, § 4231(b)(1) (punishing dispensing with imprisonment of up to three years, a fine of up to \$75,000, or both, and punishing selling with imprisonment of up to five years, a fine of up to \$100,000, or both).

²²⁵ VA. CODE ANN. §§ 18.2-10(e), 18.2-250(A)(a), 54.1-3448(1) (2018) (classifying simple possession as a class 5 felony, punishable by not less than one but not more than ten years or confinement in jail for not more than twelve months and a fine of not more than \$2,500, either or both in some circumstances).

²²⁶ W. VA. CODE § 60A-4-401(a)(i) (2018) (classifying the offense as a felony punishable by not less than one but not more than fifteen years, a fine of up to \$25,000, or both).

Table 10. Heroin Laws

Jurisdiction	Quantity and Circumstances for Felony Liability
Arkansas	Possession of any amount ²²⁷
Delaware	Possession of one gram or more ²²⁸ <u>or</u> possession with intent to deliver any amount ²²⁹
Idaho	Possession of any amount ²³⁰
Iowa	Possession of any amount with two or more prior offenses ²³¹ <u>or</u> possession of any amount with intent to deliver ²³²
Michigan	Possession of any amount ²³³
Montana	Possession of any amount ²³⁴
New Hampshire	Possession of any amount ²³⁵
North Dakota	Possession of any amount for a second or subsequent offense ²³⁶

²²⁷ ARK. CODE ANN. §§ 5-4-401(a)(5), 5-64-419(b)(2)(a) (2018) (considered a class D felony, the sentence for which shall not exceed six years).

²²⁸ DEL. CODE ANN. tit. 11, § 4205(b)(6) (2018); *id.* tit. 16, §§ 4751C(5)(b), 4756 (2018) (considered a class F felony, with a sentence of up to three years).

²²⁹ *Id.* tit. 16, §§ 4205(b)(4), 4754(1) (considered a class D felony, with a sentence of up to eight years).

²³⁰ IDAHO CODE ANN. §§ 37-2705(c)(11), 37-2732(c)(1) (2018) (punishing possession as a felony punishable by up to seven years, a fine of \$15,000, or both).

²³¹ IOWA CODE §§ 124.401(5), 902.9(1)(e) (2018) (punishing the offense as a class D felony, which is punishable by up to five years incarceration and a fine of \$750–\$7,500).

²³² *Id.* § 124.401(1)(c)(1) (punishing the offense where there is 100 grams or less of a mixture or substance containing heroin as a class C felony, which is punishable by incarceration of up to ten years and a fine of up to \$50,000).

²³³ MICH. COMP. LAWS ANN. § 333.7403(2)(a)(v) (2018) (classifying possession of any amount less than twenty-five grams as a felony punishable by not more than four years confinement, a fine of \$25,000, or both).

²³⁴ MONT. CODE ANN. §§ 45-9-102(3), 50-32-101(6) (2018) (punishing possession of a dangerous drug with a prison term of up to five years, a fine of up to \$5,000, or both). Offenses in which the sentence imposed upon conviction is death or a state prison term exceeding one year are classified as felonies in Montana. *Id.* § 45-2-101(23) (2018).

²³⁵ N.H. REV. STAT. ANN. §§ 318-B:26(II)(a), 651:2(III)(a)(2) (2018) (classifying simple possession as a class B felony, punishable by confinement up to seven years, a \$25,000 fine, or both).

²³⁶ N.D. CENT. CODE §§ 12.1-32-01(4), 19-03.1-23(8)(b) (2018) (classifying a second or subsequent possessory offense as a class C felony, punishable by a maximum penalty of five years imprisonment, a \$10,000 fine, or both).

Rhode Island	Possession of any amount ²³⁷
South Carolina	First offense possessing more than two grams ²³⁸ <u>or</u> second offense possessing any amount ²³⁹ <u>or</u> possession of any amount with intent to deliver ²⁴⁰
South Dakota	Possession of any amount ²⁴¹
Tennessee	Subsequent possessory offense when individual has two or more prior convictions ²⁴² <u>or</u> possession of any amount with intent to deliver ²⁴³
Vermont	Possession of more than 0.2 gram ²⁴⁴ <u>or</u> possession of any amount with intent to deliver ²⁴⁵
Virginia	Possession of any amount with intent to deliver ²⁴⁶
West Virginia	Possession of any amount with intent to deliver ²⁴⁷

²³⁷ R.I. GEN. LAWS ANN. §§ 11-1-2, 21-28-4.01(c)(2)(i) (2018) (punishing possession of less than one ounce with imprisonment for up to three years, a fine of \$500-\$5,000, or both).

²³⁸ S.C. CODE ANN. § 44-53-370(a)-(b)(1), (d)(4) (2018) (treating possession of more than two grams as prima facie evidence of intent to deliver, which is a felony punished by up to fifteen years imprisonment, a fine of up to \$25,000, or both).

²³⁹ *Id.* § 44-53-370(d)(1) (punishable by imprisonment for up to five years, a fine of up to \$5,000, or both).

²⁴⁰ *Id.* § 44-53-370(b)(1) (punishable by imprisonment for up to fifteen years, a fine of \$25,000, or both).

²⁴¹ S.D. CODIFIED LAWS §§ 22-6-1(8), 22-42-5 (2018) (classifying simple possession as a class 5 felony, which is punishable by five years in the state penitentiary and an optional fine of \$10,000).

²⁴² TENN. CODE ANN. § 39-17-428(b)(6) (2018).

²⁴³ *Id.* §§ 39-17-417(b), 40-35-112(a)(2) (classifying the offense as a class B felony, punishable by not less than eight years but not more than twelve years incarceration and an optional fine of up to \$100,000).

²⁴⁴ VT. STAT. ANN. tit. 13, § 1 (2018) (classifying any offense whose maximum term of imprisonment is more than two years as a felony); *Id.* tit. 18, § 4233(a)(2) (2018) (punishing this offense with imprisonment for up to five years, a fine of up to \$100,000, or both). The statute is written in terms of milligrams (200 mg.) but is converted to grams in this Article for comparison purposes.

²⁴⁵ *Id.* tit. 18, § 4233(b)(1).

²⁴⁶ VA. CODE ANN. §§ 18.2-10(e), 18.2-250(A)(a), 54.1-3446 (2018) (classifying simple possession as a class 5 felony, punishable by not less than one but not more than ten years or confinement in jail for not more than twelve months and a fine of not more than \$2,500, either or both in some circumstances).

²⁴⁷ W. VA. CODE § 60A-4-401(a)(i) (2018) (classifying the offense as a felony punishable by not less than one but not more than fifteen years, a fine of up to \$25,000, or both).

Table 11. Methamphetamine Laws

Jurisdiction	Quantity and Circumstances for Felony Liability
Arkansas	Possession of less than two grams ²⁴⁸
Delaware	Possession of five grams or more ²⁴⁹ <u>or</u> possession with intent to deliver any amount ²⁵⁰
Idaho	Possession of any amount ²⁵¹
Iowa	Possession of any amount with two or more prior offenses ²⁵² <u>or</u> possession of any amount with intent to deliver ²⁵³
Michigan	Possession of any amount ²⁵⁴
Montana	Possession of any amount ²⁵⁵
New Hampshire	Possession of any amount ²⁵⁶
North Dakota	Possession of any amount for a second or subsequent offense ²⁵⁷

²⁴⁸ ARK. CODE ANN. §§ 5-4-401(a)(5), 5-64-419(b)(1)(A) (2018) (considered a class D felony, the sentence for which shall not exceed six years).

²⁴⁹ DEL. CODE ANN. tit. 16, §§ 4756, 4751C(5)(d) (2018); DEL. CODE tit. 11 § 4205(b)(6) (2018) (considered a class F felony, with a sentence of up to three years).

²⁵⁰ DEL. CODE ANN. tit. 16, §§ 4205(b)(4), 4754(1) (2018) (considered a class D felony, with a sentence of up to eight years).

²⁵¹ IDAHO CODE ANN. §§ 37-2707(d)(1), 37-2732(c)(1) (2018) (punishing possession of any amount of a schedule II drug as a felony punishable by up to seven years, a fine of \$15,000, or both).

²⁵² IOWA CODE §§ 902.9(1)(e), 124.401(5) (2018) (punishing the offense as a class D felony, which is punishable by up to five years incarceration and a fine of \$750–\$7,500).

²⁵³ *Id.* §§ 902.9(1)(d), 124.401(1)(c)(6)-(7) (classifying possession with intent to deliver any amount of a mixture containing methamphetamine of less than five grams as punishable by imprisonment for not more than ten years and a fine of \$1,000–\$10,000).

²⁵⁴ MICH. COMP. LAWS ANN. §§ 333.7214(c)(ii), 333.7403(2)(a)(iv) (2018) (classifying possession of any amount less than twenty-five grams as a felony punishable by not more than four years confinement, a fine of \$25,000, or both).

²⁵⁵ MONT. CODE ANN. §§ 45-9-102(3), 50-32-101(6) (2018) (punishing “possession of a dangerous drug” with a prison term of up to five years, a fine of up to \$5,000, or both). Offenses in which the sentence imposed upon conviction is death or a state prison term exceeding one year are classified as felonies in Montana. *Id.* § 45-2-101(23) (2018).

²⁵⁶ N.H. REV. STAT. ANN. §§ 318-B:26(II)(a), 651:2 (2018) (classifying simple possession as a class B felony, punishable by confinement up to seven years, a \$25,000 fine, or both).

²⁵⁷ N.D. CENT. CODE §§ 12.1-32-01(4), 19-03.1-23(8)(b) (2018) (classifying a second or subsequent offense as a class C felony, punishable by a maximum penalty of

Rhode Island	Possession of any amount ²⁵⁸
South Carolina	First offense possessing more than one grams ²⁵⁹ <u>or</u> second offense possessing any amount ²⁶⁰ <u>or</u> possession of any amount with intent to deliver ²⁶¹
South Dakota	Possession of any amount ²⁶²
Tennessee	Possession of any amount with intent to deliver ²⁶³
Vermont	Possession of more than 2.5 grams ²⁶⁴ <u>or</u> possession of any amount with intent to deliver ²⁶⁵
Virginia	Possession of any amount ²⁶⁶
West Virginia	Possession of any amount with intent to deliver ²⁶⁷

five years' imprisonment, a \$10,000 fine, or both).

²⁵⁸ R.I. GEN. LAWS ANN. §§ 11-1-2, 21-28-4.01(c)(2)(i) (2018) (punishing possession of any amount with imprisonment for up to three years, a fine of \$500-\$5,000, or both).

²⁵⁹ S.C. CODE ANN. § 44-53-375(B)(1) (2018) (treating possession of more than one gram as prima facie evidence of intent to deliver, which is a felony punished by up to fifteen years imprisonment, a fine of up to \$25,000, or both).

²⁶⁰ *Id.* § 44-53-375(A) (punishable by imprisonment for up to five years, a fine of up to \$7,500, or both).

²⁶¹ *Id.* § 44-53-375(B)(1) (punishable by imprisonment for up to fifteen years, a fine of \$25,000, or both).

²⁶² S.D. CODIFIED LAWS §§ 22-6-1(8), 22-42-5 (2018) (classifying simple possession as a class 5 felony, which is punishable by five years in the state penitentiary and an optional fine of \$10,000).

²⁶³ TENN. CODE ANN. §§ 39-17-417(c)(2)(A), 40-35-111(b)(2) (classifying possession of less than 0.5 grams as a class C felony, punishable by not less than three years but not more than six years' incarceration and an optional fine of up to \$100,000).

²⁶⁴ VT. STAT. ANN. tit. 13, § 1 (2018) (classifying any offense whose maximum term of imprisonment is more than two years as a felony); *id.* tit. 18, § 4234a(a)(2) (2018) (punishing this offense with imprisonment for up to five years, a fine of up to \$100,000, or both).

²⁶⁵ *Id.* tit. 18, § 4234a(b)(1).

²⁶⁶ VA. CODE ANN. §§ 18.2-10(e), 18.2-250(A)(a), 54.1-3448(3), (2018) (classifying simple possession as a class 5 felony, punishable by not less than one but not more than ten years or confinement in jail for not more than twelve months and a fine of not more than \$2,500, either or both in some circumstances).

²⁶⁷ W. VA. CODE § 60A-4-401(a)(ii) (2018) (classifying the offense as a felony punishable by not less than one but not more than five years, a fine of up to \$15,000, or both).

Table 12. Marijuana Laws

Jurisdiction	Quantity and Circumstances for Felony Liability
Arkansas	Possession with intent to deliver 0.5 ounces or more ²⁶⁸
Delaware	Possession of any amount with intent to deliver ²⁶⁹
Idaho	Possession of more than three ounces ²⁷⁰ <u>or</u> possession with intent to deliver any amount ²⁷¹
Iowa	Possession of any amount with intent to deliver ²⁷²
Michigan	Possession of any amount with intent to deliver ²⁷³
Montana	Possession of any amount with intent to deliver ²⁷⁴
New Hampshire	Possession of any amount with intent to deliver ²⁷⁵
North Dakota	Possession of more than one ounce ²⁷⁶

²⁶⁸ ARK. CODE ANN. §§ 5-64-436(b)(2), 5-64-438(b)(2), 5-4-401(a)(5) (2018) (considered a class D felony, the sentence for which shall not exceed six years). The Arkansas statute itself describes the lower quantity threshold as fourteen grams, which is approximately 0.5 ounces.

²⁶⁹ DEL. CODE ANN. tit. 11, § 4205(b)(4) (2018); *id.* tit. 16, § 4754(1) (considered a class D felony, with a sentence of up to eight years).

²⁷⁰ IDAHO CODE ANN. §§ 37-2705(d)(19), 37-2732(e) (2018) (punishing possession of more than three ounces of marijuana as a felony punishable by up to five years, a fine of \$10,000, or both).

²⁷¹ *Id.* §§ 37-2705(d)(19), 37-2732(a)(1)(B) (classifying the offense as a felony punishable by up to five years incarceration, a fine of up to \$15,000, or both).

²⁷² IOWA CODE §§ 124.401(1)(d), 902.9(1)(e) (2018) (classifying the offense as a class D felony, which is punishable by incarceration of up to five years and a fine of \$750–\$7,500).

²⁷³ MICH. COMP. LAWS ANN. § 333.7401(2)(d)(iii) (2018) (classifying the offense as a felony punishable by imprisonment of up to four years, a fine of up to \$20,000, or more).

²⁷⁴ MONT. CODE ANN. §§ 45-9-103(3), 50-32-101 (2018) (classifying marijuana as a “dangerous drug” and punishing possession of marijuana with intent to distribute with incarceration in the state prison for up to twenty years, a fine of up to \$50,000, or both). Offenses in which the sentence imposed upon conviction is death or a state prison term exceeding one year are classified as felonies in Montana. *Id.* § 45-2-101(23).

²⁷⁵ N.H. REV. STAT. ANN. § 318-B-26(I)(d)(1) (2018) (punishing possession with intent to sell less than one ounce with imprisonment of up to three years, a fine of up to \$25,000, or both). New Hampshire considers offenses that are not statutorily categorized as felonies as such when the maximum term of confinement exceeds one year. *Id.* § 625:9(III).

²⁷⁶ N.D. CENT. CODE §§ 19-03.1-23(7), 12.1-32-01(4) (2015) (classifying possession of more than an ounce of marijuana as a class C felony, punishable by a maximum penalty of five years imprisonment, a \$10,000 fine, or both). This statute has since been amended in a manner that makes it unclear when felony liability is triggered.

Rhode Island	Second offense possessing more than one ounce ²⁷⁷ <u>or</u> possession of any amount with intent to deliver ²⁷⁸
South Carolina	Possession of more than one ounce ²⁷⁹ <u>or</u> possession of any amount with intent to sell ²⁸⁰
South Dakota	Possession of more than two ounces ²⁸¹ <u>or</u> possession of any amount with intent to sell ²⁸²
Tennessee	Possession of more than 0.5 ounce with intent to deliver ²⁸³
Vermont	Possession of two ounces or more ²⁸⁴ <u>or</u> possession of more than one ounce with intent to deliver ²⁸⁵
Virginia	Possession of more than 0.5 ounces with intent to distribute ²⁸⁶
West Virginia	Possession of any amount with intent to deliver ²⁸⁷

²⁷⁷ R.I. GEN. LAWS ANN. §§ 21-28-4.01(c)(2)(ii), 21-28-4.11(a) (2018) (punishing a second offense with twice the authorized term for a first-time offense, which is a maximum of one year). Rhode Island classifies any offense punishable by more than one year imprisonment as a felony. *Id.* § 11-1-2.

²⁷⁸ *Id.* §§ 11-1-2, 21-28-4.01(a)(4)(i) (punishing possession with intent to deliver less than one kilogram with imprisonment for up to thirty years, a fine of \$3,000–\$100,000, or both).

²⁷⁹ S.C. CODE ANN. §§ 44-53-370(b)(2), (d)(4) (2018) (treating possession of more than one gram as prima facie evidence of intent to deliver, which is a felony punished by up to five years imprisonment, a fine of up to \$5,000, or both); *Id.* § 16-1-10(c) (2018) (classifying all offenses with a term of imprisonment of less than a year as misdemeanors, which presumably makes the aforementioned offense a felony).

²⁸⁰ *Id.* §§ 22-42-7, 22-6-1(9) (classifying the offense as a class 6 felony, which is punishable by two years' imprisonment, a fine of \$4,000, or both).

²⁸¹ S.D. CODIFIED LAWS §§ 22-6-1(9), 22-42-6 (2018) (classifying the offense as a class 6 felony, which is punishable by imprisonment for two years, a fine of \$4,000, or both).

²⁸² *Id.* §§ 22-6-1(9), 22-42-7 (classifying the offense as a class 6 felony, which is punishable by imprisonment for two years, a fine of \$4,000, or both).

²⁸³ TENN. CODE ANN. §§ 39-17-417(g)(1), 40-35-111(b)(5) (2018) (classifying the offense as a class E felony, punishable by not less than one year but not more than six years' incarceration and an optional fine of up to \$5,000).

²⁸⁴ VT. STAT. ANN. tit. 13, § 1 (2018) (classifying any offense whose maximum term of imprisonment is more than two years as a felony); *Id.* tit. 18, § 4230(a)(2) (punishing this offense with imprisonment for up to three years, a fine of up to \$10,000, or both).

²⁸⁵ *Id.* tit. 18, § 4230(b)(2) (punishing this offense with imprisonment for up to five years, a fine of up to \$100,000, or both).

²⁸⁶ VA. CODE ANN. §§ 18.2-10(e), 18.2-248.1(a)(2) (2018) (classifying this offense as a class 5 felony, punishable by not less than one but not more than ten years and a fine of up to \$2,500 with suspended sentences available in certain circumstances).

²⁸⁷ W. VA. CODE § 60A-4-401(a)(ii) (2018) (classifying the offense as a felony punishable by not less than one but not more than five years, a fine of up to \$15,000,

