



Race and the Criminal Justice System in the United States: Part 1

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Abstract: Racial disparities can be found not only throughout the procedures, policies and institutions of the criminal justice system but also in the differences in social and economic standing in American society. Criminal justice and punishment, as it will be referred to, can be viewed as a vehicle of social control help to explain the disproportionately massive reach of its consequences in the lives of black Americans (majority male). This sociological perspective of social control theory frames both how structural barriers encourage the prevalence of offending and victimisation of crime in black communities and reinforce them during and after imprisonment or contact with law enforcement. The present articles seeks to describe and analyse the existing literature on how race and ethnicity matters in criminal justice outcomes, in addition to examining the inverse—how the difference in criminal justice outcomes of blacks and whites influence their social mobility and standing, economic status, communities and families. The implications of the findings discussed the will be addressed in the conclusion (Part 2).

Key words: racial disparity; criminal justice; punishment; social control.

INTRODUCTION

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Public perceptions in the U.S. about crime and punishment often do not align with the data, nor do rates of incarceration increase proportionally with an increase in crime. Characteristically, surveys conducted by the Pew Research Centre found that in late 2016, 57 percent of registered voters responded that they thought crime had increased since 2008, even though the data of the Federal Bureau of Information (FBI) and the Bureau of Justice Statistics (BJS) illustrate that violent and property crime rates declined by at least 19 percent and 22 percent respectively.² Whether or not that fact that most of the participants of the survey who believed in the increase in crime rates were Trump supporters remains speculative for the time being, however this suggests that tangible consequences that can come from the media and politics that perpetuate stereotypes and selectively quote statistics that disproportionately affect blacks. The significance of this data is that it is not new —since 1989, Gallup has been conducting surveys on the public perceptions of crime trend and it was only in 2001 where equal shares of respondents thought there was more crime versus less.³

Furthermore, even though crime rates began a steep decline that continued through 2010, after peaking the year prior, 89 percent of Americans believed crime rates were rising.⁴ This is particularly surprising, given that during the years after 1991, the number of people confined and controlled by the criminal justice system (probation, parole and imprisonment) increased by 50-75 percent. This lack of correlation between crime and punishment has been explained by some sociologists as a result of the use of punishment as a tool of social control. The empirical evidence for this observation and its interpretations in the scholarly literature on crime, punishment and the racial disparities within them are the main topics of discussion in this article.

Leading scholar Michael Tonry (2004b) has highlighted that governments' decisions on the severity of punishment are by and large not related to actual crime rates and this can be seen particularly when viewing crime and punishment from an international perspective. Part 1, Section I of this article precisely addresses this point. For instance, while official crime rates in Finland, Germany and the United States were similar between 1960 and 1990, the U.S. incarceration soared by a factor of 4, the Finnish rate dropped by 60 percent and the German rate remained relatively stable

² Gallup, Bureau of Justice Statistics (2018).

³ Gallup. (2019). Available at: <https://news.gallup.com/poll/1603/crime.aspx>.

⁴ Sourcebook of Criminal Justice Statistics Online, table 2.33. (2009).

(ibid). As is done in Section 1, a snapshot description of the American justice system shows that not only is it unique in its scale of incarceration (655 per 100,000) and severity and harshness of punishment but also in the stark racial disparities that result from these punitive procedures and policies, which will be examined in further detail in Part 2 of this article.⁵

In Section 2, different theories and explanations on the role and purpose of punishment are explored, with particular attention paid to the social control function of punishment and how the retributive model is actually in many ways criminogenic rather than crime reducing. The explanation given draws on the theory of social disorganisation to understand why certain groups may commit more crime than others that relates to the strength of community and social ties as well as informal institutions of social control such as schools. In addition to the discriminatory collateral consequences that harsh policies may produce, this section also looks at the effect of them on the offender's behaviour, further arguing that it is not tougher penalties that deter individuals (particularly blacks) from engaging in crime, rather, social factors. Lastly, Section 3 examines further the social and economic inequalities that can encourage offending and victimisation in black and minority communities and the inequalities that come as a consequence of being formerly confined or controlled by the criminal justice system. In looking at the case of juvenile justice the connection between the former and the latter are astonishingly clear. If by and large incarcerated black men have lower levels of education or unemployed, and when they are released have difficulty in getting access to employment, housing or further professional training, then how can it be expected that crime rates will reduce or that the gap in racial disparities will narrow, if some of the main risk factors for offending are unemployment, low levels of education, time spent outside of the home without parental supervision (for juveniles) among others? This question remains to be rhetorically addressed in this article, as normative questions on whether the severity of punishment, policies that lead to racially disparate outcomes, or to what degree race or ethnicity should influence these outcomes are beyond the scope of this article.

⁵ The most severe penalties include the three-strikes-and-you're-out law which requires a minimum prison sentence of 25 years to life after the third time conviction of a felony, no matter how minor it is. Life without possibility of parole which can also apply to juvenile offenders and mandatory minimum sentencing laws are two other examples.

Part 2, the second and final part in the series of articles *Race and the Criminal Justice System*, will have three sections including: the problems of prosecution and sentencing, policing and corrections in order to view the racial disparities in-depth, produced in every branch and level of the American criminal justice system. Although this article (Parts 1 and 2) does not address the unique and empirically significant experience of women, Latinos and immigrants these groups are indeed vulnerable to the worst treatment and outcomes of all. On the other hand, this article is introductory and attempts to take a broad sweep of the criminal justice system and its main structures and outcomes, where black men are overwhelmingly overrepresented. Hopefully, other students and academics will extend this systematic review to encompass the myriad of facets that make up the nexus between race, ethnicity, gender, class and age and the criminal justice system. This article is intended to take a broad look at how race matters in the criminal justice system, from its inception to its collateral consequences, with the implication that students of sociology or other social sciences will take an interest and understand the gravity of racial divide and hierarchies in the United States.

The common denominator in my analysis in Part 1 is the the U.S. criminal justice system not only has racial disparities in its outcomes, but does not appear to have the objective of actually reducing crime, rather, as in the functionalist argument for the purposes of punishment, it serves a wider function of maintaining racial hierarchies. This process is not a conspiracy theory in which the combined powers of law enforcement meet and discuss how to keep black communities socially and economically disadvantaged, and as noted previously, it is not an inevitable result; yet, racial differences in social mobility and economic standing are indeed a consequence. Racial disparities in criminal justice outcomes can be seen as a residual consequence of historical racial caste systems such as slavery and Jim Crow (a discussion that is beyond the scope of this article) but also of contemporary housing, education, employment and prosecutorial and sentencing policies that claim to be race-neutral, and racial segregation—all of which are alive and well today.

I. American Exceptionalism in the Criminal Justice System

POLITICS AND PUBLIC OPINION

The murder of the unarmed 17-year-old young black teenager Trayvon Martin by neighbourhood watch coordinator George Zimmerman in 2012, who was charged with murder but later acquitted, fuelled both the public and policy debates about the inequalities (or lack thereof) embedded in the criminal justice system and the need for reform; it even gave rise to the popular movement Black Lives Matter which was created by the black mothers whose sons died due to police brutality, as a response to the victimisation of black youth at the hands of the police and the lack of prosecutorial justice.

Nevertheless, neither the phenomenon —targeted police violence informed by implicit bias towards blacks— nor the political nature of crime and punishment was new. Since the 1960s, prosecutors, who have practically total discretionary power over sentencing, and politicians, have taken a harsh stance on crime to increase their electability rather than focusing on reducing crime and public safety (Beckett, 1997).

Not only is the American system unique in this sense, but also the racially charged nature of public attitudes towards crime and punishment is notable. In a research study carried out by The Sentencing Project (2014) it is demonstrated that white perception of crime as being mostly associated with blacks and Latinos have contributed to the implementation of harsher policies meant to reduce crime — policies that have actually been shown to be counterproductive (Enns, 2014). One example of this is illustrated by a study carried out by Gallup on public support for the death penalty that reached its highest level of support in 1994, with 80 percent in favour (Jones, 2013).

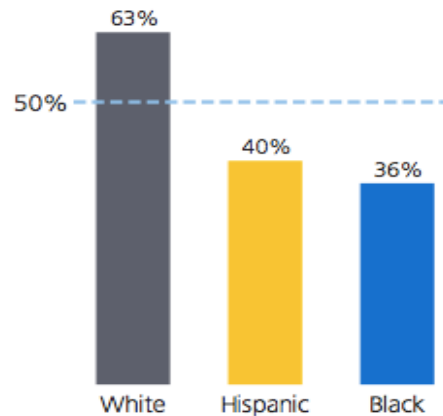
Another poll done by the Pew Research Centre (2014) presents results consistent with disproportionately higher rates of white support for the death penalty, recording 63 percent in favour in 2013 (see Figure 1.1.).

Mark Ramirez (2013) investigated the changes in public support for the death penalty (another exceptional feature of the United States punishment measures) as well as for harsher judicial sentencing, increased law enforcement and higher spending on police.⁶ He concluded that support for these punitive policies grew around the 1970s and 1980s, by no coincidence, in tandem with conservative politicians' pandering to this

⁶ For a more extended discussion on trends, see Ramirez (2013); See e.g. La Vigne, Fontaine & Dwivedi (2017); see also Figure 1.2.

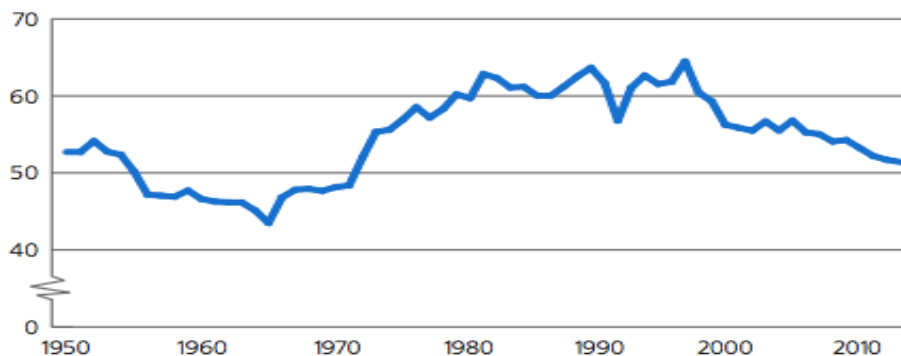
popular white sentiment of unbridled crime in black communities, taking advantage of the racial schisms of the 1960s civil rights era.⁷ Through to the 2016 presidential election prison policy remains a highly politicised and bipartisan issue.

Figure 1.1.: Support for death penalty for persons convicted of murder by race, 2013.



Note: Reprinted from *Race and Punishment: Racial Perceptions of Crime and Support for Punitive Policies*, by N. Ghandnoosh, retrieved from Pew Research Center. *Shrinking Majority of Americans Support Death Penalty*. Washington, D.C. Available at: <http://www.pewforum.org/2014/03/28/shrinking-majority-of-americans-support-death-penalty/>. Copyright 2014 by The Sentencing Project.

Figure 1.2.: Punitive Sentiment, 1951 to 2013.



Note: Reprinted from *Race and Punishment: Racial Perceptions of Crime and Support for Punitive Policies*, by N. Ghandnoosh, retrieved from Ramirez, M. D. (2013). Punitive Sentiment. *Criminology*, 51(2), 329–364 (p. 337). Copyright 2014 by The Sentencing Project.

CRIME AND MASS INCARCERATION

Similar studies to that of Ramirez are consistent with the view of disproportionately higher support amongst whites for harsher punishments compared to

⁷ As David Garland highlights, the public’s paranoia about a perceived increase in crime and violence was more a reflection of their racial biases that were reinforced by the media’s representations of the urban black population. See Garland (2012, p. 158); for wider historical context on the political impact on the rise of harsh punishment policies see Thompson (2010), especially pp. 728-729.

blacks in an already exceptionally retributive criminal justice system.⁸ Furthermore, public attitudes —although a conventional explanation— can help to explain why American penal policies became so severe, in the case of mass incarceration. For example, Enns (2014) carried out a study that demonstrated a statistical trend in which changes in the public’s attitude towards punishments preceded the amount of focus put on crime in congressional hearings (Enns, 2014, p. 17).

Despite, the public’s tendency to support retributive punishment measures in general, and specifically towards blacks and Latinos, crimes rates have not increased at a proportional rate to incarceration levels —hence the denomination ‘mass incarceration’. The U.S prison population grew exponentially over the last 40 years from 300,000 to 2.2. million today—a 500 percent increase—and beats every other country on earth in terms of incarceration rate per 100,000, in which the U.S boasts 655 and reached its peak in 2007-2008 at 760 prisoners per 100,000. Comparing these figures by the standards of developed democracies of Europe, no countries even reach up to as much as 200 prisoners per 100,000 as illustrated in Figure 1.3.⁹

The racial aspect of mass incarceration is even more exceptional—the U.S. incarcerates a larger percentage of blacks than South Africa did at the peak of apartheid (Alexander, 2010, p. 6). Yet, studies show that people of all racial backgrounds use and sell drugs at similar rates and that whites are complicit in more drug crimes than blacks.¹⁰ Despite this fact, it is recorded that in major cities affected by the War on Drugs (an unsuccessful campaign spearheaded by the U.S. government with the aim of drug crime reduction) up to 80 percent of young black men have criminal history, meaning that they are subject to life-long discriminatory and collateral consequences.¹¹

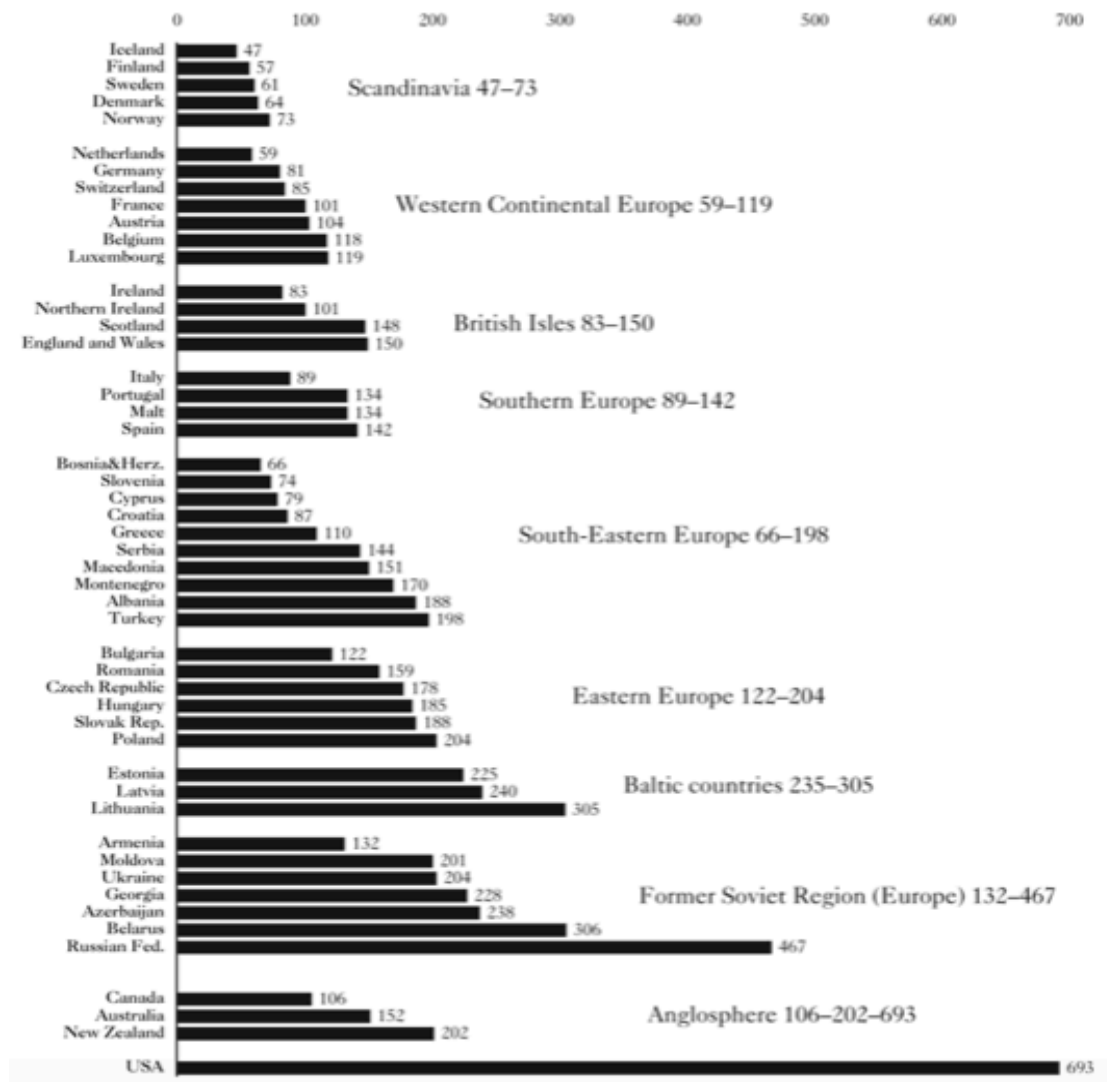
Figure 1.3.: Incarceration Rates per 100,000 in Europe and the Anglosphere, 2014.

⁸ See e.g. Johnson (2008) for an analysis of how the racial difference in support for harsh criminal penalties has can be linked to white prejudice against blacks from the point of view of conflict theory.

⁹ For an in-depth discussion on American exceptionalism and incarceration see Reitz (2018), especially pp. 3-4 and Seppälä (2016) for an analysis of incarceration trends in comparative perspective, Part II, Chapter 5.

¹⁰ See, e.g. U.S. Department of Health and Human Services, Substance Abuse and Mental Health Services Administration, *Summary of the Findings from the 2000 National Household Survey on Drug Abuse*, NHSDA series H-13, DHHS pub. No. SMA 01-3549 (Rockville, MD: 2001), reporting that 6.4 percent of whites, 6.4 percent of blacks, and 5.3 percent of Hispanics were current users of illegal drugs in 2000.

¹¹ For a robust discussion see Street (2002).

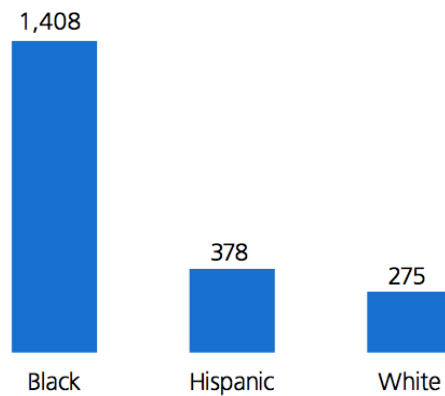


Note: Reprinted from *American Exceptionalism in Crime and Punishment*, by K. R. Reitz, retrieved from Council of Europe Annual Penal Statistics, Annual Report 2014, Space I (<http://wp.unil.ch/space/space-i/annual-reports/>); International Centre for Prison Studies (<http://www.prisonstudies.org>). Copyright 2018 by Council of Europe & University of Lausanne.

As Figure 1.4 illustrates, blacks are incarcerated at a rate over 5 times than that of whites and Hispanics 1,4 more times, which are modest numbers when compared to the statewide statistics where more than half of the prison population is black in 12 states, for example.¹²

Figure 1.4.: Average rate of incarceration by race and ethnicity, per 100,000.

¹² For a more thorough discussion see Nelli (2016) for analysis on state-wide racial disparities in prisons. Nelli makes a salient point about the possibility of understated racial/ethnic disparities due to the unreliability of ethnicity data. There are even four states that do not report ethnicity data to the Bureau of Justice Statistics as well as many instances where Hispanics are counted as white, inflating the white prison population and under representing that of the Hispanic population.



Note: Reprinted from *The Color of Justice: Racial and Ethnic Disparity in State Prisons* by Ashley Nellis retrieved from United States Department of Justice. Office of Justice Programs. Bureau of Justice Statistics. National Prisoner Statistics, 1978- 2014. Bibliographic Citation: ICPSR36281-v1. Ann Arbor, MI: Inter-university Consortium for Political and Social Research [distributor], 2015-10-09; U.S. Census Bureau (2013). *2013 Population Estimates*. Annual estimates of resident population by sex, race, and Hispanic origin for the United States, states and counties: April 1, 2010 to July 1, 2013. Washington, DC: U.S. Census Bureau. Copyright 2016 by The Sentencing Project.

The consensus among scholars on the causal factors of racial disparities in prisons is that it cannot only be explained by the crime rate. As Nelli (2016) summarises,

«Three recurrent explanations for racial disparities emerge from dozens of studies on the topic: policies and practices that drive disparity; the role of implicit bias and stereotypes in decision-making; and, structural disadvantages in communities of color which are associated with high rates of offending and arrest».

The politically convenient (for Republicans) and traditional explanation for the origin of racial disparities which manifested markedly in the 1980s and 90s has been that black commit more crimes or that crime rates in American were higher than others (Bennett, DiIulio, and Walters, 1996; Blumstein, 1982). Yet, the numbers illustrate that crime rates in the United States, excluding homicide have not been higher than other countries (Tonry, 2004). A more sophisticated interpretation lies in the difference in policy response to crime rates. Comparing America, Germany and Finland, trends were the same from 1965 to 1990 but in America incarceration increased from 160 prisoners per 100,000 to 500, the Finnish from 165 to 60 and that of Germany was stable around 90-100 per 100,000 through and since 1990.¹³

¹³ Michael Tonry (2011) argues that when we put the U.S. crime rates against that of Finland and Germany we find that despite similar trends in growth and decline in similar periods, the imprisonment rate in the U.S increased exponentially whilst that of Finland and Germany decreased. This is crucial because it drives in the point that American exceptionalism in both incarceration rate, severity of

As Tonry (2011) broadly argues, America's divergence with other developed nations in crime policy can be explained by historical developments of the

«post-Revolutionary War constitutional system in which prosecutors and judges are elected at local levels, . . . a history of race relations in which each era devices have been created to maintain white political and economic domination of blacks, and a continuing influence of Protestant moral attitudes».

Convergent arguments will be discussed in future sections of this article.

PROSECUTION AND CORRECTIONS

Sentencing polices, whose disproportionate impact on people of colour will be examined in further detail in forthcoming sections of this article, are only one aspect of how racial bias manifests in the American criminal justice system. The way in which sentences are reached demonstrate an even more deeply engrained power structure where prosecutors have almost total discretionary authority. Prosecutors are virtually unaffected by any claims of prosecutorial misconduct or claims that their practice is unconstitutional (Poulin, 1996).¹⁴ Perhaps one of the most salient examples of the consequences of unbridled prosecutorial discretion is in the “pre-bargain” stage in which the prosecutor offers not to charge the defendant with a crime in exchange for a private confession of guilt. The problem lies in a lack of transparency because the prosecution's decision almost always goes unreviewed and it is positioned as an economic force, for instance, in the case of prosecution of white collar crimes where the corporations get off scotch free if they agree to merely make some structural reforms.¹⁵ As Angela Davis encapsulates the phenomenon, «the most remarkable feature of these important, sometimes life-and-death decisions is that they are totally discretionary and virtually unreviewable» (2007, p. 5).

sentencing and prosecutions and the racial disparities that underline both aspects of the criminal justice system cannot be reduced to the cause of higher rates of crime offenders; See Tonry (2011b); See also Tonry (2011a), for the extended argument on why certain countries have gone for less harsh prison policies and the U.S. towards more retributive policies; See Alexander (2010) where it is argued at length about the social control function and impact of the American Criminal Justice system.

¹⁴ See cases *Imbler v. Pachtman*, 424 U.S. 409; 96 S.Ct.984 (1976) and *Van de Camp v. Goldstein*, 554 U.S. 942; 129 S. Ct. 25.

¹⁵ This line of argument is well demonstrated in McCoy (1998).

In analysing the impact of race and ethnicity on prosecutorial outcomes, the often cited cases are one involving the disproportionate sentencing decisions reached due to ‘race neutral’ policies. To give an example, at face value, the 100-to-1 crack versus powder cocaine sentencing law where both 5 grams of crack cocaine and 500 grams of powder cocaine warrant the same 5-year mandatory minimum sentence, appears to be the result of legitimate law enforcement goal of reducing the distribution of the (what was believed to be) harsher drug.¹⁶ However, upon examination, because 85 percent of those involved in drug offences involving crack cocaine are black, compared to a 30.5 percent involvement of blacks in powder cocaine offence, blacks end up being disproportionately targeted. The arbitrariness and retributive nature of prosecutorial decision-making is also demonstrated in research that shows that the use of priors (criminal history) as a determining factor for increasing sentence length disproportionately affects black and minorities, while having little impact on reduced recidivism.¹⁷

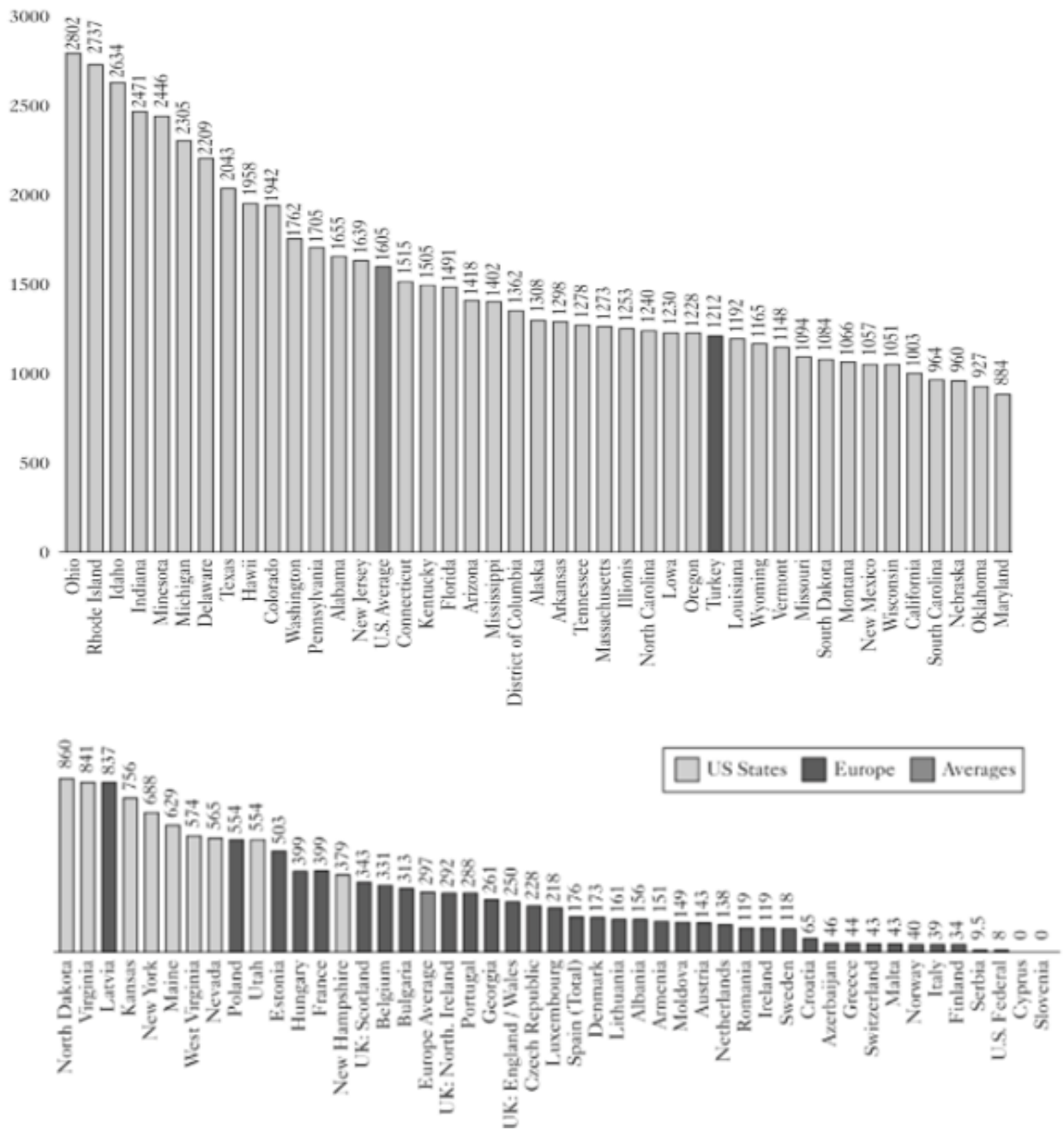
A similar pattern of simultaneously increasingly harsher criminal justice policies yet increasing rates of recidivism and incarceration can be seen on an exceptionally massive scale within the corrections (probation and parole) system. In 2014, 4 million people were serving probation sentences, which is over five times the average in European countries, according to the Robina Institute of Criminal Law and Justice (Alper, Corda, and Reitz, 2016).¹⁸ Below is a visual indicator of the sheer scale of American probation relative to international figures.

Figure 1.5.: American Exceptionalism in Probation Supervision: Probations per 100,000 (see continuation below).

¹⁶ Contrary to the belief at the time, recent research shows that the relative harmfulness to health of crack cocaine over powder cocaine is overstated. See, U.S. Sentencing Comm’n, *Report to the Congress: Cocaine and Federal Sentencing Policy* 63 tbl. 3 (2002).

¹⁷ See Lu, L. D. (2007) where it is argued in detail from the insightful perspectives of former U.S. Attorneys.

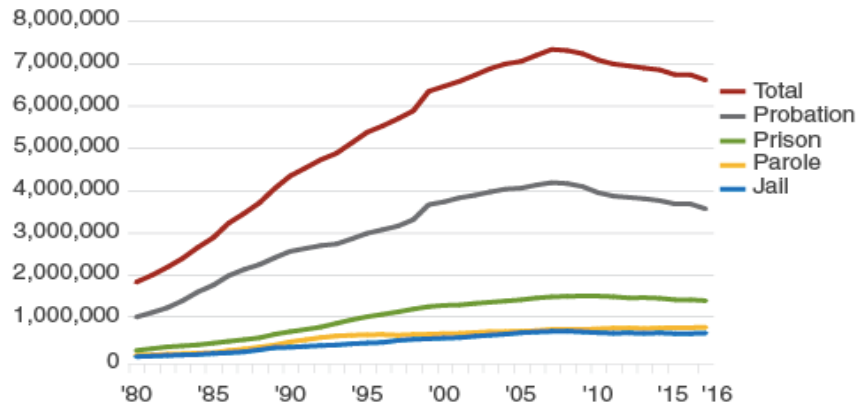
¹⁸ This ratio is even conservative because the study done by the Robina Institute didn’t take into account some offender categories that may not meet the same criteria of serving probation as in the U.S. The figures could be as high as 9:1.



Note: Reprinted from American Exceptionalism in Crime and Punishment, by Kevin R. Reitz, retrieved from Alper, Mariel, Alessandro Corda, and Kevin R. Reitz. American Exceptionalism in Probation Supervision. Minneapolis, MN: Robina Institute of Criminal Law and Criminal Justice, 2016. Copyright 2016 by Robina Institute.

The scale of people on parole supervision is less overwhelming with 269 per 100,000 serving individuals in 2014, however consistent with incarceration and probation rates, parole numbers increased 5-fold from their levels in 1965, as is depicted in Figure 1.6.

Figure 1.6.: Total adult correctional population, 1980-2016.



Source: Sources: Bureau of Justice Statistics, Annual Probation Survey, Annual Parole, Survey, Annual Survey of Jails, Census of Jail Inmates, and National Prisoners Statistics, 1980-2016.

In addition, the intensity and the length of supervision that prison releasees are subject to is much more punitive and managerial in comparison to Europe where parole is used as a rehabilitative method (van Zyl Smit and Corda, 2018).¹⁹ The ineffectiveness of America’s retributive approach to addressing incarceration rates is further demonstrated in high rates of parole revocation compared to European figures. In 2014, 26 percent of all prison admissions were due to parole violations originating in the highly conditioned and surveilled circumstances of parole and further collateral consequences that ex-convicts must face upon release such as unemployment (see Table 7 in Carson, 2015, p. 10). In Europe, revocations only added up to 7.4 percent of all prison admissions (see Table 8 in Aebi and Delgrande, 2015).

The racial and gender disparities in the probation population appear to contradict the trend of policies disproportionately punishing black men and Hispanics, indicating a 56 percent of probationers as non-Hispanic white. Given that those on probation tend to have committed less violent crimes, this statistic is not an inconsistency but rather it reflects not only the higher violent crime offender rate amongst blacks and Hispanics but also racial profiling, unconscious bias, the “War on Drugs” and sentencing laws that severely punish offences more commonly committed by blacks and Hispanics (Tonry and Melewski, 2008).

The significance of assessing corrections from the perspective of American exceptionalism in crime and punishment is that much like prosecutors, the parole board wields vast amounts of power, if not more than prosecutors, over prison terms length

¹⁹ See also Chapter 10 in Reitz (2017).

and only 347 individuals were found to serve on the parole boards in a 2009 study (Paparozzi and Caplan, 2009).²⁰

SANCTIONS AND COLLATERAL CONSEQUENCES

Although systematic research on economic sanctions in criminal punishment is quite sparse, several studies show that there has been an increase in fines, asset relinquishing and other taxes raised against offenders.²¹ There has also been a demonstrated effort of constitutional provisions that permit victim restitution as a part of sentences (Tobolowsky et al., 2010, pp. 155-157). In comparison, in some European countries fines are used to lessen shorter prison terms and may replace imprisonment for less serious crimes.²²

As with the other retributive methods of tackling incarceration and crime, several research studies show that imposing economic sanctions has the counterproductive effect of increasing crime rates.²³ Failure to meet payments leads to further sanctions that lead to more restrictions impeding the offender's chances of re-entry into society.²⁴ Debt incurrence leads to bad credit making it harder to access employment, education, housing and pay household expenses.²⁵

This punitive cycle is important to note in an analysis of how race impacts the crime and the criminal justice system because not only do harsh and retributive policies lead to recidivism and re-offending, they affect communities and families of current and

²⁰ Parole boards also oversee revocation which accounted for 28% of all prison admissions in 2015.

²¹ On the amounts of financial sanctions in the United States, see Beckett and Harris (2010: p. 512); Bannon, Nagrecha, and Diller (2010, p. 1); Corbett (2015); Ruback and Clark (2011, pp. 752–53). On costs, fees, and assessments, see American Law Institute (2017, § 6.04D; recommending their abolition); Ruback (2015) (same).

²² In Scandinavian countries for example, they use a “day fine” system whereby financial penalties are calculated based on wealth, earning power and the obligations of each defendant.

²³ Although there have been very few studies, empirical research suggests this view Piquero and Jennings (2016); Pleggenkuhle (2012).

²⁴ Probationers in most states may be revoked to prison for failure to make payments (Mitchell et al. 2014), and the threat of revocation is used as a powerful collections tool. At least some others turn to the criminal economy to meet their financial debts to the justice system see Goffman (2014); Ruhland, Robey, Corbett, and Reitz (2017).

²⁵ If a parent can't contribute to child care and household expenses then a collateral effect of economic sanctions is less family stability and a greater chance of recidivism non-integration into society for the offender.

future generations. The academic literature suggests that good housing, stable families, and employment are the factors that protect individuals most from getting into crime.²⁶

Amongst economic sanctions are other types of collateral consequences such as disenfranchisement and losing the right to hold public office, serve on a jury and testify in court. While some of these consequences from 1962 still stand today, in contemporary times, other penalties include mandatory deportation, loss of access to public housing and benefits, financial aid ineligibility and employment restrictions that can last a lifetime.²⁷ Even extending up to 70 million people who have never been to prison but have priors on their records, the impact of collateral consequences is characteristic of American exceptionalism because of its scale in comparison to modest figures in Europe and its disproportionate effect on the most disadvantaged ex-convicts.

II. Functions of Criminal Justice

PUNISHMENT AND SOCIAL CONTROL

In addition to analysing the crime reduction utilitarian functions of punishment as has been done briefly in the previous section and will be explored further, social theory also provides insightful explanations about the social functions of punishment rather than justifying it on a normative basis or selective empirical descriptions. One of the more cited explanations of functionalist thread of criminology literature on the nature of contemporary American punishment policies is argued by sociologist Loïc Wacquant (2002a, 2002b). For Wacquant, punishment policies were just an addition to, and evolution of, already existing social and legal institutions that maintain the racial

²⁶ Work relationships and job stability correlate with lower rates of reoffending see, Sampson and Laub (1995, pp. 140–41). The acquisition of a “satisfying job,” may have an even greater correlation with desistance (Shover, 1996). One study found the employment effect greatest for men over the age of 27, see Uggen (2000, p. 529). On housing, see National Research Council (2007, pp. 54–55): «Released prisoners who do not have stable housing arrangements are more likely to return to prison». One widely cited study found that being married was associated with a 35 percent reduction in risk of reoffending Sampson, Laub, and Wimer (2006, p. 465). Other research has discovered similar but smaller effects Horney, Osgood, and Marshall (1995, p. 665); Piquero, MacDonald, and Parker (2002, p. 654). On the importance of family ties more generally, see National Research Council (2007, p. 44): «Greater contact with family during incarceration (by mail, phone, or in-person visits) is associated with lower recidivism rates. Prisoners with close family ties have lower recidivism rates than those without such attachments».

²⁷ These measures are summarised by the American Law Institute (2017, p. 238).

hierarchy of whites over blacks. Moreover, Michelle Alexander in *The New Jim Crow* (2011) following a similar line of argument, the key is that discriminatory and exclusionary housing policies on zoning lending and mortgage insurance that limited blacks' access to housing as well as other discriminatory policies were explained in race neutral terms. Exclusion may not have been the objective but it has been one of the principal consequences as is evident in the aforementioned "100-to-1 rule", that came to be the largest cause of racial disparities in federal prisons (Massy and Denton, 1993; McDonald and Carlson, 1993). What social control theorists aim to do then is to explain how and why disparate and discriminatory consequences result from legitimate (a generous qualification) law enforcement policies.

In contrast, theories on crime prevention based on deterrence theory which come from the strand of classical criminology of Caesar Beccaria and Jeremy Bentham, claim that sanctions deter people from committing crime.²⁸ Nevertheless, there is little evidence that increasing the severity of the punishment will make the offender rethink their actions according to the consequences that would ensue if they were to break the law. Convincing evidence for the crime reduction effects of deterrent policies have primarily been found in the offenders perception on their likelihood of being caught (certainty of punishment), which helps to explain why strategic deployment of police is effective in deterring crime.²⁹

Given this lack of empirical evidence for the deterrent effects of formal punishment alone on the reduction of crime and the American system's reliance on there exists a vacuum that social theory can help to enrich. For instance, while formal sanctions can discourage individuals from committing crime, the effect of the imposition of this social norm is more effective when they are internalised through socialisation in the form of informal sanctions.³⁰ Basing their analysis on Durkheim's notion of social norms not only being imposed, but constructed through social actors and behaviours, Kirk Williams and Richard Hawkins (1992) contend that the offender's perception of the degree of social costs that can arise if they engage in criminal activity

²⁸ Different to other types of social control, deterrence is retributive in nature, in the sense that it relies on punishment that deprives or harms the offender.

²⁹ See, e.g., Blumstein, Cohen, & Nagin, (eds.) (1978); Cook (1980); Sherman & Smith, with Schmidt & Rogan (1992).

³⁰ Coser (1975); Grasmick & Bursik, Jr. (1990); See generally Fagan & Wilkinson (1998).

is more likely to improve the deterrent effects of formal and legal sanctions.³¹ This conclusion is consistent with the empirical data on the relative efficacy of the certainty of punishment risk that the offender perceives over the perceived severity of punishment.

REHABILITATION AND DETERRENCE

The pattern of crime and punishment policies in America seems to be that «more crime yields more arrests yields more convictions yields more prison sentences yield high prison populations and imprisonment rates», as Tonry (2004b, p. 28) characterises it. Furthermore, there is consensus in the data that changes in crime rates are not strong determinators of the rate of incarceration (Tonry, 2004; 2007). This assumption is based on a model of retributive justice (incapacitation) that entails the imposition of suffering to an individual for having committed a crime. Yet this approach to punishment presents a contradiction because at once the offender is seen as a rational decision-maker whose behaviour can be deterred and discouraged while at the same time the view that offenders are inherently wrong and beyond rehabilitation.

The question is then— how does this punishment approach feed off of and reproduce racial disparities in the criminal justice system? As explained in the previous section, there is agreement amongst criminologist that changes to the social structure in the latter of the 20th century in communities of concentrated poverty reduced the strength of informal social processes.³² Therefore, instead of focusing on the individual characteristics of blacks and their supposed propensity to commit crimes based on low economic status or unemployment as an explanation for the racial disparities in crime offending and prosecution, structural arguments view the macro-social patterns of inequality as giving rise to concentrated poverty and social isolation which in turn, reinforce social, political and economic structural barriers. These barriers result in communities that are more likely to be victims and perpetrators of crime (Sampson and

³¹ See Williams & Hawkins (1992); Nagin & Paternoster (1993); Nagin & Paternoster (1994)

³² For summaries on neighborhood social change and crime, see Short, Jr. (1997); Robert J. Sampson & Janet L. Lauritsen (1994); Jeffrey Fagan (2008). The breakdown in social structure is not only related to crime but also applicable to other social problems like teenage pregnancy, family disruption and violence, and school dropout.

Wilson, 1995). Sampson and Wilson (1995) argue that in the case of black communities, because of structural changes such as concentrated poverty, declining marriage rates, residential mobility and low political participation weakened the informal controls of social institutions— schools, church etc.—and social cohesion, the effectiveness on deterrent punishment is diminished and can even lead to a more criminogenic environment by worsening unemployment, economic status and family networks.

In terms of rehabilitation effort in the American system, the political and scholarly community in the 1970s came to the conclusion that “nothing works” (Martinson, 1974) to reduce recidivism. The irony of this attitude towards rehabilitation is that it was directed towards programs conceived in the punishment paradigm. Despite this, empirical evidence illustrates that treatment programs overall reduce reoffending rates. The rehabilitation paradigm that has the most empirical support backed by thousands of studies is that of behavioural conditioning, social learning and cognitive psychology. The psychology of criminal behaviour sees it as any other antisocial or prosocial behaviour that can be changed through social learning. This perspective is compatible with the functionalist theory of social organisation where communities lose social regulatory capacity leading to anti-social behaviour, however, the psychological point of view may de-emphasize importance of social and community networks over individual behaviour.

LEGITIMACY

After having analysed the social roles and functions of the criminal justice system to punish, deter and incapacitate it is useful to discuss how the criminal justice system influences people’s behaviour at the level of “mainstream processes of socialisation” (Garland, 1990, pp. 288-9). In his instrumental analysis psychologist Tom Tyler (1990, 2009) found that people obey the law when it agrees with their own values and when they regard it as “legitimate”.³³ According to Tyler, the negative implications that deterrent policies have on peoples’ attitudes and behaviours is antagonistic in nature

³³ An authority is considered to be legitimate when people regard its laws as entitled to acceptance and compliance by others. See Tyler (2009).

characterised by an association of the law with risk and punishment rather than safety and social cohesion.

These insights are evidenced in studies on the racialised perceptions of the criminal justice system. For instance, people of colour used the descriptors unfair, illegitimate and excessive in reference to their experience with the justice system and another 2013 survey illustrated that 68 percent of blacks in contrast to 25 percent of whites saw the criminal justice system as biased against blacks.³⁴ In addition, in a national survey, half of blacks responded that they had someone in their kinship who was currently in prison, in comparison to 10 percent of white respondents.³⁵ People's lack of feeling of trust of the criminal justice system as a result of police brutality against black communities and mass incarceration which are both considered deterrent crime control methods, has criminogenic effects and undermines public safety, further pointing to the counterproductive nature of punitive crime control measures.

Research shows that young people who have even simply been in contact with the police report higher crimes of criminal behaviour, and as previously demonstrated, engagement in crime is self-perpetuating.³⁶ Furthermore, the role of perceived legitimacy on informal social control has been studied and the conclusions are consistent with that of social organisation theory — «lack of faith in the police inhibits informal social control activities, and in fact explains lower capacities for informal social control in minority communities» (Drakulich and Crutchfield, 2013, p. 403).³⁷ Lastly, as previously mentioned in the section “Sanctions and Collateral Consequences”, given that good housing, stable families, and fulfilling employment are some of the factors that protect individuals most from getting into crime, the collateral consequences of a criminal record that acts as a barrier to realise these needs, would lead to more criminal offending.

³⁴ Pew's 2013 survey found that seven-in-ten blacks and one-third of whites said that blacks are treated less fairly than whites in their dealings with the police while 68% of blacks and 27% of whites said blacks are not treated as fairly as whites in the courts, See Pew Research Center (2013).

For a more in-depth analysis on racial attitudes towards the criminal justice system Peffley & Hurwitz (2010); Langton & Durose (2013); Eith & Durose (2011).

³⁵ Bobo & Thompson (2010).

³⁶ Wiley, Slocum, & Esbensen (2013); Liberman, Kirk, & Kim (2014).

³⁷ Drakulich & Crutchfield (2013).

III. Inequality

RACE AND CRIME

As demonstrated above in Section II, racial differences in exposure and risk to victimisation and offending can be attributed, to a considerable extent, to family and community characteristics. Blacks and Hispanics are more vulnerable than whites to be victimised by household and personal crime and are arrested disproportionately regardless of age or gender, both of which will be examined in further detail in this section (Spohn, 2011).³⁸ According to the Bureau of Justice Statistics (2007), racial disparities in victimisation and offending of serious violent crimes in 2005 were 9 times higher for black males (20.6/100,000) over white males and over 4 times higher for black females compared to white females in victimisation rates and in terms of offending whites made up 59 percent of arrested offenders while blacks made up 39 percent (FBI, n.n., table 43.). These former figures are remarkable considering that in 2007 blacks accounted for just 13 percent of the U.S population and whites 83 percent. The question remains, why do these disparities in criminal justice risk and outcomes persist and how do we know?

Among the few studies that examine the causes of offending and victimisation across all levels including race, age, community and family factors, the empirical evidence suggests that the origin of risk come out to be similar irrespective of race (Lauritsen, 2003). For instance, black and Hispanic youth are exposed to the higher risk of crime and victimisation (nonlethal) because of the structural barriers listed by Sampson and numerous other studies—less parental supervision and more time away from home, single parent homes, less stable living arrangements (residential mobility) and highly economically disadvantaged communities.³⁹ This conclusion is constructive because it strongly challenges traditional arguments that there is an inherent psychological or biological deficiency within black communities that give them a higher propensity to commit more crime. In other words, the sources of risk of victimisation and offending are similar across racial and ethnic lines but the level and degree of

³⁸ See, Walker et al. (2007).

³⁹ See the National Crime Victimization Survey (1995), for more data on the effects of individual, family and community characteristics on the risk for nonlethal violence. For a comprehensive study that came to similar conclusions when comparing likelihood of Asians, Native Americans, Hispanics, blacks and whites to commit serious violent crimes, see McNulty and Bellair (2003).

exposure to the social and economic barriers that are strong predictors of crime, are more likely to be present in the families and communities of blacks and ethnic minorities.

Moreover, the empirical evidence indicates that the causes of the net result of racial and ethnic disparities in criminal justice can be summarised by the differential enforcement of the law (excessive use of force and racial profiling) and the discriminatory effects of the court system (incarceration, sentencing and the death penalty). The primary disparity between whites and blacks with respect to their treatment by law enforcement is in the use of excessive physical force at the hands of the police and the higher victimisation rate to police brutality towards blacks and Hispanics.⁴⁰ Secondly, not only has deciding whether or not to stop someone based on their race been ruled in courts as legitimate if it leads to improved law enforcement, among those who are searched after being stopped, whites, blacks and, Hispanics either have similar “hit rates” (Harris, 2002; Lamberth, 2003) —rates at which illegal contraband is found — or blacks and Hispanics have significantly lower hit rates than whites (Smith et al., 2003).⁴¹

Black and ethnic minorities have to confront direct and indirect discrimination at all levels of the court system—namely bail decisions, plea bargaining, jury selection, and sentencing (Spohn, 2011). As has been substantially discussed in this article, the racial disproportionality in incarceration rates is not merely due to the fact that blacks and Hispanics commit more crime than whites, instead, in the case of being arrested for drug offences, blacks have a higher chance of arrest than whites do (Tonry, 1995) in addition to the fact that racial differences only account for half of the racial disparities in incarceration for drug offences. In sentencing decisions, Spohn (2000) found a main effect for race, ethnicity or both in that blacks and Hispanic were more likely to be sentenced to prison and receive longer sentences. The main sources of this criminal justice outcome were minority characteristics (male, young, unemployed, less

⁴⁰ For the statistical evidence on the racial disparity of excessive force used by police see, Bureau of Justice Statistics (2001) ‘Policing and Homocide, 1876-98’ and Weitzer and Tuch (2004) “Race and Perceptions of Police Misconduct.”; For analysis on the likelihood of whites versus ethnic minorities to be shot and killed by the police see, Fyfe (1982); Sparger and Giacomassi (1992); Sorensen, Marquart, and Brock (1993)

⁴¹ See cases *State v. Dean*, 543 P.2d 425, 427 [Arizona 1975] and *State v. Martinez-Fuerte*, 428 U.S.542 [1976]) as examples of court rulings that deem it legitimate to stop drivers based on race in certain and broadly defined set of circumstances.

educated), process-related factors (e.g. pleading guilty, hiring a private attorney and providing testimony) that led to greater sentence severity for minorities and the race of the defendant and the victim (blacks who sexually assaulted whites received more severe sentences than others). Lastly, in the case of capital punishment, a report by the General Accounting Office in 2010 concluded that those who murdered whites were more likely to get the death penalty than those who murdered blacks. An overwhelming majority of more contemporary studies are consistent with those referenced here.

SOCIOECONOMIC INEQUALITY

There is little dispute in criminology on the existence of racial and economic disparities in the causes of offending, victimisation and criminal justice outcomes. The empirical evidence and analysis provided in this article discuss the different arguments on the causes of crime rates such as the weakened networks of social control, implicit bias and the ineffective methods of crime prevention, for example. Nevertheless, other structural factors such as segregation, education levels employment opportunities can also contribute to explanations on the cause of persistent of racial disparities in the criminal justice system. For instance, in a study carried about by George Bridges and Robert Crutchfield (1988), they found that the differences in punishment are similar even when controlling for differential involvement in crime and that such differences are linked to differences in social standing such as poverty, employment, housing and family structure that can lead to biases in criminal justice administration. Conclusions drawn by Ruth Peterson and Lauren Krivo (1996) are illustrated of this view in that because blacks disproportionately live in concentrated poverty, communities in which there tends to be higher crime rates, particularly violent crime, blacks end up having the highest rates of offence relative to whites and Hispanics. Expounding on prior research that suggests segregation creates more social problems, Piquero et al. (2003) highlight that 62% of blacks live in highly segregated and inner city neighbourhoods that tend to experience greater levels of crime, whereas most whites live in more advantaged neighbourhoods with less crime.

Inequalities in education also play a role in explaining the racial disparities in crime rates. When black men lack an educational background beyond high school their

labor market opportunities are reduced because they lose work experience opportunities. This is reflected by the fact that the main source for upward mobility among black men is a college degree and military service and that state prisoners have a tenth grade education and around 70 percent not even a high school diploma (Western, 2010). Furthermore, most of the growth in rates of incarceration is concentrated among young men with low education. The percentage of young, black, and male high school dropouts went from 10 percent in 1980 to 37 percent in 2008. The racial disparities in the degrees of education among black men is linked to those of employment in that by 2008, around 40 percent of black male high school dropouts were unemployed and this is *without* counting the prison population. In the former case, the unemployment rate of black men with low education levels soared to 75 percent by 2008. These social and economic inequalities do not only reflect inequalities of outcome, rather they also suggest that due to structural material barriers that may contribute to a higher rate of victimisation and offending among black males inequalities of opportunity as compared to whites are reinforced and perpetuated.

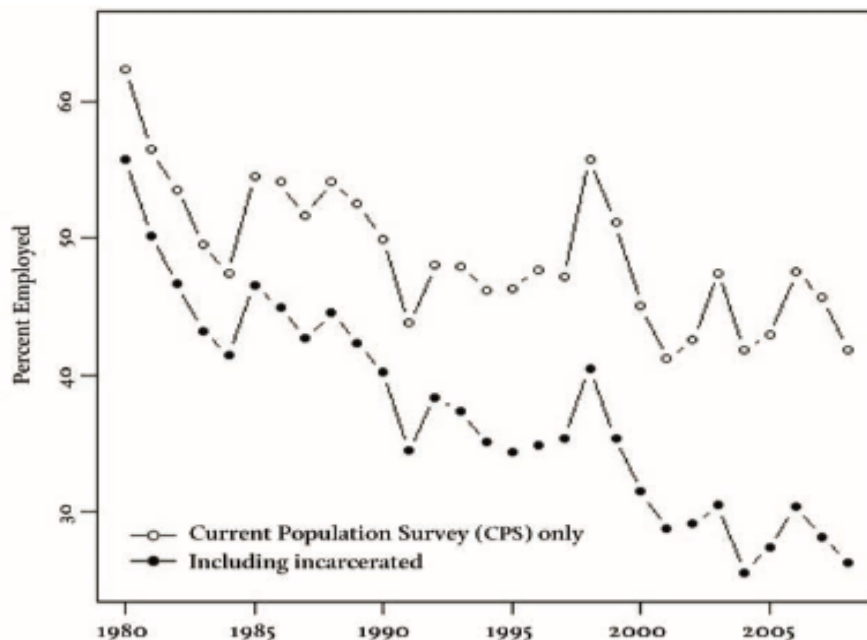
While the extent to which racial inequalities in criminal justice outcomes produce inequalities of opportunity is beyond the scope of this article, the impact of social and economic disadvantages produced by incarceration can be characterised as invisible, cumulative and intergenerational (Western and Pettit, 2010). Inequality is invisible because, as illustrated in unemployment data gathered by the Current Population Survey among the black and male population with low levels of education, the rate only takes households into account. Moreover, inequality can be considered cumulative and intergenerational because, as their article as demonstrated, having a criminal record lessens social mobility and economic prosperity. For example, as shows in Figure 3.1., data collected in the National Longitudinal Survey of Youth demonstrate that serving time in prison was linked to a 40 percent reduction in earning power, job tenure, hourly wage and unemployment.

In addition, having priors might also affect job prospects due to the stigma attached to having a criminal conviction.⁴² The NSLY data also illustrates that among low-income men of the lowest quintile of income distribution in 1986 who are non-incarcerated but may have lower levels of intelligence and education and high school

⁴² See Pager (2003). This audit study demonstrated that because employers fear that former convicts are a liability and less reliable, they are reluctant and less likely to hire them.

dropouts, they still had a higher chance of upward mobility by 2006 than the formerly incarcerated. Lastly, mass incarceration of black men has led to widespread single black women heading households with no economic or emotional support from the children's' fathers. The negative impacts are partly reflected in the higher chance for children beget in such circumstance to suffer from developmental and cognitive disorders.⁴³ Thus, it is clear that offending rates among black men, socioeconomic disadvantage and imprisonment are not only linked but each have accumulative affect on one another, reinforcing social stratification along both racial lines.

Figure 3.1.: Employment to Population Ratio, African American Men Aged Twenty to Thirty-Four with Less than Twelve Years of Schooling, 1980 to 2008.



Note: Reprinted from *Incarceration & Social Inequality* by B. Western and B. Pettit (2010). *Daedalus*,139(3), 8-19.; retrieved from “Technical Report on Revised Population Estimates and NLSY79Analysis Tables for the Pew Public Safety and Mobility Project” by Becky Pettit, Bryan Sykes, and Bruce Western. Copyright 2010 by Harvard University.

JUVENILE OFFENDERS

Consistent with statistical data on black and Hispanics on the level of overrepresentation in criminal justice outcomes presented in this article, the figures for black youth follow the same pattern. Out of the 48,043 youth that were held in juvenile facilities in 2015, forty-four percent of them were black, despite black youth only making up 16 percent of the total youth population in the U.S. (Hockenberry et al.,

⁴³ See, Wildeman (2010).

2016; Sickmund, 2017).⁴⁴ Overall, the black youth placement rate (the rate of confinement into a juvenile facility e.g. adult jail and prison, detention centres etc.) was 433 per 100,000 while that of white youth was 86 per 100,000 and the racial disparity between the two groups has increased 22 percent since 2001. The mechanisms that leads to disproportionate minority contact (DMC) with law enforcement are linked to several risk factors also discussed in this article such as economic status, lower levels of education, disorganised neighbourhoods and family structure (Office of Juvenile Justice and Delinquency Prevention [OJJDP], 2009). First of all, research has shown a correlation between that a black youth coming from a family environment that is less structured and harsher penalties (Morrow, Dario & Rodriguez, 2015). In addition, compared to their white middle class counterparts, black youth are more likely to have there cases proceeded in criminal court over juvenile court or be removed from their homes (Bishop & Frazier, 1996).

Secondly, the DMC in the juvenile justice system has been linked to the overrepresentation of black youth in the welfare system. For example, of youth in the welfare system, blacks are more likely than whites to be involved in the juvenile justice system (Center for the Study of Social Policy, 2009) and black involvement in the child welfare system can act as a ‘pipeline’ into juvenile confinement (Ryan, Chiu & Williams, 2011). This is due to the fact that not only are many children in the welfare system have a history of abuse and neglect which are both risk factors for offending but also because when they are confined in both systems (dually involved youth) their needs are not met in either systems, putting them at even higher risk for offending and recidivism. (Ryan, Herz, Hernandez, & Marshall, 2007). The spiral effect that many at-risk black youth in disorganised and deprived communities are caught into should not come as a surprise, given that the same trends of the underlying socio-economic issues of black communities being punished and marginalised instead of being rehabilitated and transformed, can be seen in all levels of the criminal justice system.

Lastly, one of the most significant risk factors that can lead to a juvenile being arrested are the policies in procedures in the educational environment, often called the school-to-prison pipeline (Christle, Jolivet & Nelson, 2005). The most prevalent example of this phenomenon are the zero-tolerance policies that were implemented

⁴⁴ Statistics calculated from Sickmund, Sladky, Kang, Puzzanhera (2017).

thought the 90s in low performing schools in areas with high rates of poverty and still have negative impacts on educational and juvenile justice outcomes for black youth. For example, certain behaviours that were dealt with internally by the school came to be seen as criminal and requiring intervention of law enforcement, even if it is typical adolescent behaviour (Hayes & Ward, 2014). The implementation of these policies has led to suspensions, expulsions, and in-school arrests which intersects with and exacerbates other risk factors for engagement in crime such as weakened family and community ties and low levels of education previously noted in this article. Therefore, the mutually reinforcing relationship between structural (education, social and economic standing, criminal justice system, communities and segregation etc.) and micro-level (e.g. racial perceptions of criminality and implicit bias, stigmas and stereotypes) racial disparities and the relatively high degrees to which several risk factors present at the same time for black youth illustrate how and why inequality causes DMC.

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