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## Race and the Criminal Justice System

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RACE AND THE CRIMINAL JUSTICE SYSTEM

by

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B.A., University of Maryland, 2017

A Research Paper  
Submitted in Partial Fulfillment of the Requirements for the  
Master of Arts

Department of Criminology and Criminal Justice  
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RESEARCH PAPER APPROVAL  
RACE AND THE CRIMINAL JUSTICE SYSTEM

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Karissa Lena Murphy

A Research Paper Submitted in Partial  
Fulfillment of the Requirements  
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Master of Arts  
in the field of Criminology and Criminal Justice

Approved by:

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Graduate School  
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## CHAPTER 1

### INTRODUCTION

The Emancipation Proclamation, signed into law by the late President Abraham Lincoln in 1863, was effective in all states by 1865 when the Civil War ended. This document stated that all enslaved individuals were free, however not long after, Black Codes emerged in southern states, limiting the rights of the recently freed Black slaves. Black Codes, in short, stated that persons who were more than one eighth Black could not own land, enter legal contracts, or even marry legally. In addition, Black Codes provided harsh punishments for alleged crimes committed by Black individuals, including “hiring out” in which the alleged offender would be sentenced to hard labor and “hired out” to a private owner for a length of time specified by a judge.

Beginning in the 1890s, Jim Crow laws required separation of the races in all public facilities in the former Confederacy (Travis, Western, & Redburn, 2014) and was enforced by all White police organizations. The power dynamic between White and non-White citizens continued both legally (Plessy v. Ferguson’s “separate but legal doctrine”) and brutally until the Civil Rights Act of 1964 overturned “separate but equal,” only 55 years ago. Communities of color can still recall a time when members of their community attended segregated schools and sat in the back of the bus. However, it was not overnight that equality was achieved. Today, we still see too many examples of the institutionalized bias that existed during our parents and grandparents time. I use the term “we” because the issue of disparate treatment by the criminal justice system, an example of institutionalized racism, is not a “Black problem.” It is an American issue that has affected specific communities. Historically, laws and policies that permitted overt differential treatment of non-White persons and the behavior that followed were

widespread. Today, these policies allow legal response to be tailored to the individual and the circumstances, but this flexibility may contribute to covert differential treatment and discrimination that is less readily identifiable. This poses a barrier to conceptualizing and measuring discrimination for the purpose of social scientific research.

Moving forward, perhaps coincidentally, the number of individuals processed by the criminal justice system has increased exponentially since the early 1970s (Travis, Western, & Redburn, 2014), following the passage of the Civil Rights Act in 1964 which most notably ended segregation in public spaces. Prior to the Civil Rights Act, the rate of incarceration saw 50 years of stability (Travis, Western, & Redburn, 2014). Shortly after the Civil Rights Act was passed, there was a clear and present increase in harsher and longer punishments. The Sentencing Project (2019) identifies numerous factors which contributed to the increase in the incarceration rate, to include the increase of women incarcerated, which increased at twice the growth rate of male incarceration, racial disparity, and the increase of “lifers” (those sentenced to life in prison, with or without parole). Those convicted of crimes began serving harsher and longer sentences. Specifically, the Black male incarceration rate increased 7.9 percentage points from 1974 to 2001, from 8.7 to 16.6 percent. This increase was 2.6 percentage points for White males (Bonczar, 2003). The Sentencing Project (2019) also acknowledges policy changes and its impact on the incarceration rate. Through the 1970s and 1980s, the “tough on crime” era, predominantly consisting of bad policy decisions, is characterized by the emerging limits of judicial discretion and stricter sentencing guidelines which partially contributed to more people being incarcerated for longer periods of time (Mears & Cochran, 2015).

Although not at the highest rate of incarceration in the history of the United States, the country still incarcerates more individuals than any other developed nation at 655 per 100,000 in

the population. Nonetheless, the incarceration rate does not tell the full story. One in three Black men will be incarcerated in their life compared to one in 17 White men. Moreover, one in 18 Black women will be incarcerated compared to one in 56 White women (The Sentencing Project, 2019). In general, research suggests that Black individuals are more likely to be arrested, convicted, and receive harsher and/or longer punishments (Black & Reiss, 1970; Pierson et al., 2017). Additionally, research also suggests that disparity exists partially as a result of internal disparity within each key criminal justice actor and every level of the criminal justice system (Clemons, 2014). Some scholars argue that this may not be a direct effect of sentencing disparities, but rather a cumulative effect of discretionary decisions at every step in the criminal justice system (See Crawford, Chiricos, & Kleck, 1998; Demuth, 2003; and Schlesinger, 2005). It is necessary to also note that discretion, in and of itself, is not a hindrance to our criminal justice system. Rather, it is a benefit which allows for a fair and equitable system tailored to the individual and the circumstances of the offense (Gelsthorpe & Padfield, 2012). The issue with discretion lies in its lack of neutrality, possibly the result of a lack of information. Gottfredson and Gottfredson (1987) describe decision-making as having three main components: a goal, alternatives, and information. In order to effectively make a decision, criminal justice actors should have clearly defined goals and an availability of information to make a decision. These decisions by each criminal justice actor are important as “decisions by police affect the workload of the prosecutors, whose decisions in part determine cases to be tried in court” (Gottfredson & Gottfredson, 1987, p. 4).

The following paper will examine the literature related to race and the criminal justice system post-Civil Rights Act of 1964. Specifically, this paper will examine how disparities may exist in all stages of the criminal justice system as a result of discretionary decision making,

leading to certain communities feeling the impacts of these “collateral” consequences more so than others. As this literature review will demonstrate, there are patterns of disparity that are rooted deeply in the country’s history of racism, discrimination, and prejudice. People of color experience disproportionate rates of police contact (Black & Reiss, 1970; Pierson et al., 2017), including arrest which typically leads to interaction with the court system and if convicted, interaction with the correctional system. While these patterns do exist, there is still some untangling of those patterns to do. This paper is written with the hopes of offering a theoretically driven explanation.

## CHAPTER 2

### CONFLICT THEORY

A helpful perspective to better understand how a history of racism, discrimination, and disparity has impacted the current criminal justice system would be through the viewpoint of conflict theory. Conflict theorists propose that laws are created by those in power to protect the relatively powerful and their interests, and that crime is the result of class conflict (Siegel, 2000). Additionally, those with relative power use these legal pathways to maintain their position and the inequality it causes. Conflict theory initially focused on economic status, where the wealthy commit crimes to maintain their position in society while the poor commit crime out of anger or need for economic advancement (Siegel, 2000). Conflict theory was initially and commonly used to describe the relationship between economic classes but has since expanded to include other ways of holding relative power. Rather than viewing conflict between economic classes, it is possible to understand the theory more generally: that society consists of competing populations using its available resources to maintain or improve their position.

Criminologists have since used conflict theory to describe disparity in criminal justice processes. Conflict theorists believe that one, the values and interests of complex industrialized societies deviate, and two, power and resources are unequally allocated. As a result, some groups “are in a better position than others to have their own values and interests adopted in a formal capacity and subsequently embedded in the policies and practices of the institutions” (Williams & Arrigo, 2007). Moreover, Petrocelli, Piquero and Smith (2003) explain that “the relative power of a given social group dictates social order in that powerful groups not only control the lawmakers, but also the law enforcement apparatus of the state” (p. 2). In sum, a group’s position in a social structure makes the group’s values more or less likely to be adopted into policy and

enforced by police forces. This may lead to behaviors which characterize or stereotype a group becoming criminalized. One example of this is the Anti-Drug Abuse Act of 1986 which established a 100-to-1 ratio crack/powder cocaine sentencing disparity (Beaver, 2010). The sentencing guideline unjustly targeted crack cocaine despite crack and powder being the same drug in different forms, and primarily impacted lower socioeconomic communities as crack cocaine is cheaper to produce and purchase. In regard to enforcement practices, Chevigny (1995) argues that the role of police is critical in regard to social control as police are the only state-sanctioned coercive force permitted to employ legally sanctioned violence against members of society. In subtle ways, those in positions of advantage whose values and interests have been adopted into policy, may condone behaviors such as police violence, which help them maintain their position by arguing its necessity to maintain public order.

In general, Black (1976) argues that the relative position of victim and offender and the degree of distance will be perceived differently by both society and justice agencies. Using socioeconomic status (SES) as an example, an offender of low SES, perhaps a homeless person, versus a victim of high SES, such as a billionaire will influence perception. However, perception will also be influenced by the degree of distance. A crime between a homeless person versus a billionaire would be perceived differently than one between a member of the middle-class, such as a schoolteacher, and a member of the working-class, such as a construction worker. Black refers to this concept as the sociological distance between victim and offender. Additionally, the direction of crime influences the direction of law. A homeless person who commits a crime against a billionaire would be committing an upward crime and would be punished by downward law. Important to the understanding of this paper is Black's (1976) proposition that "upward crimes are more serious than downward crimes" (p. 24). In other words, crimes against those of

higher SES by someone of lower SES are perceived to be more serious than crimes committed by those of higher SES against someone of lower SES.

Minority threat hypothesis, a distinct specification of conflict theory, proposes that a presence, or perceived presence of more racial and ethnic minorities in a community is perceived as a threat by the racial majority (Blalock, 1967) as a result of the historically-established power relationship. Like conflict theory, power dynamics manifest in racial and ethnic difference instead of socioeconomic differences, although this does not discount the sociological arguments of the inter-relationship between race and socioeconomic class. Research has found a relationship between fear of crime and the proportion of Black citizens in a city (Liska, Lawrence, & Sanchirico, 1982) as well as a relationship between crime committed by White suspects and their perception of minority status in their neighborhood (Chiricos, Hogan, & Gertz, 1997). Along similar lines, some studies have found that Black suspects and defendants are treated more harshly than that of their White counterparts (American Civil Liberties Union, 2014). The mentioned research demonstrates that within the White-Black power dynamics, White individuals appear to hold greater power leading to better criminal justice outcomes.

Moreover, White individuals have higher representation in government and other positions of influence, higher levels of economic prosperity, and more positive occupational and educational outcomes than non-White persons (Kubrin & Weitzer, 2003). Referring back to Williams and Arrigo (2007), the relative advantage of individuals is both displayed by higher representation in government and positions of influence as well as place White individuals in a better position to have their values adopted into policy based on the relative positions of power that White individuals hold.

Minority threat hypothesis will provide a framework for which we can better understand the role of police in the enforcement of laws, prosecutors in the charging of said laws, and the corrections system in the punishing of those laws. The decisions made by each justice agency and their members are representative of government as a whole. The policies which inform these decisions are often based on the values and interests of groups in relative positions of power. Moreover, the historical associations of skin color and race have influenced the way government functions, and the way justice actors perceive and portray messages about criminality (See Mendelberg, 1997 for further discussion). In the following review, discretionary decisions made at each level of the criminal justice system will be examined through a minority threat perspective, in which it appears more favorable outcomes are associated with the group with relative power which will be demonstrated to be individuals who are White. Those who are White also tend to hold more relative positions of power in both government and as members of higher status groups (e.g., higher SES) which can influence legislation and policy which then influences the practices and policies of criminal justice agencies.

A common theme among scholarly research is that race, to some degree, does matter in criminal justice outcomes. Both implicit and overt biases of individual justice actors and agency policies contribute to the disproportionate impact the criminal justice system has on people of color. Disproportionate, in this context, refers to a group of people that experience contact with criminal justice actors at higher rates than is predicted based on the proportion that make up the population. In general, one's interaction with the criminal justice system tends to begin with police. In the following pages I will examine the literature in relation to use of force and arrests by police as well as how these interactions influence community opinions and relations.

## CHAPTER 3

### RACE, ARRESTS, AND COMMUNITY ATTITUDES

Policing is generally one's first interaction with the criminal justice system which can lead to interaction with the courts and eventually the correctional system. Some examples of discretionary decisions made at the policing level include the decision to stop, write a ticket, or arrest when departmental policy does not require mandatory arrest. There is a general consensus regarding the widespread adoption of selective enforcement among police officers (Smith & Visher, 1981). Smith and Visher (1981) propose an important question: "upon what criteria is the law being invoked?" (p. 167). The following chapter will continue to examine the literature related to disparities in use of force and arrest with the goal of understanding decision-making among law enforcement officers.

#### **Race and Use of Force**

The appearance of disproportionate use of force by police officers, particularly deadly force, has gained national attention. Some argue that the attention on deadly force has merely been a result of cell phone cameras and the internet creating a façade of higher prevalence (Marenin, 2016). Nevertheless, data has shown that unarmed Black men are more likely than unarmed White men to be shot and killed (Edwards, Lee, & Esposito, 2019). In fact, recent research has found that 100 in 100,000 young Black men and boys will die as a result of police violence compared to 39 in 100,000 young White men and boys (Edwards, Lee, & Esposito, 2019).

This incongruity in use of force is a considerable issue for police departments and their communities. Police departments face issues of due process, legitimacy, and detrimental officer behavior. Due process is the fair treatment of individuals by criminal justice agencies and actors

which can influence legitimacy, referring to “the right to exercise power” (Tankebe, 2013, p. 103). When an officer’s behavior is deemed as unjust by members of the community, it can have detrimental effects on their perceived legitimacy and their right to exercise power in those communities. As Marenin (2016) argues, a few publicized events of perceived misuse of force by police decreases officer legitimacy in the eyes of the community, and in most cases, those communities are comprised of ethnic and racial minorities. These communities then experience feelings of fear and concern for their safety during interactions with the police. Fryer (2016) explained these feelings well:

For much of the 20<sup>th</sup> century, law enforcement chose to brazenly enforce the status quo of overt discrimination, rather than protect and serve all citizens. The raw memories of these injustices have been resurrected by several high profile incidents of questionable uses of force. Michael Brown... Eric Garner... Walter Scott... Samuel Du Bose... Rekia Boyd... Zachary Hammond... (p. 1)

Fryer (2016) notes that even when civilians are reportedly compliant, Black individuals are 21.2 percent more likely to experience some level of force during a police interaction. The types of force documented include placing hands on a subject, pushing, handcuffing, and ultimately arresting the subject. Some level of force refers to a subject experiencing “at least” hands.

In addition to race, numerous other factors play a role in use of force incidents. As will be evident in the following pages, race is one of the most researched and seemingly one of the most salient factors aside from legal and situational factors in researching use of force. Like most issues, use of force is likely the result of a legal, situational, and other individual (both officer and suspect) characteristics (Sun, Payne, & Wu, 2008). Arrests are another form of coercive force which leads to the detainment of an individual for a span of time. The following section

will examine the recent literature related to racial differences in arrest rates and the physical ways power relationships can emerge.

### **Disparities in Arrests**

To arrest means to place someone who breaks the criminal law into the custody of the government, and police have great latitude in making arrests. When someone is arrested, they are typically taken to a holding facility or jail where the suspect will be stripped of many of his rights, freedoms, and privileges. As previously noted, the minority threat hypothesis argues that police coercive force can be used as a tool for those in a relative position of power to maintain their position. Ousey and Lee (2008) eloquently write:

...Whites view Blacks, and other non-White minority groups, as potential competitors who may challenge their ascendant position in society. Consequently, as Blacks (non-Whites) become more prevalent and less residentially segregated in a given area, it is hypothesized that Whites will perceive a greater threat and therefore move to protect the existing status quo via a variety of discriminatory methods, including unjustly focusing criminal justice resources at their non-White competitors. (p. 324)

Arrest, like other forms of force, is one avenue that power dynamics between racial groups can become evident. The following research will demonstrate that Black individuals are more likely to be arrested, even when controlling for legal factors.

Overall, research has found that Black suspects are more likely to be arrested than White suspects. The disparity was largest for drug offenses where Black suspects were six times more likely to be arrested than their White counterparts and for violent and weapons offenses where Black suspects were four times more likely to be arrested (Ousey & Lee, 2008).

Along similar lines, a meta-analysis by Lytle (2014) found that irrespective of the seriousness of offense, the influence of race persisted in arrest rates. In a study of racial disparities in police traffic stops across 20 different states, Pierson et al. (2017) found that Black individuals were more likely to be ticketed, searched and arrested. This study of 60 million state patrol stops supported this claim, discovering “widespread racial disparities in stop, citation, search, and arrest rates” (Pierson et al., 2017, p. 15). The researchers emphasize, however, that while the data demonstrated widespread disparity, it does not identify the causes of that disparity and that the existence of disparity does not mean the existence of racial bias or discrimination. The disparity in use of force against and arrest of Black individuals by police is recognized by communities of color and has led to negative perceptions of and damaged the legitimacy of law enforcement. The following section discusses how these instances of perceived injustice have impacted the opinions and perceptions of community members.

### **Community Perspectives**

The occurrence of several recent highly publicized police use of force incidents has called into question the state of police-community relations in certain communities. It is argued that “negative minority community perceptions toward police in America have a historical basis in fact” (Edwards, 2016). To expand, most youth in high-crime areas of Philadelphia hold negative views of the police (Carr, Napolitano, & Keating, 2007). These views are grounded in personal experiences of negative interactions with the police, however, when these youth were asked how best to reduce crime in their neighborhood, most youth wanted tougher enforcement of the laws, explicitly stating “more cops on the block” (Carr et al., 2007, p. 462). In a separate study in the United Kingdom, community members described their confidence in the police as lacking and their relationship with police as hostile (Sharp & Atherton, 2007). In the United

States, the Gallop Poll found an increase in overall public confidence in police but a decrease in confidence by Black respondents. The percentage of those who responded having a “great deal” or “quite a lot” of confidence in police grew from 52 to 57 percent overall, while Black respondents dropped from 35 to 30 percent between survey years 2012-2014 and 2015-2017 (Congressional Research Service, 2018). It is also important to note that between 2014 to 2017, several high-profile cases of use of force deaths occurred, including Eric Garner in 2014, Freddie Gray in 2015 which led to the Baltimore riots, and Philando Castille in 2016 which may be able to partially explain the decrease in confidence although this has not been tested.

Other research attempts to account for individual experiences versus vicarious experience arguments, demonstrating that depending on the operationalization and measurement of variables, both personal and vicarious experiences do matter in individual attitudes toward police. On one hand, research has found that police encounters condition attitudes toward police, and these findings are more consistent when the experiences are negative (See Tyler & Huo, 2002). However, Rosenbaum and colleagues (2005) found no significant change in attitude as a result of a police-initiated encounter. These findings are explained: “This study suggests that encounters with the police can be conditioned by prior attitudes about the police rather than the other way around” (p. 360). Nevertheless, a meta-analysis containing 92 studies found that those who identified as Black or non-White held more negative attitudes toward police as compared to their White counterparts, regardless of measures and operationalization of “attitudes” (Peck, 2015).

Community perspectives in regard to police interactions matter. From the research discussed in this chapter, it has become apparent that not only are perceptions of a propensity towards criminality among Black individuals shaped by the presence of minority individuals in

the population, but also that Black individuals' perceptions of injustice and inequality by police can be shaped through both direct and vicarious experiences with police.

The racial majority holds relative power and controls both the lawmakers and the law enforcement apparatus of the state (Petrocelli, Piquero, & Smith, 2003). A main contention of minority threat hypothesis dictates that the presence or perceived presence of more racial and ethnic minorities in a community is perceived to be a threat by the racial majority (Blalock, 1967). Petrocelli and colleagues (2003) found that police stops were more likely to result in a search in areas predominantly occupied by Black individuals. This differential application of power in areas predominantly occupied by Black residents is in line with minority threat arguments. These stops and searches can lead to arrest and interaction with the court system. In the following section, prosecutors' charging decisions will be discussed.

## CHAPTER 4

### PROSECUTORIAL DECISION-MAKING

The first step in the court process is the prosecutorial decision of whether and what to criminally charge. Of course, as with any other institution, there are legal factors which primarily dictate decision-making, however discretionary decisions are not absent of bias. In general, there is a higher proportion of Black males in prison (Clemons, 2014) which comes as a result of being charged, convicted, and sentenced at the court stage in criminal justice processing. Some argue that the disparity is partially the result of disproportionate participation in criminal activity, however, research consistently finds that disproportionate engagement in criminal activity does not explain present incarceration rates, particularly in regard to drug offenses. Clemons (2014) argues that the disparity is partially the result of implicit racial bias of individual key actors throughout the criminal justice system. Unfortunately, much of what we know about disparity in prosecution is at the sentencing stage leaving the public vastly unaware of trends in initial charges and charge reductions as a result of plea agreements. The Vera Institute labels prosecution the “black box” of the criminal justice system as much of the work prosecutors perform occurs without much public attention or required documentation.

#### **Plea Bargaining**

Understanding prosecutor decision-making helps us understand the disproportionate impact incarceration will have on Black defendants. The court system functions under a larger organization: the government and is impacted by the policies and legislation it enacts. The policies are another form of social control used to protect the interests of a dominant group through legal pathways and are influenced by discretionary decisions of each individual. The court system is impacted by these decisions and the decisions of the criminal justice agency and

actor before them. The results of these decisions may lead to a criminal conviction that is often followed by invisible punishments, discussed later, that will strip away civic rights.

A significant responsibility of prosecutors is negotiating plea agreements with those charged with a criminal offense. Plea bargaining begins at arraignment when a defendant is presented with the charges against him. The prosecutor may present a plea bargain at this time, which is an agreement between the defendant and the prosecutor that the defendant will admit guilt in exchange for reduced charges or sentence. Should the defendant reject the plea bargain, the prosecutor may seek the maximum charge or punishment at trial. If the defendant accepts the plea bargain, he may plead guilty to a lesser charge or the same charge with a lesser sentence (Bar-Gill & Ben-Shahar, 2009). When a plea of guilty is admitted, only the judge presiding over the case may sentence the defendant. It is typical however, of judges to approve plea agreements to expedite the case (Davis, 1998) and to avoid clogging court dockets.

Less than 10 percent of all criminal cases will ever make it to trial (Devers, 2011). The rest will be disposed of via guilty plea and most of those through the plea-bargaining process. For many, the plea-bargaining process appears to eliminate the risk associated with trial and the potential for harsher punishment. Davis (1998), who was an attorney with the Public Defender Service (PDS) in Washington, D.C. during the 1980s and 1990s, witnessed trends which showed prosecutorial discretion leaning more harshly for defendants who were non-White and more favorable for the few White defendants that came through her office, which sometimes resulted in the dismissal of a white defendant's case. Davis (1998) argues that "Almost always, this disparate treatment [between racial groups] was the result of action taken by the prosecutor at the charging, plea bargaining, trial, or sentencing stage of the case" (p. 15). Davis' claims are supported by research. Black individuals are 23 percent less likely to receive a downward

departure from the standard sentence for all modes of conviction (negotiated plea, non-negotiated plea, bench trial, and jury trial) compared to their White counterparts according to one study (Johnson, 2003). Another study found that White defendants are 25 percent more likely to have their charges dropped or reduced based on electronically available data obtained from the Wisconsin Circuit Courts. Statistics relating to the sentencing stage and incarceration rates are commonly cited in scholarly works, whereas data on plea bargaining is comparably neglected considering its prevalence (Bushway & Frost, 2013; Ulmer, 2012). Methodologically strong research on plea bargaining is rare in comparison with other aspects of criminal justice processing which leaves much of discretion less understood. Lack of data is a likely major contributor to this gap in research.

Some scholars argue that perhaps prosecutors hold too much power in the criminal justice system (Berdejó, 2018). Factors which influence a prosecutor's decision to charge may include legal factors such as the seriousness of the offense, prior criminal history, a victim's desire to pursue prosecution, the evidence available, and the likelihood of conviction. However, both unconsciously and consciously prosecutors sometimes consider extralegal factors such as the race of the accused, the race of the victim, and the socioeconomic status of both. These decisions influenced by possible bias or disparate practices may lead to adverse impacts on Black defendants, such as higher charges and increased length or type of charge (Johnson, 2003; Spohn et al., 1981; Petersilia, 1983; Zatz, 1984). Stolzenberg and colleagues (2013) found that Black defendants received severe sanctions more often; specifically, Black defendants were 42 percent more likely to receive a more severe sanction, referring to both type and length of sanction, even after controlling for prior record and other legal and extralegal variables. Similarly, Kutateladze et al. (2014) found that Black defendants were more likely to receive a custodial plea offer, an

offer which would include jail or prison time, and were more likely to be incarcerated while a separate study found Black defendants served 270 more days in prison on average than their White counterparts for a first-time offense (Burch, 2015). In sum, Black defendants are more likely to receive a plea offer involving jail or prison and spend more time incarcerated.

As mentioned, some scholars argue that prosecutors hold a great deal of power in justice outcomes and the data does suggest that prosecutors' decisions do play a role in the disproportionate number of Black and other minority persons being processed in the criminal court system, particularly in regard to reduced and dropped charges (Berdejó, 2018). Prosecutors' charging decisions can constrict the discretion of the judge at sentencing due to sentencing guidelines which are minimum and maximum punishments set by legislature, and by other legal factors such as the crime and the defendant's criminal history. Judicial oversight exists to limit the power of prosecutors in the hopes of maintaining a just system, however, evidence still exists that regardless of oversight, Black individuals receive less leniency than their White counterparts (American Civil Liberties Union, 2014; Bar-Gill & Ben-Shahar, 2009). Some ways reduced charges can lead to leniency include when felonies are reduced to misdemeanors and result in little to no jail time. Lastly, the initial charge filed by the prosecutor may influence plea negotiations and the willingness of a defendant to accept a plea deal.

Nevertheless, Davis (1998) argues that by virtue of the court system, the prosecutor's decision to charge a suspect almost predetermines the outcome of a case as most cases are disposed of via guilty pleas and guilty verdicts. Other opponents of plea bargaining argue that defendants should go to trial for each case to be processed unbiasedly. As a result, it may limit prosecutors to processing cases where there is strong evidence to convict and perhaps reduce the number of innocent defendants accepting guilty pleas out of fear and leniency towards chronic

offenders (Bar-Gill & Ben-Shahar, 2009). Even so, it appears that those who opt to go to trial are more likely to receive a harsher sentence than those who accept a plea bargain (Devers, 2011; Ulmer & Bradley, 2006). Ulmer and Bradley (2006) found that Black defendants who pursue a jury trial receive a length trial penalty that is 15 percent greater than Whites, meaning that Black individuals will receive a sentence that is 15 percent longer when incarceration is selected. The likelihood of a defendant accepting a plea increases based on the seriousness of the offense, strength of evidence, the use of a defense attorney (public or private), whether the defendant is held in pre-trial detention (Ulmer & Bradley, 2006), and by lack of predictability and risk associated with going to trial (Devers, 2011).

Prosecutors have been described as gatekeepers who control the flow of cases and pre-trial proceedings (Wu, 2016). In the only meta-analysis of its kind, Wu (2016) discovered that race played a significant role in prosecutors' decisions in charging or pursuing full prosecution (i.e. non-dismissal). These decisions may be based on legal variables, docket constraints, or even on the public's desire for punishment. The last point is worrisome, as communities with greater influence and power may be able to sway a prosecutor towards or away from prosecution which can contribute to the disparity that has been identified by several researchers.

The public's desire for punishment is not a new phenomenon, however appealing to the public's desire may also be portrayed as representing the interests of the dominant group in some circumstances. Prosecutors, as part of the government and law enforcement apparatus, can be weaponized and used as a means of protecting the interests and maintaining the power of the dominant group. As discussed above, Black defendants are less likely to have their charges dropped, less likely to receive a downward departure from standard sentencing guidelines and face longer prison terms when trial is pursued. These are just a few ways of maintaining the

status quo for the powerful. Additionally, this status quo is maintained through opinions of guilt. Black guilt and propensity toward criminality can be traced back to historical trends of criminalizing newly freed slaves during reconstruction and Jim Crow so that Whites could maintain their way of life and status in society.

As gatekeepers, prosecutors' decisions can significantly impact sentencing outcomes. The following section will describe trends in the incarceration rate, who has been impacted, and what the consequences of incarceration have been. It is important to note that discretionary decisions made at previous points in the criminal justice process have led to a disproportionate number of Black individuals under correctional supervision. The impact of this is amplified by policy changes known as invisible punishments.

## CHAPTER 5

### MASS IMPRISONMENT AND ITS EFFECTS

The cumulative effects of the decision-making dynamics of criminal justice actors discussed earlier in this paper have led to lasting institutional and community consequences. As mentioned previously, one in three Black men will be incarcerated during his lifetime (Clemons, 2014). The shocking reality for the Black community is reminiscent of a history plagued by racism and overt discrimination. One scholar argues: “The cumulative effect of such disparity is that today--fifty years after the passage of the Civil Rights Act and 150 years after the ratification of the Reconstruction Amendments – more Black Americans are under correctional control than were enslaved in 1850” (Clemons, 2014, p. 690-691).

Muhammad (2019) argues that the evolving laws and increasing incarceration rates were on par with historical trends of the criminalization of blackness. Specifically, Muhammad notes that the 13<sup>th</sup> Amendment (1865) abolished slavery “except as punishment for crime.” Freedmen were forced to become sharecroppers or face harsh punishment or death. Muhammad proposes that this was just the beginning of viewing Black people as belonging to a criminal race.

Criminologists agree that Black individuals are overrepresented at every step in the criminal justice system. With a focus on correctional confinement, Black people are significantly overrepresented. Black inmates account for 38 percent of all those incarcerated, but only account for 12 percent of the American population. In fact, one in every 23 Black men is incarcerated, compared to one in 147 White men based on 2010 data (Baradaran, 2013).

Equally important is the success of these individuals after returning to society, however the numbers are bleak. One study of former jail inmates found that within one year of being released, 43 percent of Black offenders reoffended while 31.1 percent of White offenders did

(Jung, Spjeldnes, & Yamatani, 2010). This lends truth to the thought that the *correctional* system is unsuccessful at correcting and rehabilitation offenders to eventually be productive members of society.

### **Invisible Punishments**

Between 1980 and 2012, the incarceration rate increased 250 percent and the correctional population, including jail, prison, probation, and parole, grew from two million to seven million over the course of three decades. The increase in the incarceration rate has been accompanied by an increase in released offenders. Approximately 600 to 700 thousand individuals are released from state and federal prisons annually. While research has varied, there is general agreement that at least 93 percent of all inmates will eventually return to society (Mears & Cochran, 2015). Meanwhile, Mears and Cochran (2015) identified that in 2005, 77 percent of ex-prisoners were rearrested for a felony or serious misdemeanor within five years of release, 55 percent were reconvicted of a new crime, and 28 percent were returned to prison for a new crime. It is evident through this data that reentry is not an easy process and many will fail.

The consequences of a felony conviction make it difficult to return to society and be a successful law-abiding citizen. These consequences partially contribute to a cycle of recidivism which plague some disadvantaged communities. As is the overarching theme of this paper, racial disparity exists in the criminal justice system, resulting in communities of color being uniquely impacted by the experiences and consequences of incarceration and felony convictions, regardless of whether they were imprisoned. The less obvious dynamics of all criminal justice actors contribute to these consequences which have a disproportionately negative impact on Black populations.

As most inmates will eventually return to society, it is important to discuss the barriers to successful reentry. One factor thought to be integral to successful reentry is gainful, legitimate employment. Successful reentry refers to desistance from (or ceased involvement with) criminal activity. Nagin (1998) describes the stigma of a felony conviction as a scarlet letter. This stigma is reinforced through banning those with felony convictions from certain jobs and by requesting the disclosure of felony convictions on job applications.

Notwithstanding, other factors contribute to limited employment prospects for released offenders. Incarceration can lead to extended periods of time out of the workforce (Sviridoff & Thompson, 1983) also referred to as “gaps” in employment. Along similar lines, Visher and colleagues (2008) found that most respondents obtained employment by speaking with friends and family or returning to a previous employer, however returning offenders experience a loss of social capital which can benefit the reentry process. This study also found that those who were employed and earning higher wages were less likely to return to prison during the first year of reentry (Visher, Debus-Sherrill, & Yahner, 2008).

While there are significant barriers to obtaining gainful employment for all returning offenders, these barriers are amplified for Black returning offenders. However, very few studies have examined racial differences in obtaining employment post-release. Holzer (2009) explains that “men with criminal records – and in particular black men – face much weaker demand for their labor than do comparable men without these records” (p. 16). In this study, the results demonstrated that young Black men had a significant decrease in employment and work force participation.

Pager (2003) published an experimental study which helps account for some of the gaps in research. This study tested the likelihood of callback for a job for four testers: one White and one Black tester with a criminal history and one White and one Black tester without a criminal history. There were several key results of this study in relation to race, criminal history, and job attainment. The first is that those most likely to receive a callback for job was the White tester *without* a criminal history who received a callback for 34 percent of the positions applied to and the White tester *with* a criminal history who received a callback 17 percent of the time. The Black tester *without* a criminal history received a callback for 14 percent of positions and the Black tester *with* a criminal history received a callback for five percent of positions. Pager (2003) notes that in a similar job audit experiment almost a decade earlier, Black applicants were 24 percentage points less likely to receive a job offer compared to White applicants (Bendick et al., 1994).

The results of Pager's (2003) study demonstrate that race and criminal record interact to reduce job market opportunities and have been replicated across time and place (Decker et al., 2015; Pager, Western, & Bonikowski, 2008). The difference in percentage points between White testers with and without a criminal record was about half (34 percent vs. 17 percent) while the difference between Black testers was about two-thirds (14 percent vs. 5 percent). In Pager's (2003) experiment, she ensured employers knew of criminal record even if they did not ask by using correctional facility employment as work history and using parole officers as references for the testers with a criminal record. However, Holzer and colleagues (2002) found that employers who do not ask about criminal history tend to hire fewer Black employees.

In addition to employment, housing can play a significant role in the success of an offender and is likely one of the most immediate concerns for many returning inmates. However, depending on the convicted crime, access to public housing may be restricted and if an offender's family lives in public housing, he or she may also be prohibited from living with or even visiting them. Specifically, access to federal housing assistance can be restricted through the “One Strike and You’re Out” policy which denies admission to anyone “based on past or present criminal activity, including violent offenses and drug offenses” (Katzen, 2011, p. 237). Black drug admissions to prison increased 25-fold between 1983 and 1998 compared to White drug admissions at 7-fold (Mauer, 2003). Returning inmates restricted from subsidized housing due to drug convictions may also face landlords who refuse to rent to a felon which can be discovered through a background check (Petersilia, 2005). Black returning inmates will face these legally permissible obstacles to obtaining housing in addition to potential discrimination based on race (Turner, 2008). Those who are unable to find stable housing have higher recidivism rates than those who do (Meredith, Speir, & Johnson, 2007).

In addition to barriers to finding employment and housing, former inmates are removed from potentially positive family environments which can have a beneficial impact on recidivism (Berg & Huebner, 2011). Ex-prisoners may have their legal parental rights terminated (Travis, 2002; Mears & Cochran, 2015) possibly leading to weakened family ties. Those who can return home after imprisonment experience relationship challenges with reintegrating into a family that adjusted during the offender's absence. Sometimes this involves rebuilding relationships that were damaged during incarceration. Many inmates do not receive visitation, mail, or phone calls from family or friends (Mears & Cochran, 2015), which may cause strain on both returning citizens and their families during the reentry process. Due to the disparities in arrest and

prosecution, Black inmates face these challenges more often leading to Black families and communities being disproportionately impacted.

More than half of the incarcerated population are parent to minor children. It is estimated that 2.7 million children currently have a parent incarcerated (The Pew Charitable Trusts, 2010). Almost one in four (24.5 percent) children born in 1990 to a Black father had at least one parent incarcerated by age 14 (Wildeman, 2009). For children born to a White father, only 3.6 percent of children experienced paternal incarceration by age 14. Incarceration disrupts family bonds and weakens potentially positive relationships. Less than half of incarcerated fathers see their children regularly while the majority will never see their children in person during incarceration (Travis et al., 2001). The impact of parental incarceration is complicated but has been shown to negatively impact both the incarcerated parent and their children.

Of those imprisoned, at least 93 percent will return home (Mears & Cochran, 2015). Most of those returning will face obstacles obtaining prosocial ties to the community. Of those factors, employment and housing, some of the most immediate concerns, have been associated with recidivism. Barriers to finding legitimate employment, stable housing, and maintaining positive social ties plague many of those who reenter society, but research shows that Black inmates will face these barriers more often.

## CHAPTER 6

### CONCLUSIONS

Disparity is apparent at the policing, court and correctional levels of the criminal justice system. At the policing level, Black individuals are more likely to be stopped, arrested, and experience force. At the court level, Black individuals are less likely to have their sentence reduced and more likely to receive a harsher or longer sentence. And at the correctional level, one in three Black men will be incarcerated in his lifetime. All these decisions, at every level of interaction, eventually lead to a disproportionate impact of incarceration. Berdejó eloquently writes:

The treatment of African Americans in the criminal justice process has been the subject of intense scrutiny in both academic literature and the popular press. Many have argued that policing practices disproportionately target black individuals who are also more likely to be arrested and become defendants in criminal cases. These black defendants are incarcerated more often and sentence to longer terms in prison relative to white defendants. (p. 1189)

Discretion is a crucial but sensitive subject to discuss. Discretion is necessary in many ways to ensure a more equitable criminal justice system. It also allows criminal justice actors to formulate a response specific to both the offense and the offender. On the other hand, discretion is not absent of bias and the data exhibits clear disparity, although there is not general agreement on the causes of that disparity.

In the preceding pages, I discussed race in the context of scholarly published works, however it should not be forgotten that regardless of the results of this paper, there are real-world implications for people of color. At a young age, most Black children will receive “the talk,” in

which Black parents and leaders will inform their children how to act when they come in contact with police: “no sudden movements... keep your hands in plain sight... say ‘yes sir’ and ‘no ma’am’” in order to stay alive. The Black community has a general view that interactions with police are life or death situations, and that speaks volumes to the state of police relations with Black communities.

Discretion is not the only potential contributor to disparate treatment of minority individuals. Bad policy such as the policy initiatives that cracked down on drug, violent, and repeat offenders in the late 1970s may also be contributors to the disproportionate number of Black individuals processed by the criminal justice system and currently incarcerated in state and federal prisons. Nonetheless, the United States fails to address the needs of incarcerated persons returning to society. Most people will be released from prison and most of those they will also be rearrested (Mears & Cochran, 2015). This represents a failure of the correctional system to produce law-abiding citizens through incapacitation alone.

This begs the question of where do we go from here? How can we begin to adjust for damage already done?

Conflict theory, and specifically minority threat hypothesis, helps us better understand the relationship between race and criminal justice outcomes. The perceived threat of a particular minority group is associated with fear of crime (Liska, Lawrence, & Sanchirico, 1982), punitive attitudes (King & Wheelock, 2007), and harsher punishment (Stolzenberg, D’Alessio, and Eitle, 2013). It is difficult to identify whether disparity at one interaction is compounded or reversed at the next due to lack of appropriate data. However, each stage of the criminal justice system is plagued by disparity and a compounded effect is one possible explanation for why so many Black males are and have been imprisoned. Black people have at one point historically been a

subordinate race while those who were White were part of the dominant race. Using legal pathways of maintaining their position, White legislators created laws that specifically criminalized the Black community and used the law enforcement apparatus of the state to enforce these laws. In the years since, “separate but equal” and discrimination have been outlawed but a trend of criminalizing people of color still exists.

This paper does little justice to explain experiences of formerly and currently incarcerated individuals. In fact, most research has also failed in this pursuit. Current research is primarily a snapshot of singular events at certain levels of the criminal justice system, which does little to help understand at what level discretion may be negatively impacting individuals. Future research should aim to not only capture single events and interactions with the criminal justice but follow offenders longitudinally from initial interaction with law enforcement through reintegration. Understandably, longitudinal studies may be met with some level of resistance due to expense and smaller sample sizes. Lastly, future research should continue to examine the relationship between minority threat criteria and criminal justice outcomes.

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