



Annotated Bibliography:

Racial Disparities in the Criminal Justice System

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Few criminal justice issues are more troubling than the prevalence of racial disparity within the criminal justice system. At all stages of the system – beginning with arrest and proceeding through imprisonment and parole – substantial racial and ethnic disparities are found in virtually all jurisdictions in the United States. While these disparities have persisted for years, in many respects they have been exacerbated in recent years despite considerable social and economic progress in many areas of American life.

The causes and consequences of these disparities are complex and have been the subject of much academic and public attention. Research and analysis has considered the various influences of crime rates, criminal justice processing, and broader social policy as contributing factors to these outcomes. This bibliography is intended to provide an assessment of some of the leading scholarly research and analysis appearing in journals in this area. It is not meant to be exhaustive, but rather to outline the varying types of inquiry and issues that are being explored in this field. We hope that it will provide both policymakers and the public with a useful resource for addressing these issues in a thoughtful manner.

**Blumstein, Alfred. "Racial Disproportionality of US Prison Populations Revisited."
University of Colorado Law Review. Vol. 64. (1993)**

Blumstein updates his 1983 study which found that the bulk of racial disproportionality in prisons, about 80%, was attributable to differential arrests for serious crimes like murder and robbery that tend to lead to imprisonment. In 1991, unexplained racial disproportionality had slightly worsened, with the updated study showing that only 76% of the disproportionality could be explained by differential arrest figures. In examining offenses other than drugs, racial disparities actually substantially decreased, and racial differences at arrest accounted for 94% of the racial disproportionality in prison. However, the striking new issue, according to Blumstein, is the saliency of drug offenders in prison. In 1991, blacks comprised 58% of incarcerated drug offenders but only 40% of arrestees. That difference is comparable to that found in the 1983 study, but the problem was greatly exacerbated by 1991 because the percentage of prisoners who were drug offenders had quadrupled. For adults and juveniles, the white arrest rate has declined or remained constant since the mid 1970s whereas the nonwhite rate has soared to a level more than triple the white rate. As recently as the early 1980s, the white juvenile arrest rate for drugs was higher than the nonwhite rate.

Blumstein also carries out state-specific analyses of incarceration rates by race. Counter to the stereotype that southern states are more likely to practice racial discrimination, liberal northern and midwestern states like Connecticut, Minnesota, and New Jersey have the highest ratios of black-to-white incarceration rates, while Alabama, Georgia, Mississippi, and South Carolina have some of the lowest. Blumstein asserts this phenomenon is largely attributable to differences in overall incarceration rates in each state. He demonstrates how low incarceration rates positively correlate with heightened racial disparities, presumably because prison populations in states with low rates have a greater percentage of serious offenders than states with high rates, and the black-to-white ratios at arrest are most extreme for these most serious offenders.

**Bridges, George, Robert Crutchfield and Edith Simpson. "Crime, Social Structure and Criminal Punishment: White and Nonwhite Rates of Imprisonment."
Social Problems. Vol. 34, No. 4. (October 1987)**

Bridges et al. explore what aspects of crime, social structure, and the criminal justice system might explain differential rates of incarceration between whites and nonwhites. For measures of social structure, they calculated for each county in Washington state the level of economic inequality between whites and nonwhites, the degree of urbanization, and the percentage population nonwhite. Likewise, they used data on county crime and arrest rates, as well as the workload of county courts, to measure the effect of crime and the criminal justice system respectively. These data were supplemented by interviews with law enforcement officials, judges and public leaders.

The authors found that, although statistically significant, violent crime and arrest rates had limited influences on differential rates of imprisonment. However, percentage nonwhite population and urbanization had a significant and direct impact. Increasing

minority population percentages strongly correlated with increasing nonwhite imprisonment rates whereas they had no effect on the white rate. In addition, the nonwhite imprisonment rate increased as county urbanization increased, while the white rate actually declined slightly. Workload of the county courts did not appear to contribute to racial disparities. In conclusion, Bridges et al assert that as minority populations increase, especially in urban areas where minorities tend to be segregated and where crime is more intense, there may be a heightened sense that minorities represent a threat to community order. In response to this perceived threat, law enforcement officials adopt informal strategies for controlling crime that have racially disparate impacts.

Butler, Paul. "Affirmative Action: Diversity of Opinions." *University of Colorado Law Review*. Vol. 68, No. 4. (Fall 1997)

Paul Butler contends that while affirmative action has been successful in remedying discrimination in the contexts of education, employment, and voting, it is completely absent in the realm of criminal law, where perhaps the most troubling racial disparities in America actually exist. Butler believes that the three traditional rationales for affirmative action—to make reparations for past discrimination, to remedy present discrimination, and to achieve diversity—all apply to the nation's law enforcement and incarceration policies. Centuries of slavery, discrimination, and segregation, according to Butler, have created the social environments that fuel high levels of African-American criminal behavior. Therefore, just like low standardized test scores, poor grades, and depressed wages, black criminality is another product of a history of white supremacy. In addition, especially in regards to drug enforcement, where blacks comprise just 13% of drug users but 74% of those incarcerated for drug offenses, Butler asserts that even though conscious discriminatory intent may not exist, the criminal justice system is presently administered in a racially discriminatory fashion. Further, the parity-diversity construct of affirmative action calls for an equal distribution of benefits and resources, and if applied to criminal law, would also encourage equal distribution of burdens with the hope of reducing minority incarceration to a more proportionate component.

Butler points out that lawful race-consciousness in the administration of justice, such as the use of drug courier profiles and racial segregation in prisons, as well as fairness preferences for some non-racial groups, such as death penalty defendants and rape victims, may help pave the way for race-based affirmative action in the criminal justice system. Finally, Butler offers several affirmative action proposals regarding black criminal defendants: that rehabilitation, not retribution shall be the primary justification of punishment, that they have the right to be tried and sentenced by majority black juries, that the death penalty be abolished for interracial homicide, that they be arrested and incarcerated for drug possession only in proportion to their involvement in drug use, and that as a near future goal the percentage of African Americans in prison not exceed by more than two percent their proportion of the population of that jurisdiction.

Butler, Paul. "Racially Based Jury Nullification: Black Power in the Criminal Justice System." *Yale Law Journal*. (December 1995)

Given the devastating consequences widespread imprisonment has had on the black community, and the failure of white policymakers to utilize any strategies aside from incarceration to address black social problems, Paul Butler argues it is the moral responsibility of black jurors to acquit black lawbreakers in some cases. The black community, plagued by unemployment, single-parent households, and limited male role models, would be better served if some non-violent offenders remained in the community rather than go to prison. Butler looks to a legal doctrine known as jury nullification whereby jurors ignore the facts of the case and instead vote solely as their conscience dictates. For serious violent crimes, Butler believes juries should consider the case strictly on the evidence presented. However, in cases involving non-violent, "victimless" crimes like drug possession, he asserts there should be a presumption in favor of nullification. For non-violent, *malum in se* (inherently bad) crimes, such as theft, there need be no presumption in favor of nullification, but it ought to be an option to be considered based on the circumstances of the crime.

Butler explains that jury nullification has been part of English and American law for centuries, involving well-known cases such as when northern abolitionist juries refused to find escaped slaves guilty for violating the Fugitive Slave Law. The Supreme Court has officially disapproved of jury nullification, but neither the Court nor the Constitution has any power to prohibit jurors from engaging in it. Butler addresses moral arguments from opponents of nullification, and concludes by reminding black jurors to exercise this legal power they already have, for it may be the only power they actually possess to overcome the stubborn indifference of white majority rule.

Cole, David. "The Paradox of Race and Crime: A Comment on Randall Kennedy's 'Politics of Distinction.'" *Georgetown Law Journal*. Vol. 83. (September 1995)

David Cole offers a critique of Randall Kennedy's position that the criminal justice system does not discriminate against blacks as a class because high levels of black incarceration benefits one subset of the black community, the law-abiding members, while harming another subset of blacks, the law-breaking members. As most crime is intra-racial, and the majority of blacks are law-abiding citizens, Kennedy contends increased law enforcement in the black community is a public good. Cole claims Kennedy's argument is flawed because even an intentionally discriminatory practice, such as making it illegal only for blacks to sell crack, would have the same consequence of benefiting law-abiding African-Americans while hurting those who sell crack. Thus, Kennedy's argument appears to lead to the conclusion that all discrimination in criminal law would be subject only to minimal scrutiny.

Cole also criticizes Kennedy's article for entirely omitting any information about the impact on the black community of law enforcement or police brutality and harassment. It

is hard to consider increased law enforcement a public good when, according to Cole, removing so many black men from the community and stigmatizing them with a criminal conviction is likely to lead to more single-parent families, less adult supervision of children, more unemployment and poverty, and in turn, more drugs, crime, and violence. Furthermore, the fact that African-Americans are so disproportionately represented in the nation's prisons contributes to the stereotype that all young black men are potential criminals, which increases the likelihood of the criminal justice system being administered in a racially biased way. Finally, Cole questions why Kennedy's response to the high rate of crime in the black community is increased law enforcement when the redistribution of other public goods, such as jobs, housing and education, would have more promising results without further debilitating the black community.

Davis, Angela J. "Prosecution and Race: The Power and Privilege of Discretion." *Fordham Law Review*. Vol. LXVII, No. 1. (1998)

Davis argues that prosecutors, more than any other officials in the criminal justice system, have the most direct impact on racial disparities, and thus, must bear the most responsibility in remedying them. The power of prosecutors, according to Davis, stems from their near complete control over the charging decision and the plea bargaining process, and their authority to establish policy priorities. Furthermore, courts have consistently upheld and sanctioned prosecutorial discretion and have made it increasingly difficult to mount successful legal challenges to the discriminatory impact of that very discretion. Davis comprehensively discusses important cases, primarily *Armstrong v. United States*, *McCleskey v. Kemp*, and *Whren v. United States* that have required a near impossible standard to show discriminatory intent. A major reason why this standard is so difficult to meet is because racial discrimination is much less overt than it was in the past, and is often too subtle or unconscious to irrefutably prove. Davis's solution is the use of racial impact studies that collect and publish data on the race of the defendant and the victim in each case for each category of offense, and the action taken at each step of the criminal process. These studies would reveal the nature and degree of any disparate treatment of African American defendants and victims, and help to hold prosecutors accountable through the electoral process for the consequences of their discretionary decisions. Davis reminds the reader that the role of the prosecutor is not simply to lock up criminals, but to ensure that the overall administration of the nation's justice system is carried out with equity and fairness.

Harer, Miles and Darrell Steffensmeier. "The Differing Racial Effects of Economic Inequality on Black and White Rates of Violence." *Social Forces*. Vol. 70, No. 4. (June 1992)

Harer and Steffensmeier investigate the relationship between different measures of economic inequality and rates of violent crime among blacks and whites. In addition to total inequality and between-race inequality (white-to-black income differences) that are traditionally used in related studies, this study also measured within-race inequality

(white-to-white and black-to-black inequality). Harer and Steffensmeier found that regardless of which measure of inequality is used, inequality is a poor predictor of high rates of black violent crime. In contrast, it is a powerful predictor of high rates of violent crime among whites. The results are at odds with important prior research which claims racial inequality explains high rates of black crime, especially black violence. Further, since within-race inequality had a strong and significant effect on white violence, and between-race inequality had only a weak and insignificant effect, these findings support the theory that when assessing their economic well-being, whites and blacks are unlikely to use the other race as a comparison group. As Harer and Steffensmeier's research was concerned only with direct effects, it is very possible that inequality has indirect effects on black violence by destabilizing families and communities. They therefore call for sociological research on black rates of violence to shift attention away from inequality and poverty to other structural and community sources.

Hawkins, Darnell F., John H. Laub, Janet L. Lauritsen and Lyn Cothorn. "Race, Ethnicity, and Serious and Violent Juvenile Offending." *Juvenile Justice Bulletin*. U.S. Department of Justice, Office of Juvenile Justice and Delinquency Prevention. (June 2000)

Hawkins et al. provide a review of research investigating racial differences in serious juvenile offending. They compare findings based on official crime data as well as alternative data sources such as victimization and self-report surveys, and discuss the benefits and drawbacks of these sources. To explain racial differences, the authors look to community-level research that focuses on how community structures and cultures impact differential criminal involvement. Research shows that family disruption, which is affected by levels of joblessness and poverty, directly impacts juvenile violence rates. Family disruption more typically characterizes poor blacks than it does poor whites. Increased urbanization, inequality, and class segregation have also had a disproportionate impact on blacks. Other research has shown that when controlling for the juvenile's residential neighborhood, racial and ethnic differences in delinquency disappeared.

Hawkins et al. encourage that more research be conducted addressing how sociocultural characteristics of urban neighborhoods affect the community's ability to regulate behavior. To do this, researchers need to utilize multilevel research studies across all racial and ethnic groups and genders that require analysis of community social organization and political economy, as well as ethnographic methods. They recommend new research pay more attention to within-group differences and take into consideration factors such as exposure to violence and levels of victimization, and situational factors such as alcohol and drug use, use of weapons, and the relationship between victims and offenders.

Kennedy, Randall. "The State, Criminal Law, and Racial Discrimination: A Comment." *Harvard Law Review*. Vol. 107. (April 1994)

Kennedy criticizes what he considers a common and exaggerated perception that definitions of criminality and the administration of law enforcement is pervaded with invidious racial prejudice. Since African Americans are much more likely than whites to be victims of violent crime, the greatest threat to their communities is not racist police officers, but violent—typically black—criminals. Critiques of racist law enforcement, according to Kennedy, ignore the fact that blacks suffer from an inadequate amount of police protection. He then discusses *State v. Russell*, a Minnesota Supreme Court case that struck down a state law punishing crack cocaine more harshly than powder cocaine on the grounds that it illegally discriminated against blacks. Kennedy disagrees with the court's ruling because the law was not intentionally designed to disadvantage blacks and it does not disproportionately affect all blacks as a class. Rather, it places a heavy burden on one subset of that group who violate the law while benefiting the majority of blacks who are law-abiding citizens. Whereas the frequent portrayal of government policies is that they unambiguously favor white interests over black interests, Kennedy believes that not enough attention is paid to the varied and conflicting ways in which policies affect black communities. Kennedy concludes that in the absence of findings of discriminatory purpose, legislatures, not the courts, are a more appropriate forum for confronting and remedying policies that have racially disparate consequences.

Pope, Carl E. and William Feyerherm. "Research Summary: Minorities and the Juvenile Justice System." U.S. Department of Justice, Office of Juvenile Justice and Delinquency Prevention. (December 1993)

This report examines the role that minority status plays in the processing of youth at various stages (arrest, intake, detention, etc.) of the juvenile justice system. A review of the literature revealed mixed results. While roughly one-third of the studies found no evidence of racial disparity, the remaining studies found that disproportionate treatment occurred either at the overall system level or some of the processing stages, or that small racial differences accumulated and became more pronounced as minority youth proceeded further into the system. Pope and Feyerherm also discovered that there were relatively few program initiatives or policies in any jurisdictions specifically designed to reduce disproportionate representation and ensure equitable decision making. They then propose two analytic models for local and state jurisdictions to collect and evaluate data that assesses how minority youth are being treated at all levels of the juvenile justice system. Pope and Feyerherm provide several guidelines to direct future research, including: disaggregate data as finely as possible, include multiple decision points in the processing system, employ multivariate models to detect indirect racial effects, attend to structural and community influences in both the officials' and offenders' environments, include family characteristics of the youth, and focus on rural and suburban as well as metropolitan areas. They also offer policy guidelines to assist state and local jurisdictions in monitoring and examining racial disparities as well as how to eliminate them if they are found.

Spohn, Cassia C. “Thirty Years of Sentencing Reform: The Quest for a Racially Neutral Sentencing Process.” *Criminal Justice* 2000, Vol. 3. National Institute of Justice. (2000)

Spohn reviews forty recent and methodologically sophisticated studies investigating the link between race and sentence severity. Many of the studies, especially at the Federal level, found evidence of direct discrimination against minorities that resulted in significantly more severe sentences than their white counterparts. Although these findings suggest that overt discrimination in the criminal justice system still exists, Spohn cautions that it would be premature to claim that there is a consistent and widespread pattern of direct discrimination, mainly because several of the studies reviewed showed no direct effects on sentence severity and the review examines a relatively small number of jurisdictions.

Spohn discusses how certain types of minority offenders, perhaps because they are perceived as being more dangerous, are singled out for harsher treatment. Blacks and Hispanics who are young, male, and unemployed are particularly more likely than their white counterparts to be sentenced to prison and in some jurisdictions, they also receive longer sentences or differential benefits from guideline departures. There is also evidence that minorities convicted of drug offenses, those with longer prior criminal records, those who victimize whites, and those who refuse to plead guilty or are unable to secure pretrial release are punished more severely than similarly situated whites. Spohn encourages researchers to broaden their research to include other racial and ethnic groups, incorporate qualitative techniques into their research designs, conduct more extensive research on the effects of pre-trial decisionmaking, and to continue to ask the question: when does race make a difference—under what conditions, for what types of offenders, and in interaction with what other factors? Spohn concludes that the sentencing reforms implemented since the 1970s have not achieved their goal of ameliorating racial disparities and discrimination, and that contrary to the position of some researchers, it is clear that racial discrimination is not a thing of the past.

Tonry, Michael. “Racial Disproportion in US Prisons.” *British Journal of Criminology*. Vol. 34, Special Issue. (1994)

Michael Tonry demonstrates that racial disparities in the US prison system have been increasing throughout the last third of the twentieth century. Even though blacks comprise just 12% of the national population, the black percentage of prison admissions exceeds that of whites. In addition, the racial composition of the prison population has reached near parity between blacks and whites. Tonry points out that, unlike other ethnic immigrant and migrant communities in the past, there is a black urban underclass disproportionately located in the Rust Belt and Snow Belt cities which has not been able to assimilate into the mainstream economy, and comprises a significant portion of black prisoners. Tonry agrees with Blumstein that historically, much, but not all, of the black over-representation in prison can be attributed to the disproportionate rate at which blacks commit serious crimes. Looking at more recent and dramatic racial disparities occurring

since the early 1980s, however, Tonry attributes these to the federal War on Drugs, supporting his view with data showing the extraordinary increases in several states of nonwhite drug offenders committed to prison. He also discusses the wide variations in the ratio of black-to-white incarceration rates in the fifty states, and explores the seeming anomaly that many of the more socially and politically progressive states have the most racially disproportionate incarceration rates.

Tonry also compares racial incarceration rates in America to those in Australia, Canada, and England and Wales. He finds the ratio of black-to-white incarceration rates in England and Wales is 7.10:1, slightly higher than the United States' ratio of 6.44:1. Numbers in Australia and Canada also reveal that these four countries handle visible minority groups no less differentially harshly than does the United States. Tonry suggests several ways in which racial disparities can be remedied. He recommends that adversity be recognized as a mitigating circumstance to justify diversion into treatment and training programs, that policies such as the War on Drugs which have foreseeable and negative racial consequences should never be launched in the first place, and that criminality within ethnic groups be viewed as a marker of social distress so that it can be used as an indication of the need to provide targeted social services and supports.

**Wacquant, Loïc. "Deadly Symbiosis: When Ghetto and Prison Meet and Mesh."
Punishment and Society. (Fall 2000)**

Loïc Wacquant contends that the prison is the most recent in a historical sequence of "peculiar institutions" designated with the task of controlling and marginalizing African Americans. Since the 17th century, America has relied upon slavery, the Jim Crow regime, and the Northern ghetto to organize and extract black labor while ostracizing African Americans from the mainstream of society. He explains that as the automation of industrial labor and the relocation of factories to the suburbs and overseas makes ghetto residents superfluous to the economy, the prison is replacing the ghetto as the dominant institution of social control and racial confinement.

Wacquant also demonstrates how the ghetto and the prison have begun to blend into one another. The ghetto now closely resembles a prison because it is composed almost entirely of the poor and uneducated, it serves to warehouse—not rehabilitate or retrain—a surplus labor supply, it has had its communal institutions replaced with institutions of state control like welfare agencies, public housing, and police, and is characterized by a culture of fear, violence, and distrust of authorities. Similarly, the prison has taken on a ghetto demeanor by placing a population of poor blacks (inmates) under the direct supervision of whites (guards), and by replacing the "convict code" of inmate solidarity against guards with the "code of the street" distinguished by rigid racial divisions and self-centered, predatory conduct. Wacquant contends that in addition to social control and confinement, America's "peculiar institutions" shape and remold the social significance and meaning of race. The explosion of black imprisonment has revitalized and cemented into the national consciousness the centuries-old association of blackness with criminality and violence. It has also depoliticized race by relegating racial militancy

to prison uprisings and inflicting a social death upon blacks by excluding so many from voting, seeking higher education opportunities and receiving public aid as a result of a felony conviction.

Zatz, Marjorie S. “The Convergence of Race, Ethnicity, Gender, and Class on Court Decisionmaking: Looking Towards the 21st Century.” *Criminal Justice 2000*. Vol. 3. National Institute of Justice (2000).

After reviewing the major findings from studies with a singular emphasis on race, gender, or class, Zatz addresses substantive and methodological concerns of research that explicitly consider the interaction of two or more of these dimensions. Zatz then uses the O.J. Simpson murder trial and the prosecution of crack mothers as a springboard for discussing the importance of simultaneously considering race, ethnicity, gender, and class status of both the offender and the victim. Zatz examines three current crime control policies—the war on drugs, the war on gangs, and the automatic transfer of youths to adult court—to demonstrate that the court decision process can be racialized, gendered, or classed. Also addressed are methodological and policy questions for the future. Researchers, according to Zatz, will be challenged to make appropriate distinctions among race, ethnicity, and culture, and between sex and gender, and to confront measurement issues such as how best to code race, ethnicity, and class. Zatz analyzes the ramifications of crime control policies and criminal justice decisions for poor communities of color and concludes with a set of recommendations for policymakers, practitioners, and researchers.