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## ARTICLE

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### THE CONFLICT AMONG AFRICAN AMERICAN PENAL INTERESTS: RETHINKING RACIAL EQUITY IN CRIMINAL PROCEDURE

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*This Article argues that neither the criminal justice reform platform nor the penal abolition platform shows the ambition necessary to advance each of the primary African American interests in penal administration. It contends, first, that abolitionists have rightly called for a more robust conceptualization of racial equity in criminal procedure. Racial equity in criminal procedure should be considered in terms of both process at the level of the individual, and the number of criminal procedures at the level of the racial group—in terms of both the quality and “quantity” of stops, arrests, convictions, and the criminal sentencing that result in jail or prison admission. To this end, the Article proposes that the principle of racially unbiased criminal procedure be coupled with the (seemingly quixotic) pursuit of racial proportionality in criminal procedure.*

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*But African Americans have at least two other primary interests in penal administration: a security interest (in relation to private violence) and a democratic interest (in regard to the group's influence over penal institutions). To pursue racial proportionality in criminal procedure while also advancing the African American security and the African American democratic interest—that is, to overcome the prospect of a zero-sum relationship among these interests—criminal scholars must embrace the reform platform while adding welfarist and employment policy solutions as a supplementary normative dimension.*

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*We are beginning to think [of] crime and punishment—penal control and social control—punishment and welfare—state violence and interpersonal violence—together. And this, it seems to me, is a development to be welcomed.*

— David Garland<sup>1</sup>

## INTRODUCTION

Criminal justice reform is a broad normative field with considerable promise, particularly, it would seem, for African Americans. If the most ambitious reform advocates had their way, free from all political constraint, they would likely advance the African American liberty interest in penal administration by insulating criminal procedures from racial bias. One imagines they would also reduce the high rate of African American violent-crime victimization in support of the African American security interest and convey more influence over penal institutions to African Americans to advance the African American democratic interest. In this sense, criminal justice reform often presents as a dynamic and long overdue racial justice project advancing the African American liberty, security, and democratic interest in penal administration.

But criminal justice reform loses some of its luster when the African American liberty interest in penal administration is conceived as having two parts: an interest in racially unbiased criminal procedure, on one hand, and an interest in racially *proportionate* penal outputs, on the other.<sup>2</sup> This is to conceive of criminal procedure as having both a qualitative and a quantitative dimension. The qualitative dimension accounts for the quality of the criminal procedure in question. The quantitative dimension accounts for the rate of stop, arrest, conviction, and incarceration. We might think of these events, then, as not only criminal procedures, but also as *penal outputs*. In a narrow sense, African Americans have an interest in reducing their penal outputs such that these outputs more closely approximate the racial group's

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<sup>1</sup> David Garland, *Theoretical Advances and Problems in the Sociology of Punishment*, 20 PUNISHMENT & SOC'Y 8, 16 (2018).

<sup>2</sup> A substantial portion of the criminal procedure literature has migrated over the past two decades from a focus on process as it relates to criminal procedure to a focus on the racial disparity in *penal outputs*. In taking racially disparate penal outputs as a discrete harm deserving of scholarly attention, the criminal procedure literature now shows a degree of thematic overlap with sociology and criminological theory, but it has yet to incorporate many empirical and theoretical insights from the two fields, particularly those falling at the intersection of political economy and violent crime commission and victimization.

population numbers.<sup>3</sup> The principle of racial equity would seem to demand nothing less.<sup>4</sup>

And herein lies the problem. The criminal justice reform project cannot, in any of its current manifestations, accommodate a two-part African American liberty interest—one targeting both racial bias in criminal procedure *and* disproportionate African American penal outputs. While many reform initiatives seek to reduce the racial disparities in penal outputs, few expressly seek to eliminate them.<sup>5</sup> And this is no mere oversight. The notion of proportional penal outputs for African Americans is unappealing among reformers because it raises dispiriting questions. For instance, is there a normative theory of criminal justice reform—a set of rules governing penal administration—that would eliminate both the disparate rate of African American stop, arrest, conviction, and jail and prison admission, *and* the disparate rate of African American violent-crime victimization? Can a reform program designed to eliminate disparate African American penal outputs also make African Americans safer? Is there a theory of reform that makes African Americans subject to stop, arrest, and criminal punishment at a rate equal to their White counterparts, improves African American public safety, and gives African American political majorities more influence in criminal justice rulemaking?

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3 To be clear, the interest is in a reduction of African American stops, arrests, and jail and prison admissions, rather than a ratcheting up of the same for Whites. Many scholars have critiqued the criminal justice reform movement's inclination to punish unsympathetic defendants more severely—a ratcheting up rather than a ratcheting down. See Aya Gruber, *Rape, Feminism, and the War on Crime*, 84 WASH. L. REV. 581, 625-26 (2009) (“The historical moment in which American feminist reformers find themselves is one where criminal law and incarceration has for at least three decades been the most acceptable form of government action. This philosophy has devastating effects on the most subordinated segments of society.”); Benjamin Levin, *Mens Rea Reform and Its Discontents*, 109 J. CRIM. L. & CRIMINOLOGY 491, 497 (2019) (arguing that the criminal justice reform movement is subject to a number of pathologies including a tendency to “make exceptions and support harsh treatment for particularly unsympathetic defendants”); Kate Levine, *Police Prosecution and Punitive Instincts*, 98 WASH. U. L. REV. 997, 1017 (2021) (“In short, there has been tremendous pressure placed on district attorneys to use their discretion to prosecute more police officers. This pressure is ratcheting up at a time when the general trend has been toward fewer prosecutions and more mercy to criminal suspects.”)

4 This is without mention of the penal system's reflexive moral condemnation of those subject to criminal conviction, the stereotypes associated with a criminal record, the resonance between such stereotypes and the African American racial identity, and the practice of statistical discrimination based on the racial skew of penal outputs. See generally András Tilcsik, *Statistical Discrimination and the Rationalization of Stereotypes*, 86 AM. SOCIO. REV. 93 (2020) (illustrating how theories of discrimination can reinforce or lower the weight of stereotypes).

5 See Luerie R. Garduque, *Challenges and Opportunity: Safely and Equitably Reducing the Use of Jails*, MACARTHUR FOUND. (Dec. 16, 2021), <https://www.macfound.org/press/perspectives/challenges-and-opportunity-safely-and-equitably-reducing-the-use-of-jails> [<https://perma.cc/Q4JV-SZKY>] (“Despite overall reductions in jail populations, the racial disparities that preceded the pandemic have persisted . . . This has occurred even as the SJC has centered racial equity in its approach.”).

This Article tentatively answers no to each of these questions. It argues that even at its maximum utility, criminal justice reform cannot, in its current theoretical manifestations, simultaneously advance the African American liberty, security, and democratic interest in penal administration. Moreover, this essential shortcoming has opened the door to more radical normative projects such as penal abolition: projects that, as a descriptive matter, capture the breadth and depth of racial injustice in penal administration but show little promise in terms of their ability to advance each of the stated African American interests in penal administration—the liberty interest, the security interest, and the democratic interest—simultaneously.

The remainder of the presentation is delivered in three parts. Part I explains the two-part conception of the African American liberty interest. It conceives of this interest as being a function of both the amount of racial bias in criminal procedure *and* the disproportionality in African American penal outputs. Accordingly, the Part calls for the reform project to expressly couple its pursuit of racially unbiased criminal procedure with the pursuit of proportionate African American penal outputs. This is, again, to assign to the African American liberty interest in penal administration both a qualitative and a quantitative dimension.

Part II moves from the African American liberty interest to theoretical consideration of the two other profiled penal interests: the security interest and the democratic interest. The security interest pertains to physical safety, while the democratic interest is meant to indicate the degree of influence African Americans hold over penal institutions. Part II argues that the three profiled African American interests in penal administration (liberty, security, and democratic influence) gradually fell in tension over the latter half of the twentieth century, making racial justice in penal administration a far more complicated theoretical proposition than either the reform or abolition literatures acknowledge.

Part III offers a normative framework for resolution of the conflict among the three primary African American penal interests, such that none of the three interests is advanced to the detriment of another. It begins by explaining both disproportionate African American penal outputs and heightened rates of African American violent crime victimization as, in substantial part, the function of fundamental changes in the nation's economy. The economic theory of mass incarceration suggests that in the absence of economic reform, a dismantling of the penal system might stall rather than advance the pursuit of racial equity in penal administration. Put differently, such a dismantling is likely to sacrifice the African American security interest (and perhaps the African American democratic interest) on the altar of the

African American liberty interest, specifically the African American interest in proportionate penal outputs.

The Part then turns squarely to the normative, arguing that reformers must account for economic policy and material racial disadvantage to solve for the conflict among African American penal interests.<sup>6</sup> To this end, it proposes that the reform project (1) adopt a conception of the African American liberty interest that incorporates a qualitative and a quantitative dimension (in keeping with the abolitionist critique of the modern American penal system<sup>7</sup>); (2) identify and forefront the tension among the African

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<sup>6</sup> Scholars of criminal law and theoretical criminology have made similar normative pleas, calling for “reforms to social policy” (John Clegg & Adaner Usmani, *The Economic Origins of Mass Incarceration*, CATALYST (Fall 2019), <https://catalyst-journal.com/2019/12/the-economic-origins-of-mass-incarceration> [https://perma.cc/3HT6-V2YR]), “economic justice” (Christopher Muller, *Exclusion and Exploitation: The Incarceration of Black Americans from Slavery to the Present*, 374 SCIENCE 282 (2021)), “structural reform” (Amna A. Akbar, *Toward a Radical Imagination of Law*, 93 N.Y.U. L. REV. 405, 415 (2018)), “social welfare” (Monica C. Bell, Katherine Beckett & Forrest Stuart, *Investing in Alternatives: Three Logics of Criminal System Replacement*, 11 U.C. IRVINE L. REV. 1291, (2021)), and a “Third Reconstruction” (Tracey L. Meares, Keynote Address, *Policing in the 21st Century: The Importance of Public Security Policing the Police*, 2016 U. CHI. LEGAL F. 1 (2016) [hereinafter Meares, *Policing in the 21st Century*]). For a brief review of criminal-legal scholarship falling under the structural reform rubric, see Jocelyn Simonson, *Police Reform through a Power Lens*, 130 YALE L.J. 778 (2020). Many of the normative platforms at the intersection of political and economic institutions stem from an inclination to couple normative criminal law with the emerging law and political economy critique without also giving up on the prospect of reform. *But see* Christopher Lewis & Adaner Usmani, *The Injustice of Under-Policing in America*, 2 AM. J.L. & EQUAL. 85, 97 (2022) (“To address the root causes of crime would be to meaningfully change the opportunity structure for most disadvantaged people in America. To do this by expanding untargeted, universal social programs would require significant resources, since the vast majority of beneficiaries are not America’s most disadvantaged people. Because penal spending is hyper-targeted in a way that social spending is not, it costs \$300 billion a year to run the developed world’s most extensive penal state but something like \$3 trillion to run its most anemic welfare state.”).

Of note, while penal abolitionists agree that the fundamental transformation of political economy (specifically, regarding working-class wages and welfare state benefits) is necessary to achieve racial equity in public safety administration, abolitionists generally ignore the risk posed by penal abolition (or its rough equivalent) in the absence of major economic policy gains. In this sense, penal abolitionists appear unwilling to establish a linear policy agenda such that the group’s economic policy goals are understood to be a precondition to the elimination of penal administration. Consequently, there remains the distinct possibility that in the absence of major economic policy gains the dismantling of public safety administration will leave the minority neighborhood communities already uniquely vulnerable to violent crime victimization subject to an even higher level of risk of physical violence.

<sup>7</sup> See Benjamin Levin, *The Consensus Myth in Criminal Justice Reform*, 117 MICH. L. REV. 259, 267 (2018) (arguing that criminal justice reform is a “catchall category for a range of critiques, proposals, scholarship, and activism”). Describing a discrepancy among critics of contemporary penal administration, Levin later adds, “[W]ithout appreciating differences in normative commitments and goals, how can we tell if a proposed reform is making the problem worse or moving the system in the right direction?” *Id.* at 268-69. He contends that there are two dominant but discrepant normative frames within the campaign to reform penal administration, the “over” frame, which holds that penal system has exceeded the optimal level of incarceration, and the “mass” frame, which presents a more fundamental critique of penal administration, questioning whether

American liberty, security, and democratic interest; and (3) resolve this tension by way of systematic engagement with welfarist policy solutions bearing upon the social and economic marginalization of unskilled African American men.<sup>8</sup>

This Article thus carries its own tension as it calls for the elimination of both the Black–White disparity in penal outputs and the Black–White disparity in violent crime victimization. To pursue both objectives is to acknowledge the depths of racial inequity in contemporary penal administration.

## I. RETHINKING RACIAL EQUITY IN CRIMINAL PROCEDURE

The African American interest in racially equitable criminal procedure is often conceived as an interest arising from discrete encounters between penal

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penal administration in the U.S. is in essence a tool of group oppression whose primary flaws cannot be fixed by reducing the number of its procedural transactions. *Id.* Within the “over” frame, a smarter approach to criminal procedure requires reduction of the carceral population and elimination of many of the collateral consequences of arrest, imprisonment, and pretextual policing. *Id.* But while the “mass” frame is also critical of penal administration, it takes mass incarceration as part of a larger system of social inequality of which penal administration is just one piece. *Id.* This Article’s description of an African American public security quagmire resonates with the “mass” frame in that it explains penal dysfunction, specifically regarding race, by stepping outside of the penal field to other policy areas to properly diagnose the dysfunction.

<sup>8</sup> Studies show employment and wages to have a significant effect on property and violent crime by youth, and wages show a strong effect on the rate of violent crime among all adults across national contexts. *See* Mirko Draca & Stephen Machin, *Crime and Economic Incentives*, 7 ANN. REV. ECON. 389, 394 (2015) (“[S]tudies that relate crime rates to specific measures of earnings have found more decisive evidence of a link between crime and the labor market.”). Nicola Lacey and David Soskice explain simultaneous changes in crime rate and those in wages throughout the twentieth century:

The 1970s and 1980s saw a continual middle class exodus from inner cities, which in itself reduced availability of low-skill service employment in the inner city . . . This in turn led to the collapse in inner city unskilled earnings. Many of the resulting group of unskilled, unemployed men were black Americans who had moved relatively recently, in the middle decades of the 20<sup>th</sup> century, from the Jim Crow South to the North in search of work and better opportunities—before becoming surplus to the requirements of the labour market in the 1970s.

Nicola Lacey & David Soskice, *Crime, Punishment and Segregation in the United States: The Paradox of Local Democracy*, 17 PUNISHMENT & SOC’Y 454, 463 (2015) [hereinafter Lacey & Soskice, *Crime, Punishment and Segregation*]. As a general matter, research shows violent crime in the U.S. to have a strong association with highly segregated, disadvantaged areas, and large ethnic populations in large “ex-manufacturing” cities that show a high proportion of high school dropouts. *See id.* (citing Lauren J. Krivo, Ruth D. Peterson & Danielle C. Kuhl, *Segregation, Racial Structure, and Neighborhood Violent Crime*, 114 AM. J. SOCIO. 1765 (2009) and LAUREN KRIVO & RUTH PETERSON, DIVERGENT SOCIAL WORLDS: NEIGHBORHOOD CRIME AND THE RACIAL-SPATIAL DIVIDE (2010)).

bureaucrats and members of the public.<sup>9</sup> The stop, the arrest, and the sentencing in criminal court might be considered the most prominent of such procedures. If a penal bureaucrat, be it a police officer, a prosecutor, or a judge executes a procedure in a manner that is free of racial bias and infused with dignity and respect, many would consider the given transaction to be fair and equitable from a racial standpoint. We might think of this bias-based assessment as part of a transactional approach to racial equity.<sup>10</sup>

This Part challenges this notion of racial equity, not in principle but in terms of its breadth. It specifically argues that the question of racial equity in criminal procedure should turn on more than the presence or absence of racial bias within discrete penal transactions.<sup>11</sup> It should also turn on racial group

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9 Those subject to criminal administration tend to place more emphasis on their sense of how they have been treated over the course of litigation than “whether or not [they] agree with a [judge’s] decision or regard it as substantively fair.” Tracey L. Meares & Tom R. Tyler, *Justice Sotomayor and the Jurisprudence of Procedural Justice*, 123 YALE L.J.F. 525, 527 (2011). Similarly, in regard to encounters with police, the public is more concerned with how they are treated during these encounters than they are with issues of legality. See Tracey L. Meares, Tom R. Tyler, & Jacob Gardener, *Lawful or Fair? How Cops and Laypeople Perceive Good Policing*, 105 J. CRIM. L. & CRIMINOLOGY 297, 307 (2015) (“[I]t is clear that people’s judgments flow from the more salient police actions that they observe during interactions and less from the background factors that determine the actual legality of police conduct.”).

10 For an in-depth analysis of the transactional approach to assessing the racial harms in criminal procedure and incorporation of the “disparate impact” approach in the context of crime policy formulation and civil litigation, see Aziz Huq, *The Consequences of Disparate Policing: Evaluating Stop and Frisk as a Modality of Urban Policing*, 101 MINN. L. REV. 2396, 2402 (2017) (“[Stop-Question-Frisk] today is defined by its large scale and ‘group-based’ application. Its distinctive moral wrong is inextricably related to this programmatic quality, not the happenstance of individual officers’ motives.”). Huq proposes a “disparate impact” standard based upon the harm discussed throughout this Article: “An alternative, more promising legal framework is a version of the *disparate-impact* standard familiar from the employment and discrimination and fair housing contexts.” *Id.* at 2403. Huq describes the standard as a “wide-angle” rubric by offering an opportunity to “weigh all relevant costs” rather than merely those related to discriminatory treatment. *Id.* at 2462. For a similar investigation of the racially disparate impact of criminal procedure using big data, see generally Sharad Goel, Maya Perelman, Ravi Shroff, & David Alan Sklansky, *Combating Police Discrimination in the Age of Big Data*, 20 NEW CRIM. L. REV. 181 (2017). For a comparison of the dichotomy between stop-and-frisk incidents as one-time events as opposed to a systemic program conducted by a police organization, see generally Tracey L. Meares, *Programming Errors: Understanding the Constitutionality of Stop-and-Frisk as a Program, Not an Incident*, 82 U. CHI. L. REV. 159 (2015).

To be clear, the racial harm identified in this Part is the racial disparity in penal outputs irrespective of underlying racial bias by police or other penal bureaucrats. For analysis of the limits of a transactional approach in constitutional adjudication, see Daryl Levinson, *Framing Transactions in Constitutional Law*, 111 YALE L.J. 1311, 1316-17 (2002) (“Once we recognize that constitutional rights cannot be modeled in the same way as common-law ones, however, we might shift the focus of constitutional analysis from transactional harm suffered by individuals to more systemic types of government failure and how these failures might be prevented through constitutional adjudication.”). Alternatively, this Article is oriented toward systemic government failures in the field of crime policy and does not extend to constitutional questions.

11 See Huq, *supra* note 10, at 2402 (reaching a similar conclusion).



outcomes. An outcome-based theory of racial equity in criminal procedure is a theory attentive to the nation's singular racial history.<sup>12</sup> To be sure, a more robust framework for racial equity inclusive of racial proportionality principle poses a difficult logistical challenge to the criminal justice reform project for reasons that will be detailed in Part II. Nevertheless, such a framework, in keeping with similar efforts in the Fourth Amendment stop-and-frisk literature,<sup>13</sup> brings theoretical clarity to the racial harms flowing from contemporary penal administration. It also positions the criminal justice reform project to pursue a far more ambitious normative agenda.

### A. Racially-Disparate Penal Outputs as a Discrete Harm

There is a subtext to the portion of the criminal-legal scholarship that details racial disparities in criminal procedure, most often expressed as Black–White disparities in stop, arrest, and incarceration via criminal sentencing.<sup>14</sup> To argue an unacceptably high volume of penal transactions involving African

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<sup>12</sup> Those investing in the project of “racial equity” have, when advancing to specific details, called for racial equality on any number of fronts—in policing, health care, education, and housing. See e.g., Deborah Archer, *Classic Revisited: How Racism Persists in its Power*, 120 MICH. L. REV. 957, 957 (2022) (“Our society has embedded racial inequality and white supremacy into our laws, policies, practices, environment, narratives, and cultural norms to form an infrastructure of racial inequality.”); Ashleigh Maciolek, *Covid-19, Economic Mobility, Racial Justice, and the Middle Class*, BROOKINGS INST. (Dec. 21, 2020), <https://www.brookings.edu/blog/up-front/2020/12/21/covid-19-economic-mobility-racial-justice-and-the-middle-class/> [<https://perma.cc/XT5V-N6K6>] (“Clearly, the pandemic has not been an equalizer in any capacity but instead, has disproportionately affected more vulnerable populations—particularly those of color.”); *Advancing Equity and Racial Justice Through the Federal Government*, WHITE HOUSE, <https://www.whitehouse.gov/equity> [<https://perma.cc/8BY7-E6CZ>] (“The Order recognized that, although the ideal of equal opportunity is the bedrock of American democracy, entrenched disparities in our laws, public policies, and institutions too often deny equal opportunity to individuals and communities.”). But even if one’s sensibilities and politics clash with the modern racial equity movement, sober evaluation of the racial skew in penal administration leaves an impression, particularly when considered in relation to the symbolism inherent to criminal punishment. The penal system heaps moral condemnation upon the criminally involved despite massive racial disparities in the rate of stop, arrest, and prison admissions. Can it be that the criminally involved deserve not only the harshest physical treatment government can lawfully apply along with society’s harsh and definitive moral judgement, when one’s probability of criminal involvement is so closely tied to race and class status? Putting aside for the moment the physical and economic hardship associated with criminal punishment, this question at the intersection of symbolism and demographic skew seems to call for moral clarity.

<sup>13</sup> See Huq, *supra* note 10, at 2402.

<sup>14</sup> In using the African American experience in penal administration as an illustrative case, this Article admittedly falls prey to the Black–White paradigm, a longstanding deficiency in the U.S. literature on race. It should be noted that much of the theoretical treatment offered in the Article can be applied to the experience of other minority groups in the U.S. Nevertheless, elements of the description and conceptualization of the harm of racially disparate penal outputs in Part I-A are African American specific as they are rooted in the deep history of African Americans in the United States.

American subjects is, it would seem, to invite a comparison to the same outputs for Whites. It is to suggest that racial equity in criminal procedure is not merely about discrimination-free criminal procedure, but also about the prospect of racially proportionate penal outputs. It is also to claim the Black-White disparity in penal outputs as a discrete harm, one flowing in significant part from the nation's history of anti-Black discrimination and, likewise, cumulative racial disadvantage. This Section clarifies the nature of this harm, identifying it as a primary concern within the radical wing of the criminal procedure literature.

Paul Butler might be considered a pioneer within this literature, a prophet regarding the racial disparities in stops, arrests, and jail and prison admissions. Butler distinguished himself at the early stages of this push beyond the left margin of the literature through what would've been considered an idiosyncratic normative theory of African American interests in criminal justice. In the opening lines of his article, "One Hundred Years of Race and Crime," Butler claimed an arch to African American interests in penal administration over the past century, from a historical interest in solving for undue African American criminalization at the hands of White bigots to a contemporary interest in solving for undue African American criminalization at the hands of a racially biased system of penal administration: "If I were writing about race and crime in 1910 . . . the problem that I would have focused on would be lynchings, which were sometimes an extra-legal response to African-American criminal suspects (and sometimes just random mob violence)."<sup>15</sup> But from Butler's vantage point, the emerging crisis at the intersection of race and criminal procedure was *outcome inequality* as demonstrated by the rate of African American imprisonment: "The fundamental paradox is that, in 2010, while evidence of racial progress is everywhere, racial disparities in criminal justice have never been greater. Nearly one in three young black men has a criminal case: he's either locked up, on probation or parole, or awaiting trial."<sup>16</sup>

In this sense, Butler claimed a shift in African American interests in penal administration—from a security interest vis-à-vis extra-legal, racially motivated White terrorism in the private sphere ("black victimization by white criminals"<sup>17</sup>) to the public sphere where the federal government and its state and local counterparts incarcerated a shocking number of African

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<sup>15</sup> Paul Butler, *One Hundred Years of Race and Crime*, 100 J. CRIM. L. & CRIMINOLOGY 1043, 1043-44 (2010) [hereinafter Butler, *One Hundred Years*] ("[T]he main race and crime problem, as identified by the first significant civil rights organization, was black victimization by white criminals.").

<sup>16</sup> *Id.* at 1045. Butler notes that the Black-White incarceration ratio at the time of his publication was 7:1. *Id.* at 1046.

<sup>17</sup> *Id.* at 1044.

Americans.<sup>18</sup> Butler's chief contention in "One Hundred Years"—that the racial disparities in criminal procedure now stand as the principal harm to African Americans within the field of penal administration—was an extension of his earlier review of Randall Kennedy's seminal book, *Race, Crime, and Law*.<sup>19</sup> In both pieces, Butler highlights and then rejects the argument, advanced by Kennedy and many African American prosecutors, that policing is a public good that African Americans have consistently been denied.<sup>20</sup> He observes that African American prosecutors, among others, "have identified a different main race problem than mass incarceration. They, like Kennedy, believe that the principal problem remains the under-protection of law and,

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18 See *id.* at 1045 ("The major race and crime problems of our time are the mass incarceration of African Americans and the extraordinary disparities between blacks and whites in the criminal justice system."). For more comprehensive discussions of racial disparities in imprisonment, see generally Alfred Blumstein, *On the Racial Disproportionality of United States' Prison Populations*, 73 J. CRIM. L. & CRIMINOLOGY 1259 (1982); Becky Pettit & Bruce Western, *Mass Imprisonment and the Life Course: Race and Class Inequality in U.S. Incarceration*, 69 AM. SOCIO. REV. 151 (2004); Ashley Nellis, *The Color of Justice: Racial and Ethnic Disparity in State Prisons*, SENT'G PROJECT (Oct. 13, 2021), <https://www.sentencingproject.org/app/uploads/2022/08/The-Color-of-Justice-Racial-and-Ethnic-Disparity-in-State-Prisons.pdf> [<https://perma.cc/5L2J-CAT4>]; Christopher Muller & Alexander F. Roehrkasse, *Racial and Class Inequality in US Incarceration in the Early 21st Century*, 2 SOC. FORCES 803 (2021) [hereinafter Muller & Roehrkasse, *Racial and Class*]. Many understand the racial disparities in penal outputs—the rate of jail and prison admission representing just one—to be a pathology of contemporary public governance, a troubling national phenomenon that transcends the variegated landscape of American federalism. See LISA L. MILLER, *THE PERILS OF FEDERALISM: RACE, POVERTY, AND THE POLITICS OF CRIME CONTROL* 12-14 (2008); Lacey & Soskice, *Crime, Punishment and Segregation*, *supra* note 8, at 454-81; see also NICOLA LACEY, *THE PRISONERS' DILEMMA: POLITICAL ECONOMY AND PUNISHMENT IN CONTEMPORARY DEMOCRACIES* 21-24 (2008) (explaining the politicization of the criminal justice system) [hereinafter LACEY, *THE PRISONERS' DILEMMA*].

19 RANDALL KENNEDY, *RACE CRIME, AND LAW* (1997).

20 See Butler, *One Hundred Years*, *supra* note 15, at 1054 ("The prosecutors I've debated, many of whom are African American, all claimed that their work is in the best interest of black people, even when that work includes locking up many blacks. These prosecutors have identified a different main race problem than mass incarceration. They, like Kennedy, believe that the princip[a]l[] problem remains the under-protection of law and, specifically, the disproportionate number of victims of violent crime, especially homicide who are African American." (footnote omitted)); Paul Butler, *(Color) Blind Faith: The Tragedy of Race, Crime, and the Law*, 111 HARV. L. REV. 1270, 1270-71 (1998) [hereinafter Butler, *(Color) Blind Faith*] (examining and then rejecting these arguments; *cf.* India Thusi, *Policing is Not a Good*, 110 GEO. L.J. ONLINE 226, 233-34 (2022) ("Social dominance theory tells us that societies are organized around the notion of dominant and subordinate groups with the dominant groups possessing disproportionate amount of wealth, power, status, and so forth.' This approach to evaluating the police purposively considers the role police play in maintaining existing social hierarchy."). *But cf.* David Alan Sklansky, *Police Reform in Divided Times*, 2 AM. J.L. & EQUAL. 3, 4 (2022) ("Inadequate protection against crime is among the most damaging forms of racial inequality in the United States, but so is the appallingly large number of young people of color, particularly African Americans, killed every year by the police.").

specifically the disproportionate number of victims of violent crime, especially homicide, who are African-American.”<sup>21</sup>

But for Butler, Randall Kennedy’s alternative conception of the primary African American interest in penal administration (sometimes referenced as the “underenforcement thesis”) amounted to White appeasement:

Reading [Randall Kennedy’s] *Race, Crime, and the Law*, which the white legal establishment has hailed as the seminal work on race and crime, it would be hard to understand why many African-Americans believe they live in a police state. Even upon careful examination of the book’s 538 pages, one finds no citation to the extraordinary evidence: half of prison inmates are black; almost half of the women in state prisons are black; nationally, nearly one-third of young black men are either in prison, on probation or parole, or awaiting trial; more young black men are in prison than in college . . . . The book’s author, however, seems to believe that [these facts] are irrelevant.<sup>22</sup>

Butler’s criticism of Kennedy was principally based on Kennedy’s omission of the subject of penal *outputs*. To be sure, several of the chapters in *Race, Crime, and Law* address the problem of racial bias in criminal procedure as held among penal bureaucrats and juries.<sup>23</sup> But, to Butler’s point, Kennedy did not address the swelling group of African Americans subject to penal supervision. In this sense, Kennedy, in 1997, showed little if any regard for the African American interest in what this Article has termed *racially proportionate penal outputs* as a function of criminal procedure. Kennedy instead trained his focus on African American security interests. Rather than address the harm of racially disproportionate penal outputs (as distinct from the issue of racial discrimination in criminal enforcement), Kennedy addressed the very real and pressing harm of racially disproportionate criminal victimization.

For Butler, however, the racial disproportionality in penal administration was paramount. He noted in 1998 that just three percent of arrests in the U.S. were for serious violent crime,<sup>24</sup> the suggestion being that the remainder of arrests and derivative prosecutions were highly discretionary. Thus, while Kennedy’s focus on African American violent-crime victimization was taken

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21 Butler, *One Hundred Years*, *supra* note 15, at 1054. “Kennedy’s tunnel vision [regarding ‘bad Blacks’] is particularly vexing because of his status as the nation’s preeminent African-American legal scholar.” Butler, (*Color*) *Blind Faith*, *supra* note 20, at 1287.

22 Butler, (*Color*) *Blind Faith*, *supra* note 20, at 1270-71.

23 Among the chapters addressing racial bias in criminal enforcement are Chapter 3 (“History: Unequal Enforcement”), Chapter 5 (“Race and the Composition of Juries: Setting the Ground Rules”), Chapter 9 (“Race, Law, and Punishment: The Death Penalty”). KENNEDY, *supra* note 19, at viii.

24 Butler, (*Color*) *Blind Faith*, *supra* note 20, at 1275.

to infer that African Americans were disproportionately imprisoned because they offended at disproportionate rates, Butler advanced an alternative thesis: “the best explanation of disproportionate black criminality is white racism.”<sup>25</sup>

The normative rift between Butler and Kennedy is illuminating not only from a substantive standpoint, but also in terms of the timing of the respective publications. Kennedy published *Race, Crime, and the Law* in 1997, just as criminal justice pundits began a slow turn from contemplation of the nation’s exceptional rate of violent crime to its exceptional rate of imprisonment. Violent crime would fall through the 2000s despite incarceration totals continuing a rise that began in the late 1970s.<sup>26</sup> Today, there are nearly two million people incarcerated in the U.S. and 2.9 million on probation.<sup>27</sup> The population subject to carceral supervision (i.e., jail, prison, probation, parole, etc.) is 5.5 million,<sup>28</sup> significantly larger than the population of South Carolina.<sup>29</sup> Nineteen million people have been convicted of a felony and seventy-nine million have a criminal record.<sup>30</sup> Of the 258 million adults in the U.S.,<sup>31</sup> 113 million have an immediate family member who has been to prison or jail.<sup>32</sup> Moreover, the racial disparity in imprisonment remains stark. In seven states, the Black–White imprisonment disparity is more than nine to one.<sup>33</sup> In New Jersey, the disparity is 12.5 to one.<sup>34</sup> In twelve states, more than half of the prison population is African

<sup>25</sup> *Id.* at 1281.

<sup>26</sup> Matthew Friedman, Ames C. Grawert & James Cullen, *Crime Trends: 1990–2016*, BRENNAN CENTER FOR JUST. (2017), at 5, <https://www.brennancenter.org/sites/default/files/publications/Crime%20Trends%201990-2016.pdf> [<https://perma.cc/YP2-EN84>] (showing a graph of the declining violent crime rate); German Lopez, *Mass Incarceration in America, Explained in 22 Maps and Charts*, VOX (Oct. 11, 2016, 1:50 PM), <https://www.vox.com/2015/7/13/8913297/mass-incarceration-maps-charts> [<https://perma.cc/KK79-6CCZ>] (illustrating how despite two decades of crime decline in the 1990s and 2000s, incarceration rates continued to increase until 2010).

<sup>27</sup> Press Release, Wendy Sawyer & Peter Wagner, Prison Pol’y Initiative, Mass Incarceration: The Whole Pie 2023 (Mar. 14, 2023), <https://www.prisonpolicy.org/reports/pie2023.html> [<https://perma.cc/Q9V7-38KD>].

<sup>28</sup> *Id.*

<sup>29</sup> *Quick Facts, South Carolina*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/SC> [<https://perma.cc/6DF8-GNC6>].

<sup>30</sup> Press Release, Sawyer & Wagner, *supra* note 27.

<sup>31</sup> Stella U. Ogunwole, Megan A Rabe, Andrew W. Roberts & Zoe Caplan, *Population Under Age 18 Declined Last Decade*, U.S. CENSUS BUREAU (Aug. 12, 2021), <https://www.census.gov/library/stories/2021/08/united-states-adult-population-grew-faster-than-nations-total-population-from-2010-to-2020.html> [<https://perma.cc/QWJ4-STB4>].

<sup>32</sup> Press Release, Sawyer & Wagner, *supra* note 27.

<sup>33</sup> See Nellis, *supra* note 18, at 5 (“In California, Connecticut, Iowa, Minnesota, New Jersey, Maine, and Wisconsin, the rate of imprisonment among Black people is more than nine times that for whites.”).

<sup>34</sup> *Id.* at 10.

American.<sup>35</sup> In the state of Maryland, seventy-one percent of prison inmates are African American.<sup>36</sup> In eleven states, at least one in twenty adult African American males is in prison. In the state of Oklahoma, the figure is one in fifteen.<sup>37</sup> African Americans make up thirteen percent of the nation's population, but thirty-nine percent of its prison population.<sup>38</sup> Moreover, the racial harms associated with imprisonment are concentrated among the most vulnerable African Americans, namely the poor. The average annual income for incarcerated African American men pre-incarceration is \$17,625 as compared to \$31,245 for nonincarcerated African American men (\$12,735 to \$24,255 for African American women).<sup>39</sup>

The rate of African American incarceration is thus a major problem for the African American community irrespective of the African American crime rate. Researchers have found that imprisonment has profound negative effects not only on the imprisoned, but also on those within the prisoner's social network.<sup>40</sup> A single prison admission eats away at the relationship between the prisoner and sons, daughters, husbands, wives, partners, parents, and neighborhood community.<sup>41</sup> And this is merely a first layer of marginalization. Federal, state, and local government along with private employers systematically (and lawfully) obstruct the upward mobility of the formerly incarcerated (anyone with a criminal record, really) and African Americans are uniquely stigmatized within this group.<sup>42</sup> Moreover, given the racial skew in prison admission, African Americans suffer the direct and

<sup>35</sup> *Id.* at 5.

<sup>36</sup> *Id.* at 20.

<sup>37</sup> Ashley Nellis, *The Color of Justice 2016 Report*, SENT'G PROJECT (June 14, 2016), <https://www.sentencingproject.org/reports/the-color-of-justice-2016-report> [<https://perma.cc/UZ26-BNX7>].

<sup>38</sup> Nellis, *supra* note 18, at 22.

<sup>39</sup> Press Release, Sawyer & Wagner, *supra* note 27.

<sup>40</sup> See Todd R. Clear, *The Effects of High Imprisonment Rates on Communities*, 37 CRIME & JUST. 97, 102 (2008) ("Penal system cycling for young adults affects social networks, social relationships, and long-term life prospects . . ."); Christopher Wildeman & Christopher Muller, *Mass Imprisonment and Inequality in Health and Family Life*, 8 ANN. REV. L. & SOC. SCI. 11, 21 (2012) (identifying the social scientific literature on the relationship between incarceration and family life).

<sup>41</sup> Clear, *supra* note 40, at 110-16 (describing the effects of incarceration on families and communities); Wildeman & Muller, *supra* note 40, at 21 (identifying the social scientific literature on the relationship between incarceration and family life).

<sup>42</sup> See Devah Pager, *The Mark of a Criminal Record*, 108 AM. J. SOCIO. 937, 959-60 (2003) (finding the effect of a criminal record to be forty percent larger for Black job applicants than White ones); see also J.J. Prescott & Sonja B. Starr, *Expungement of Criminal Convictions: An Empirical Study*, 133 HARV. L. REV. 2460, 2467 (2020) (exploring how criminal record expungement is associated with a sharp upturn in an individual's wage and employment trajectories). See generally Sandra Susan Smith & Jonathan Simon, *Exclusion and Extraction: Criminal Justice Contact and the Reallocation of Labor*, 6 J. SOC. SCIS. 1, 1-2 (2020) (addressing the relationship between criminal justice policy and the various institutions that shape labor markets).

collateral harms of incarceration at a rate that greatly exceeds Whites.<sup>43</sup> The racial dimension of the collateral consequences of criminal punishment is thus both deep and wide. The consequences are both more acute and more common for African Americans as compared to Whites.

Marshalling these facts regarding racial disparity and derivative social stratification, Michelle Alexander argues in her paradigm-shifting book, *The New Jim Crow*, that apart from the standard tale of substandard urban schools and concentrated neighborhood poverty, African Americans in contact with the penal system have been increasingly subject to “a tightly networked

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<sup>43</sup> In her heralded book, *The New Jim Crow*, Michelle Alexander claims this racial skew to be primary evidence that the modern criminal justice system is the latest in a series of state institutions designed to manage the African American population. In this light, Alexander identifies a structural homology across three institutions—slavery, Jim Crow, and the modern penal system. MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS: 10TH ANNIVERSARY EDITION* 14-15 (2020); see also Loïc Wacquant, *Slavery to Mass Incarceration*, 13 *NEW LEFT REV.* 41-42 (2002) (linking modern mass incarceration to slavery); Malcolm M. Feeley & Jonathan Simon, *The New Penology: Notes on the Emerging Strategy of Corrections and Its Implications*, 30 *CRIMINOLOGY* 449, 467-68 (1992) (arguing that modern penal policy can in part be understood as an effort to contain and exclude a largely Black and Hispanic “underclass”); Dorothy E. Roberts, *Constructing a Criminal Justice System Free of Racial Bias: An Abolitionist Framework*, 39 *COLUM. HUM. RTS. L. REV.* 261, 267-68 (2007) [hereinafter Roberts, *Constructing a Criminal Justice System*] (“Today’s penal policy has a direct lineage to the regimes of slavery and Jim Crow . . . . Those confined in U.S. prisons today are disproportionately the descendants of slaves.”). Roberts further argues that these institutions have, in succession, served as the primary mechanism for state regulation of African Americans, and that the nature of this regulation relegates African Americans to the lowest tier of the nation’s racial caste system. *Id.* at 284. (Alexander uses the term “racial caste” to “denote a stigmatized racial group locked in to an interior position by law and custom.” Alexander, *supra*, at 15.) The penal system is thought to preserve this status through the racially disparate distribution of criminal records in tandem with their unique effect on African American employment opportunities. Pager, *supra* note 42, at 959-60. For a broader discussion of the impact of the proliferation of criminal records on the labor market, see Amanda Agan, Andrew Garin, Dmitri Koustas, Alexandre Mas & Crystal S. Yang, *The Impact of Criminal Records on Employment, Earnings, and Tax Filings* 12, *INTERNAL REVENUE SERV.* (2022) <https://www.irs.gov/pub/irs-soi/22rpimpactofcriminalrecordsonemployment.pdf> [<https://perma.cc/Z22K-X63M>] (“[T]axpayer earnings and filing behavior rates fall persistently after criminal history events—even charges that do not lead to convictions . . . . A criminal record itself can be a direct barrier for employment.”); Lauren Russell, “*The New Jim Crow*: Employer Access to Criminal Record Information and Racial Differences in Labor Market Outcomes 25, *HARV. UNIV.* (2022) [https://scholar.harvard.edu/files/lauren russell/files/jmp\\_12.21.2022.pdf](https://scholar.harvard.edu/files/lauren russell/files/jmp_12.21.2022.pdf) [<https://perma.cc/9V3B-KSSW>] (“[The] expansion in access to criminal record information [has] harmed the outcomes of non-college educated black men, while benefiting primarily those of similarly educated white women . . . . [This coincided with] the decline in the labor force participation of prime-age men . . . . [B]lack men, who bear the burden of mass incarceration, are further penalized in a labor market that discriminates on the basis of criminal history and limits their opportunities for mobility.”); Jordan Segall, *Mass Incarceration, Ex-Felon Discrimination & Black Labor Market Disadvantage*, 14 *U. PA. J.L. & SOC. CHANGE* 159, 164, 168 (2010) (“[T]he unemployment gap is a product of persistent exclusionary barriers in labor markets . . . . Significant racial disparities in rates of contact with the criminal justice system appear to be a significant factor . . . .”).

system of laws, policies, customs, and institutions that operate collectively to ensure” their subordination.<sup>44</sup> Other scholars have likewise referred to the condition to which many with a criminal record are subject as “civic death.”<sup>45</sup> A criminal record may push an individual out of the legal workforce, rendering him ineligible for welfare benefits, college assistance, public housing, and voting—all under the direction of colorblind public policy.<sup>46</sup> Thus, different from Kennedy and similar to Butler, Alexander identifies racially disparate penal outputs as the primary harm—as the African American penal interest of primary interest.

Despite critical acclaim, Alexander’s book—a *New York Times* best-seller<sup>47</sup>—has taken its lumps. Critics in the legal academy have highlighted a number of flaws in the Jim Crow analogy, among them the rise in violent crime concurrent with the incarceration build-up,<sup>48</sup> the spike in incarceration

<sup>44</sup> ALEXANDER, *supra* note 43, at 16.

<sup>45</sup> See Loïc Wacquant, *Race as Civic Felony\**, 57 INT’L SOC. SCI. J. 127, 130 (2005) (“[M]ass incarceration . . . induces the civic death of those it ensnares by extruding them from the social compact . . . .”); Gabriel Jackson Chin, *supra* note 3, at 1815-16 (noting that the Supreme Court has “considered the fact that criminal convictions impose a range of collateral consequences in shaping the rights to counsel, jury trial, and other aspects of criminal procedure,” a holding that “suggest[s] that civil death is an effect of a criminal judgment of constitutional magnitude”).

<sup>46</sup> ALEXANDER, *supra* note 43, at 2 (“Today it is perfectly legal to discriminate against criminals in nearly all the ways it was once legal to discriminate against African Americans.”).

<sup>47</sup> *Best Sellers: Paperback Nonfiction*, N.Y. TIMES (June 21, 2020), <https://www.nytimes.com/books/best-sellers/2020/06/21/paperback-nonfiction> [https://perma.cc/QB2E-3D5N].

<sup>48</sup> See Lacey & Soskice, *Crime, Punishment and Segregation*, *supra* note 8 at 457 (“More generally, we argue that the debate about the relationship between crime and punishment has been distorted by its focus on imprisonment rates: while imprisonment rates do not track crime, *rates of change* in imprisonment track violent crime in a lagged way, remarkably closely.”); see also JOHN PFAFF, *LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION AND HOW TO ACHIEVE REAL REFORM* 187 (2016) (“52 percent of the growth in state prisons came from people serving time for violent offenses. The importance of locking people up for violence has only grown in recent years . . . . Thirty-six percent of prison growth in the 1980s came from incarcerating more people for violent crimes . . . . From 1990 to 2009, however, about 60 percent of all additional inmates had been convicted of a violent offense. In short, the incarceration of people for violent crimes has always been at the center of contemporary prison growth.”); NAT’L RSCH. COUNCIL, *COMM. ON CAUSES AND CONSEQUENCES OF HIGH RATES OF INCARCERATION, THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES* 68-69 (Jeremy Travis, Bruce Western & Steve Redburn eds., 2014) (“The growth in imprisonment—most rapid in the 1980s, then slower in the 1990s and 2000s—is attributable largely to increases in prison admission rates and time served. Increased admission rates are closely associated with increased incarceration for drug crimes and explain much of the growth of incarceration in the 1980s, while increased time served is closely associated with incarceration for violent crimes and explains much of the growth since the 1980s.”); J.J. Prescott, Benjamin Pyle & Sonja B. Starr, *Understanding Violent-Crime Recidivism*, 95 NOTRE DAME L. REV. 1643, 1650-52 (2020) (“A majority of prisoners have been convicted of violent crimes in large part because violent offenses typically involve longer prison sentences. There is much less violent crime than property crime reported each year, and fewer than one third of new prison admissions involve a primary offense that is violent . . . . But these crimes lead to much longer sentences on average, both because sentence judges sentence violent-crime offenders to



among non-college educated White males,<sup>49</sup> African American support for punitive crime policy in the 1980s concurrent with the rapid rise of incarceration rates,<sup>50</sup> and the fact that the African American middle class has been almost entirely spared from the mass incarceration phenomenon, very different from the totalizing quality of Jim Crow in the South.<sup>51</sup> And while each of these critiques is valid and important to an accurate causal account of contemporary penal administration as it relates to the African American underclass, the critiques have gradually come to obscure the dystopian condition Alexander highlights in *Jim Crow*: an informal caste system to which poor and working-class African Americans are disproportionately subject. In the preface of a new edition of her book, Alexander responds to her critics, focusing not so much on her racial control thesis but on the plain facts regarding the scale of state management of the African American underclass by way of carceral supervision, and the lifelong consequences of being subject to such supervision if only for a moment.<sup>52</sup> To focus intently on a snapshot of the prison population is to miss the “tens of millions” that cycle each year through probation, parole, brief jail stays, and pre-trial supervision.<sup>53</sup> Alexander notes that contrary to the “violent crime is the problem” narrative, drug crimes are the largest category of arrest, and that

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longer terms and because prisoners serve larger fractions of their violent-crime sentences on average before being released.”); Garland, *supra* note 1, at 15-16 (“In some prominent analyses of penal change writers have insisted that there is *no* relation between crime trends and penal policy and that penal policy is an autonomous, politically motivated undertaking, quite unrelated to efforts at crime control . . . This view is, however, coming to be viewed as untenable.”).

<sup>49</sup> James Jr. Forman, *Racial Critiques of Mass Incarceration: Beyond the New Jim Crow*, 87 N.Y.U. L. REV. 21, 58-60 (2012) (“One-third of our nation’s prisoners are white, and incarceration rates have risen steadily even in states where most inmates are white.”).

<sup>50</sup> See *id.* at 36 (“[B]lack activists in Harlem fought for what would become the notorious Rockefeller drug laws, some of the harshest in the nation. Harlem residents were outraged over rising crime (including drug crime) in their neighborhoods and demanded increased police presence and stiffer penalties.”).

<sup>51</sup> See *id.* at 57-58 (rejecting Alexander’s comparisons of modern mass incarceration to the Jim Crow South). Alexander acknowledged imperfections in the analogy when making the original argument and has offered an important rebuttal to the argument that her focus on the War on Drugs is reductive. ALEXANDER, *supra* note 43, at 5-8.

<sup>52</sup> ALEXANDER, *supra* note 43, at xxiii (“I wanted to expose the literal war that has been waged against our communities, a drug war in which millions were taken prisoner and tens of millions were criminalized . . . and then released into a permanent second-class status.”).

<sup>53</sup> See *id.* (repudiating the centering of “black-on-black crime” as “a stunningly effective way of refocusing attention on a relatively small number of individuals who cause harm, thus shielding from critique an entire system that inflicts incalculable harm on millions”). One in fifty-five U.S. adults is under community supervision (i.e., probation, parole, or pre-trial supervision). PEW CHARITABLE TRS., PROBATION AND PAROLE SYSTEMS MARKED BY HIGH STAKES, MISSED OPPORTUNITIES 1 (Sept. 2018), <https://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2018/09/probation-and-parole-systems-marked-by-high-stakes-missed-opportunities> [<https://perma.cc/8QTM-MBKA>]. The population under community supervision has tripled over the past thirty-six years. *Id.* at 4 fig.1.

eighty percent of the probation population and two-thirds of parolees are subject to supervision based on a nonviolent criminal conviction.<sup>54</sup> To again state the obvious, African Americans are disproportionately represented within each of these categories of penal supervision<sup>55</sup> and, from Alexander's vantage point, this is not a system whose racially disparate outputs are likely to be addressed by way of alterations at the margins.

All of this is to suggest by way of the criminal-legal scholarship attentive to structural racial inequality that separate from the question of the "how" of mass incarceration—violent crime or drug crime, social environment or racial targeting—is the reality of fortified racial caste.<sup>56</sup> Apart from criminal punishment itself, the racial disparity in penal outputs seals the unfavorable structural position of the African American underclass. And for many observers this circumstance represents not only state failure but the moral failure of greater society.<sup>57</sup>

A group of activists and scholars identifying as "penal abolitionists" advance a similar argument. While ostensibly a forward-looking advocacy

<sup>54</sup> ALEXANDER, *supra* note 43, at xxiv; *see also* PEW CHARITABLE TRS., *supra* note 53, at 8 ("At the end of 2016, 8 in 10 probationers and two-thirds of parolees had been sentenced for nonviolent crimes.").

<sup>55</sup> African Americans represent thirty percent of the population under community supervision and thirteen percent of the general population. PEW CHARITABLE TRS., *supra* note 53, at 7. One in thirty-five African Americans males is subject to community supervision as well as one in 124 African American females. *Id.* at fig.4.

<sup>56</sup> As Alexander explains:

To put the matter starkly: the current system of control permanently locks a huge percentage of the African American community out of the mainstream society and economy. The system operates through our criminal justice institutions, but it functions more like a caste system than a system of crime control. Viewed from this perspective, the so-called underclass is better understood as an *undercaste*—a lower caste of individuals who are permanently barred by law and custom from mainstream society. Although this new system of racialized control purports to be colorblind, it creates and maintains racial hierarchy much as the earlier systems of control did.

ALEXANDER, *supra* note 43, at 16. *See generally* Muller & Roehrkasse, *Racial and Class*, *supra* note 18, at 1-3 ("[B]ecause Black Americans are disproportionately connected to the poor through their families and neighborhoods, racial inequality exceeds class inequality in people's indirect experiences with imprisonment.").

<sup>57</sup> For example, abolitionist Robert H. Ambrose has described the current levels of incarceration as "our mass incarceration moral failure." Robert H. Ambrose, Note, *Decarceration in a Mass Incarceration State: The Road to Prison Abolition*, 45 MITCHELL HAMLIN L. REV. 732, 733 (2019). Regarding the racial disparities, Ambrose emphasizes the "disturbing racial disparities" that have emerged across the country, noting that African Americans are more likely to be stopped and searched than White Americans, and are also more likely to receive harsher penalties. *Id.* at 750. For additional discussion of racial disparities in criminal procedure and their effects, see Dorothy E. Roberts, *The Social and Moral Cost of Mass Incarceration in African American Communities*, 56 STAN. L. REV. 1271, 1272-73 (2004) [hereinafter Roberts, *Social and Moral Cost*] ("On any given day, nearly one-third of black men in their twenties are under the supervision of the criminal justice system—either behind bars, on probation, or on parole.").

group, penal abolitionists diligently account for the racial disparity in penal outputs and its historical origins. In doing so, they question not just the moral legitimacy of American penal administration but also that of penal reform.

### B. *Racially-Disparate Penal Outputs and Structural Racial Inequality*

This Section turns from the claim that the racial disparity in penal outputs represents a discrete harm to the claim that this harm is, in significant part, a function of structural racial inequality<sup>58</sup> derivative of the nation's sordid racial history. Penal abolitionists, for instance, call for the history of American slavery along with successive forms of de jure anti-Black discrimination to inform our sense of the quality of racial injustice in contemporary penal administration.<sup>59</sup> From a descriptive standpoint, their bottom line is that the racial disproportionality in penal outputs is not the incidental event that some might have us believe. It is instead a function of the arch of American race relations. In this vein, modern penal administration is "part of the afterlife of slavery and Jim Crow, and this legacy is deeply implicated in criminal law's persistent practices of racialized degradation."<sup>60</sup> Abolitionists thus advance a causal theory of the case that extends well beyond the racial bias of penal bureaucrats. Within their causal narrative, structural racial inequality is foundational.

Penal abolitionists generally base their claim as to the criminal justice system's illegitimacy on the same slavery and Jim Crow associations established by Alexander. Prominent abolitionist Allegra McCleod, for instance, argues that because penal administration shows the "conscious and unconscious entanglement of racial degradation and criminal law enforcement," there is a strong argument for "abandon[ing] criminal

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<sup>58</sup> Here, "structure" should be understood as patterns of group and institutional behavior. See THEODORE ABEL, *THE FOUNDATION OF SOCIOLOGICAL THEORY* 169 (1970) (describing structure as the "organization of collectivities"). In the case of structural racial inequality, patterns of group and institutional behavior produce cumulative material disadvantages for disfavored racial minorities. See generally Robert J. Sampson & William J. Wilson, *Toward a Theory of Race, Crime, and Urban Inequality*, in *CRIME, INEQUALITY AND THE STATE* 312, 315 (Mary E. Vogel ed., 2007) ("The basic thesis is that macrosocial patterns of residential inequality give rise to the social isolation and ecological concentration of the truly disadvantaged."); Robert J. Sampson, William Julius Wilson & Hanna Katz, *Reassessing "Toward a Theory of Race, Crime, and Urban Inequality": Enduring and New Challenges in 21<sup>st</sup> Century America*, 15 *DU BOIS REV.* 13, 16-17 (2018) ("[R]ace is a marker for the accumulation of social and material adversities that both follow from and constitute racial status in America."); ROBERT SAMPSON, *GREAT AMERICAN CITY: CHICAGO AND THE ENDURING NEIGHBORHOOD EFFECT* (2012) [hereinafter SAMPSON, *GREAT AMERICAN CITY*].

<sup>59</sup> See Dorothy E. Roberts, *Foreword: Abolition Constitutionalism*, 133 *HARV. L. REV.* 1, 7 (2019) [hereinafter Roberts, *Abolition Constitutionalism*] ("[T]oday's carceral punishment system can be traced back to slavery and the racial capitalist regime it relied on and sustained.")

<sup>60</sup> Allegra M. McCleod, *Prison Abolition and Grounded Justice*, 62 *UCLA L. REV.* 1156, 1199 (2015) [hereinafter McCleod, *Prison Abolition*].

regulatory frameworks . . . .”<sup>61</sup> As an analytical matter, the abolitionist target is not penal administration itself, but the feverish pursuit of penal reform. In arguing against reform, the abolitionist literature ties together the nation’s brutal racial history and the racially disproportionate rate of stops, arrests, and incarceration. The literature concludes that there is no model of criminal justice reform—no theory of penal rule change—that would eliminate the yawning Black–White gap in stops, arrests, and jail and prison admissions.

When reviewing the penal abolition literature, there is an understandable tendency to focus on the normative dimension of the argument. It seems reasonable to expect that the principal contribution of a penal abolition literature is detailed programming for the abolition of the penal system. But there is, at least in the view of this author, an irony to this literature. Its normative dimension comes across as nebulous and disjointed and thus disconcerting given the stakes.<sup>62</sup> The unique value of the abolition literature lies instead in its descriptive and moral claims, particularly in relation to African Americans.<sup>63</sup> Yes, mass incarceration is a social problem; and, yes, it has a racial dimension. But the penal abolition literature extends beyond this virtual consensus in the academy to argue the system’s manifest immorality. It does so by simply holding up racially disproportionate penal outputs next to the nation’s extraordinary racial history. In this sense, the social and historical analysis driving the penal abolitionist literature pushes the conversation beyond the issue of violent crime and the question of the presence or absence of racial bias in discrete criminal procedures. The literature alleges a collective moral failure most evident not in the scale of penal administration in the United States, but in the racial disparities that permeate this system.<sup>64</sup>

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<sup>61</sup> *Id.* at 1197.

<sup>62</sup> See generally Rachel Barkow, *Promise or Peril: The Political Path of Prison Abolition in America*, 58 WAKE FOREST L. REV. (forthcoming 2023) (manuscript at 16–21) (noting, in a section titled “The Negative Agenda: The Abolition of What?,” that “[t]he specific negative agenda remains murky despite what appears to be the plain text of the movement’s moniker”). Some observers suggest that the inchoate nature of the penal abolition project is a strategic choice. See, e.g., Máximo Langer, *Penal Abolitionism and Criminal Law Minimalism: Here and There, Now and Then*, 134 HARV. L. REV. F. 42, 51–52 (“The basic idea is that when pressed for the articulation of alternatives to the existing social order, these groups should resist articulating fully finished—that is, fully formed or laid out—messages or alternatives because fully formed or laid out messages or alternatives may be either easily absorbed by the existing system or rejected as too radical. Instead, these abolitionists and other radical groups should articulate ‘unfinished’ messages that contradict the existing order, while not being as easily co-opted or dismissed.” (footnote omitted)).

<sup>63</sup> See Barkow, *supra* note 62, at 24 (“Prison abolition responds directly to the worst aspects of the get-tough politics that have dominated the American landscape. It focuses on societal drivers of crime that are critical, but mostly ignored, by American policy. It highlights the criminogenic effects of prison itself, and the way in which incarceration is used as a mechanism of state control to further oppress already marginalized groups and produce punishments that are retributively unjust.”).

<sup>64</sup> See sources cited *infra* notes 57, 82–83.

As a general matter, the practice of criminal law has managed to insulate itself from this sort of macro theoretical treatment of American penal administration. Criminal law practice operates within a theoretical paradigm willfully ignorant of social structure. As every first-year law student learns at the opening of the 1L Criminal Law course, punishment of the criminal defendant within the Anglo-American system is understood to carry the moral outrage of society.<sup>65</sup> Henry M. Hart, Jr. described crime as conduct that incurred “a formal and solemn pronouncement of the moral condemnation of the community.”<sup>66</sup> Hart references a more severe description by George K. Gardner, who characterized criminal punishment as an “expression of the community’s hatred, fear, or contempt for the convict . . . .”<sup>67</sup> Criminal punishment and its attendant physical hardships are thus premised on the culpability of the individual,<sup>68</sup> while this culpability is itself premised on the principle of agency.<sup>69</sup> Each individual is thought to be principally responsible for his or her actions.<sup>70</sup>

In peeling back the layers of the culpability conclusion, some moral philosophers have taken a slightly more prudent position, arguing that the answer to the question of culpability should not be so narrowly focused on the individual. They point out that the standard approach ignores the force of group position and sociology.<sup>71</sup> But the bedrock principles of Anglo-American criminal law seem to call for the invisibility of “social structure,” namely, the institutional arrangements and deeply-ingrained patterns of

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65 CYNTHIA LEE & ANGELA P. HARRIS, *CRIMINAL LAW: CASES AND MATERIALS* 1 (4th ed. 2019) (“[C]riminal law is inextricably intertwined with issues of morality.”). For critiques of the first-year criminal law course and the criminal law curriculum, see generally Franklin E. Zimring, *Is There a Remedy for the Irrelevance of Academic Criminal Law?*, 64 J. LEGAL EDUC. 5 (2014); Shaun Ossei-Owusu, *Criminal Legal Education Essay*, 58 AM. CRIM. L. REV. 413 (2021); Alice Ristroph, *The Curriculum of the Carceral State*, 120 COLUM. L. REV. 1631 (2020).

66 Henry M. Hart, Jr. *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROBS. 401, 405 (1958).

67 *Id.*

68 George K. Gardner, *Baily v. Richardson and the Constitution of the United States*, 33 B.U. L. REV. 176, 193 (1953).

69 ANDREW ASHWORTH & JEREMY HORDER, *PRINCIPLES OF CRIMINAL LAW* 23 (7th ed. 2013) [hereinafter ASHWORTH & HORDER, *PRINCIPLES OF CRIMINAL LAW*].

70 *Id.*

71 See ERIN I. KELLY, *THE LIMITS OF BLAME: RETHINKING PUNISHMENT AND RESPONSIBILITY* 11 (2018) (“A blaming perspective focused predominantly on manifestations of *ill will* too readily overlooks the social and psychological context in which a person’s beliefs and attitudes are formed, and this focus distorts its moral findings.”); see also Ekow N. Yankah, *Punishing Them All: How Criminal Justice Should Account for Mass Incarceration*, 97 RES PHILOSOPHICA 185, 186 (2020) (“The instinct that criminal punishment is justified exclusively by the individual wronging-doing [sic] of an offender is so bedrock as to be nearly unquestioned. Indeed the only widely known counterweight, utilitarian justifications of law, are often thought to be defeated precisely because of the institution that it is wrongful to premise punishment on the greater social good.”).

group interaction that dictate social and economic status and individual psychology.<sup>72</sup> Recently identified in moral philosophy as the “blaming perspective,”<sup>73</sup> this relatively narrow framework for determining criminal culpability sets aside the circumstances in which an individual’s dispositions are formulated.<sup>74</sup> The method represents a refusal to relate individual and collective responsibility, leaving the two “dangerously unbalanced”<sup>75</sup> while also “mask[ing] the systematic nature of social inequality[.]”<sup>76</sup> In this light, the moral pronouncements of the penal system appear as a tragic farce: “The very point of criminal justice, so understood, is to assign moral responsibility to individual wrongdoers through findings of criminal guilt and the imposition of a stigmatizing punishment they are thought morally to deserve.”<sup>77</sup>

The call to acknowledge social structure and, similarly, neighborhood or residential “ecology”<sup>78</sup> within the philosophy of criminal punishment and in the context of criminal litigation represents an attempt to push against the individual autonomy assumption. This argument extends the frame for mitigation to questions regarding the precise weight that should be placed on “choice” and volition at the sentencing stage, particularly if retribution is the principal philosophy upon which the sentence is based.

[T]he notion of free will that is assumed in ideas of culpability . . . is a much stronger notion than that usually experienced by the poor and powerless. That individuals have choices is a basic legal assumption; that circumstances constrain choices is not. Legal reasoning seems unable to appreciate that the existential view of the world as an arena for acting out free choices is a perspective of the privileged, and that potential for self-actualization is far from apparent to those whose lives are constricted by material or ideological handicaps.<sup>79</sup>

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<sup>72</sup> See generally Peter Blau, *A Macrosociological Theory of Social Structure*, 82 AM. J. SOCIO. 26 (1977).

<sup>73</sup> KELLY, *supra* note 71, at 11.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> Ecological explanations of crime emphasize the environmental context in which criminal offending takes place. See Erica R. Fissel & Pam Wilcox, *Social Ecology*, in 1 THE ENCYCLOPEDIA OF RESEARCH METHODS IN CRIMINOLOGY AND CRIMINAL JUSTICE 217 (J.C. Barnes & David R. Forde eds., 2021) (“In criminology and criminal justice, the ‘social ecology’ perspective focuses on the interdependence between individuals and their physical, social, and cultural environments in order to understand crime. It views crime as an outgrowth of the ways in which individuals act in their various embedded environmental contexts[.]”).

<sup>79</sup> Barbara Hudson, *Punishing the Poor: A Critique of the Dominance of Legal Reasoning in Penal Policy and Practice*, in PENAL THEORY AND PRACTICE: TRADITION AND INNOVATION IN

Deep skepticism regarding the conventional legal understanding of criminal culpability would seem to put in question the basic credibility of the retributivist theory of punishment:

It is enough to declare, when it is true, that people who have been convicted of crimes have acted wrongly and that we have reasons to uphold and to protect the rights of people who have been harmed or threatened. We need not go beyond those conclusions to moralize about and to condemn criminal wrongdoers as inferior human beings. We can and should reject the use of criminal punishment as an instrument of public blame. The state does not have, and should not be given, the moral authority to allocate “deserved suffering.”<sup>80</sup>

Indeed, it seems difficult as a philosophical matter to both subscribe to the retributivist theory of criminal punishment (i.e., “an eye for an eye”) and accept a structural explanation of the racial disparity in penal outputs. And it is this specific tension that speaks to the resonance of the modern abolitionist project. The abolitionist wing of the normative literature points to research showing social environment as a primary driver of imprisonment.<sup>81</sup> It further argues that given the relationship among slave lineage, African American structural disadvantage, and rates of African American criminal offending, the scale of African American incarceration is “not only morally unjustifiable, but morally repugnant.”<sup>82</sup> Thus, if criminal justice reform is incapable of presenting a plausible normative theory by which to eliminate the racial disparity in incarceration, the project falls short of racial equity, which many consider a moral imperative.<sup>83</sup> The favored alternative, abolition of the penal

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CRIMINAL JUSTICE 292, 302 (Anthony Duff, Sandra Marshall, Rebecca Emerson Dobash & Russell P. Dobash eds., 1994).

<sup>80</sup> KELLY, *supra* note 71, at 12. Here, I limit the question of mitigation in light of social structure to the sentencing phase and, in the interest of analytical clarity, set aside questions of mens rea and the determination of guilt in the trial phase.

<sup>81</sup> “Prison abolition seeks to end the use of punitive policing and imprisonment as the primary means of addressing what are essentially social, economic, and political problems.” McLeod, *Prison Abolition*, *supra* note 60, at 1172.

<sup>82</sup> Roberts, *Social and Moral Cost*, *supra* note 57, at 1273.

<sup>83</sup> As Dorothy Roberts explains,

A more complex view of the problem recognizes that social and economic inequality contribute to racial differences in offending, but this, too, concerns the reasons for racial disparity. In terms of this debate, the morality of racially disproportionate incarceration depends largely on identifying its causes. The new direction in prison research moves from examining the causes of racial disparity to examining its consequences . . . . Regardless of its cause, however, mass imprisonment inflicts devastating collateral damage on black communities. States are not off the hook because this damage may make mass imprisonment immoral regardless of the reasons for racially disparate rates of incarceration.

system, would represent, in the words of abolitionists, a transition from a “slavery-based” society to a free society.<sup>84</sup>

It is in this narrow sense that penal abolitionism, as represented in the criminal-legal literature, has established a credibility gap in relation to the reform literature. That is to say, it would be difficult to identify a theory of criminal justice reform—again, a theory posing a series of hypothetical rule changes within the penal field—by which African American incarceration rates fall to pre-mass incarceration era levels, or to rates that would eliminate the racial disparity in stops, arrests, and jail and prison admissions. In short, there is no theory of penal rule change that will erase these margins.

This Article does not adopt the abolitionist’s normative position.<sup>85</sup> The abolitionist’s explanation of the racial disparity in penal outputs, while critically important to a full understanding of racial inequity in contemporary penal administration, does not in and of itself justify the dissolution of the system. This is largely because African Americans hold important interests in penal administration apart from eliminating the racial disproportionality in penal outputs. Nevertheless, the abolitionist’s causal theory of the case, which takes cumulative racial disadvantage as a primary driver of the racial disparity in penal outputs, should be central within a normative criminal

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*Id.* at 1278-79.

<sup>84</sup> Roberts, *Abolition Constitutionalism*, *supra* note 59, at 8.

<sup>85</sup> It instead normatively aligns with recent writings on the moral philosophy of punishment that recognize the state’s responsibility to protect members of the African American underclass from private violence. Given the state’s responsibility for the material disadvantages that drive criminal offending, it lacks a moral basis for condemning criminal disobedience. TOMMIE SHELBY, *DARK GHETTOS: INJUSTICE, DISSENT, AND REFORM* 244 (2016). Put succinctly, “[w]hen a society falls below the threshold for tolerable injustice and its governing institutions are responsible for the injustices (for either perpetrating them or not preventing them), the state’s *right to punish* crime is compromised.” *Id.* And yet, the state remains justified in enforcing the criminal law and applying criminal punishment. How so? How is criminal punishment of oppressed members legitimate under such manifestly unjust circumstances? Despite its morally compromised position, the state is responsible for protecting the vulnerable. In an unjust society, the state may not have the moral standing to condemn oppressed members for criminal violations that derive in substantial part from their oppression; but it can nevertheless legitimately punish deviant acts that warrant societal disapproval. “[I]f we separate *condemnation* of lawbreaking from *penalties* for lawbreaking,” Shelby argues, “then we can explain how punishment can be justified even when authority to punish disobedience to law and moral standing to condemn crime have both been lost.” *Id.* at 248.

Shelby’s philosophy of criminal punishment of the underclass does not serve to justify the modern criminal enforcement regime. It instead justifies what criminal-legal scholars increasingly reference as *criminal-law minimalism* where the state punishes “reluctantly,” only to prevent unjust and harmful aggression, recognizing that it may be partly at fault for these wrongs.” *Id.* at 249. Criminal law minimalism has been defined most prominently in the criminal-legal literature as a normative theory “under which there is still a penal system that has armed public law enforcement, punishment, and, for the time being, imprisonment as tools to deal with social harm.” Langer, *supra* note 62, at 57.



justice reform literature that genuinely seeks racial equity in crime governance.

C. *A Two-Part Framework for the African American Liberty Interest in Penal Administration*

The criminal justice reform project can address its credibility gap in relation to the abolition project by reimagining the African American liberty interest in penal administration. The African American liberty interest should be considered a function of two parts: (i) the degree of racial bias in criminal procedure; and (ii) the degree to which African American penal outputs (as function of criminal procedure) are disproportionate to the group's population share. On the second count, scholars, activists, and politicians at various levels of government are quick to reference the racial disparity in stops, arrests, and rates of imprisonment, and to call for the elimination of racial targeting. But few, if any, have called for a racial proportionality principle. This Section proposes such a principle.<sup>86</sup>

The procedural justice literature is a helpful framing device for further articulation of the proportionality principle. Research in social psychology finds that individuals are more likely to comply with the law when they believe criminal procedures to be fair.<sup>87</sup> While favorable penal outcomes

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<sup>86</sup> When presenting this Article, I frequently encountered skeptics who asked whether the racial proportionality principle regarding penal outputs should be taken seriously. Well, sort of. A racial proportionality principle is a daunting and seemingly impractical normative proposition for reasons detailed in Parts II and III. Yet, it seems a moral imperative and relevant to the conception of equity in penal administration given that the various mechanisms producing the Black–White disparity in penal outputs can reasonably be considered a function of the nation's history of African American subjugation.

The skeptics' second question is whether the principle should be applied to all racial groups. Though this Article discusses racial proportionality in penal outputs with an eye on the African American population, it seems the principle might reasonably be extended to any racial or ethnic group grossly overrepresented in stops, arrests, convictions, and jail and prison admissions, when the output disparity can readily be traced to structural racism or its sociological equivalent.

<sup>87</sup> In general, people consider four primary factors in their determination of whether they have been subject to fair process: (1) whether authorities listen to the public in the process of creating public policy; (2) whether the public possesses information that will allow for an assessment of whether the law is fairly enforced; (3) a general sense that law enforcers are attentive to the needs and concerns of individuals and communities; and (4) the individual's specific sense that he or she has been treated with respect and with regard for individual rights in the context of a discrete encounter. See Tracey Meares, *Policing and Procedural Justice: Shaping Citizens' Identities to Increase Democratic Participation*, 111 NW. U. L. REV. 1525, 1531 (2017) (setting forth these four factors) [hereinafter Meares, *Procedural Justice*]; Tom R. Tyler & Steven L. Blader, *The Group Engagement Model: Procedural Justice, Social Identity, and Cooperative Behavior*, 7 PERSONALITY & SOC. PSYCH. REV. 349, 351 (2003) (comparing Models of Procedural Justice by considering the focus of people's concerns); TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* 6 (2006) ("The effect of people's ethical attitudes on their behavior would be especially striking if there were a two-stage process, with people's judgments about the justice or injustice of their experience affecting their views about the

would seem the most promising way to achieve future legal compliance, studies consistently undermine this conclusion.<sup>88</sup> Perception of fair process is more important to achieving compliance than the perception of fair outcomes.<sup>89</sup> The procedural justice project thus aligns with the first of this Section's two-part conceptualization of the African American liberty interest. Identical to the first part, the procedural justice project pursues fair process and as a result targets, among other obstacles to fair process, racial bias in criminal procedure.

To establish the second part of the liberty interest, the part attentive to penal outputs, a clear distinction must be drawn between normative projects that seek to reduce the racial disparities in penal outputs and a normative "horizon" (to borrow a term often used by penal abolitionists<sup>90</sup>) that seeks to eliminate these disparities. A criminal justice reform agenda expressly aspiring to racial equity in criminal procedure but tolerant of the racial disparities in this troubled field of public administration misrepresents its aims. This is not to make the perfect the enemy of the good—to dismiss the considerable value of the criminal justice reform project apart from the proposed racial proportionality principle. It is instead to argue for a more honest rendering of the maximum utility of conventional reform within the larger pursuit of racial equity in criminal procedure.<sup>91</sup>

Even after establishing the racial proportionality principle as necessary to the achievement of racial equity in criminal procedure, questions remain. What is racial proportionality in criminal procedure exactly? How should we shape proportionality as a principle and standard? The notion that the various governments of the U.S. incarcerate too many people of African descent has been accepted by politicians, pundits, and bureaucrats across the political

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legitimacy of the authorities, and these views in turn shaping compliance with the law."'). The first part of the two-part framework aligns most closely with the fourth of these proposed elements of fair process.

<sup>88</sup> Meares, *Procedural Justice*, *supra* note 87, at 1531 ("Decades of research support the conclusion that, when people are making evaluations about the authorities they encounter, fair treatment matters much more than favorable outcomes or the effectiveness of authorities at combatting crime."); Tom R. Tyler, *From Harm Reduction to Community Engagement: Redefining the Goals of American Policing in the Twenty-First Century*, 111 NW. U. L. REV. 1537, 1539 (2016) ("Research findings indicate that the police have the capacity to play such a role . . . of creating and maintaining legitimacy.").

<sup>89</sup> To be clear, it is not that procedural justice scholars believe comparable outputs to be unimportant, only that that on the narrow question of legal compliance and citizen cooperation in criminal enforcement, it is the perception of fair process that matters most.

<sup>90</sup> Amna Akbar, *An Abolitionist Horizon for Police Reform*, 108 CALIF. L. REV. 1781, 1783 (2020).

<sup>91</sup> Of note, a normative theory that includes racially proportionate penal outputs in the conceptualization of racial equity in criminal procedure is a theory that establishes a high bar for the reform movement, one that likely necessitates direct and continuous engagement with the scale of material racial inequality. See discussion *infra* Part III.

spectrum.<sup>92</sup> The problematic quality of disproportionate African American incarceration may therefore, at first glance, seem obvious, if not painfully so. But there is value in basing this conclusion on sound analytical footing rather than mere platitudes. *How many African Americans should be in prison? When does the rate of African American imprisonment cross the line between a just circumstance and an unjust one?* It would seem that the answer to these questions should be based on a point of reference. For instance, in establishing the penal system as a primary site for racial injustice it seems plainly inadequate to merely observe that  $x$  percentage of African American men have a criminal record, reside in jail or prison, or are victim to violent crime. These statistics must relate to a base rate, one that contextualizes the same rate for African American men. The goal, of course, is to establish a non-discriminatory baseline, if we understand “discriminatory” to indicate the impact of both racial bias and structural racial disadvantage. Under this reasoning, the proposed framework for racial equity in criminal procedure—an effort to bolster the credibility of the criminal justice reform agenda as it pertains to race—sets the White rate of exposure to criminal procedure (stops, arrests, prison sentencing) as the primary reference point. The proportionality principle is therefore based on an objective benchmark and informed by the nation’s racial history. It is, moreover, responsive to the concern among abolitionists that racially disparate outputs represent a discrete harm.

The principle also pushes the reform platform beyond the question of racial discrimination in criminal procedure and beyond generic and de-contextualized claims regarding African American penal outputs such as the contention that the African American rate of imprisonment is “too high.”<sup>93</sup> To establish a credible framework for state accountability, such claims of racial harm must be coupled with a normative standard.

## II. THE CONFLICT AMONG AFRICAN AMERICAN PENAL INTERESTS

The African American interest in eliminating the racial disparity in penal outputs shows a degree of tension with the group’s interest in state protection

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<sup>92</sup> In recent years, many Republicans have decried the mass incarceration of African Americans, including two former Speakers of the House. See Nicole Orttung, *What Some Republicans are Saying about Race and Criminal Justice Reform*, CHRISTIAN SCI. MONITOR (July 18, 2016), <https://www.csmonitor.com/USA/Politics/2016/0718/What-some-Republicans-are-saying-about-race-and-criminal-justice-reform> [https://perma.cc/9QLA-EFQ6] (showing how some Republican politicians acknowledge the disparate impact the U.S. criminal justice system has on Black people).

<sup>93</sup> Without an accompanying normative standard, the claim does little to establish a framework for accountability.

from private violence<sup>94</sup> as well as its interest in exercising greater collective influence over penal institutions. Turning from the African American interest in racially proportionate penal outputs posed in Part I, this Part sets this interest next to the African American *security interest* and the African American *democratic interest*. It argues that the three interests lie in tension and that this tension shows a historical arch. While the African American liberty, security, and democratic interests in penal administration were generally aligned post-Reconstruction, the alignment broke down as the criminal threat of primary concern to African Americans shifted over the course of the twentieth century, from White racial violence to street violence. Recognition of the historical alignment of these various interests and their misalignment in recent decades helps to explain the breach in the normative criminal-legal literature between the penal reform project and the penal abolition project (and, for that matter, between Butler and Kennedy). Each side ultimately fails to properly account for each of the primary African American interests in penal administration as well as the tension among these interests.

#### A. Primary African American Interests in Penal Administration

In the article, “Living While Black,” two African American criminologists reported the results of a study designed to reveal the most stressful aspects of the African American life experience.<sup>95</sup> The researchers referenced earlier studies showing that “Black skin” assigns a social cost and labeled this condition, in keeping with the article title, “living while Black.”<sup>96</sup>

Taking a standard methodological approach, the researchers sought to test the impact of several stress factors on the quality of African American life as

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<sup>94</sup> Meares, *Policing in the 21st Century*, *supra* note 6, at 5 (wanting “policing that recognizes that people desire to be kept safe from each other” as well). The African American interest in physical security from private violence has been explored in considerable depth in recent public-facing scholarship. See Forman, *supra* note 49, at 51 (discussing how “even the ‘tough’ kids seek safety and security” when considering violence in schools). The subject has also been probed in historical scholarship produced outside of the legal academy. See MICHAEL JAVEN FORTNER, *BLACK SILENT MAJORITY: THE ROCKEFELLER DRUG LAWS AND THE POLITICS OF PUNISHMENT* 170 (2015) (“[M]any working- and middle-class African Americans did not consider police brutality a greater concern than crime.”). For an earlier generation of criminal procedure scholarship, see Tracey L. Meares & Dan M. Kahan, Foreword, *The Coming Crisis of Criminal Procedure*, 27 ANN. REV. CRIM. PROC. 1153, 1154 (1998) (arguing that the civil liberties groups that are bringing police harassment cases on behalf of the inner city minorities’ rights are opposed by the same minority residents) [hereinafter Meares & Kahan, *The Coming Crisis*].

<sup>95</sup> Shaun L. Gabbidon & Steven A. Peterson, *Living While Black: A State-Level Analysis of the Influence of Select Social Stressors on the Quality of Life Among Black Americans*, 37 J. BLACK STUDS. 83, 84 (2006) (characterizing stress as the “anger, anxiety, and frustration” that arises when a person feels that her resources cannot meet the demands of a given situation (internal citation omitted)).

<sup>96</sup> *Id.* at 84.

indicated by a quality of life index. The index was a composite of three state-level dependent variables: chronic drinking problems, suicide rate, and years of life lost before age seventy-five.<sup>97</sup> Among the independent variables were the percentage of nonelderly uninsured, the sales and receipts of African American owned businesses, the poverty level, and the African American infant mortality rate.<sup>98</sup> The study also tested the impact of two variables relevant to penal administration: the total number of African American state prisoners (divided by the number of African Americans in the given state) and African American homicide deaths per 100,000.<sup>99</sup> Thus, to investigate the quality of African American life in the contemporary U.S., the researchers considered as explanatory variables both the scale of African American imprisonment and the state's ability to protect African Americans from lethal private violence. At no point did the article take the additional step of relating the two variables theoretically, though most people in state prison are admitted on a serious violent criminal offense.<sup>100</sup> In this sense, the methodological structure of the study itself begs a question. If African American violent crime victimization and the rate of African American incarceration are both likely to diminish the quality of African American life, but incapacitation often presents as a reasonable and arguably necessary response to serious violent crime,<sup>101</sup> how should the African American community think about its core interests in the penal system?

Table 1: Primary African American Interests in Penal Administration

The Liberty Interest	The Security Interest	The Democratic Interest
Racially-unbiased criminal procedures	State protection from private violence	Political influence over penal institutions
Racially-proportionate penal outputs		Representation within penal institutions

<sup>97</sup> *Id.* at 93-94.

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> See PFAFF, *supra* note 48, at 34. (“[I]n the absence of pretextual drug charges, some of those convicted of drug crimes would have been convicted of more serious violent crimes, and thus likely would have spent more time in prison.”); see also Ben Grunwald, *Toward an Optimal Decarceration Strategy*, 33 STAN. L. & POL’Y REV. 1, 20 (2022) (“[S]tate prisons . . . together house roughly 80% of all adults serving time for criminal convictions in the United States.”).

<sup>101</sup> To be clear, the conditions of jail and prison incarceration in the contemporary United States are, in the view of this author, manifestly inhumane. But rather than address the specific conditions of incapacitation, this discussion pertains narrowly to its relative frequency across racial groups.

### 1. The Security Interest

Among the primary interests in criminal justice is physical security from private violence. In an essay questioning the conventional understanding of “public security,” Tracey Meares defines security as having two prongs: security against “private predation” and security against government overreach such that people are “free from government repression.”<sup>102</sup> Meares contends that different from police, the public considers public safety to be both the absence of crime *and* the appropriate use of force by police.<sup>103</sup> Under this alternative conceptualization, police brutality would present as a security threat.<sup>104</sup> Moreover, African Americans would presumably be uniquely invested in this conceptual shift given evidence of racially-disparate application of force by police.<sup>105</sup> The grim fact that one in every 1,000 African American men will be the victim of police homicide establishes the point:<sup>106</sup> for African Americans physical security has both a private and public dimension.

Other sociolegal scholars have also called for a more capacious conception of security such that the state’s role in protecting the public from private violence is not reduced to policing and criminal punishment.<sup>107</sup> If the concept

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<sup>102</sup> Meares, *Policing in the 21<sup>st</sup> Century*, *supra* note 6, at 5. For a broad theoretical treatment of the concept of violence in criminal law, see generally Alice Ristroph, *Criminal Law in the Shadow of Violence*, 62 ALA. L. REV. 571 (2011) and DAVID SKLANSKY, A PATTERN OF VIOLENCE: HOW THE LAW CLASSIFIES CRIMES AND WHAT IT MEANS FOR JUSTICE (2021).

<sup>103</sup> See Meares, *Policing in the 21<sup>st</sup> Century*, *supra* note 6, at 4 (noting that despite overall reductions in crime, public support for the police has remained flat).

<sup>104</sup> *Id.* at 5 (“We need a mission statement for policing that recognizes that people desire to be kept safe from each other (security against private predation), as well as be free from government repression (security against government overreach). *And* that the pursuit of both is not a zero-sum game.”).

<sup>105</sup> See Roland Fryer Jr., *An Empirical Analysis of Racial Differences in Police Use of Force*, 127 J. POL. ECON. 1210, 1213 (2019) (revealing that Blacks and Hispanics are more than fifty percent more likely to experience some form of force in interactions with police).

<sup>106</sup> Frank Edwards, Hedwig Lee & Michael Esposito, *Risk of Being Killed by Police Use of Force in the United States by Age, Race—Ethnicity, and Sex*, 116 PROC. NAT’L ACAD. SCIS. 16793, 16794 (2019). Police homicide is one of the leading causes of death for African American men. Bell, et al., *supra* note 6, at 1307; see also Josiah Bates & Karl Vick, *America’s Policing System Is Broken. It’s Time to Radically Rethink Public Safety*, TIME (Aug. 17, 2020, 5:31 PM), <https://time.com/5876318/police-reform-america/> [<https://perma.cc/G67N-YUKJ>] (noting that Black persons are three times as likely as White persons to be murdered by police).

<sup>107</sup> See Ben A. McJunkin, *Ensuring Dignity as Public Safety*, 59 AM. CRIM. L. REV. 1643, 1645 (2021) (“[A] sufficiently capacious conception of public safety is one that requires the government to provide basic necessities to struggling citizens, not merely protect them from external harms. By failing to view public safety through this broader lens, we miss that we all too frequently ask the police to perform jobs for which they are ill-suited.”); see also Bell et al., *supra* note 6, at 1305-06 (arguing that public safety as a concept should be broadened from a focus on criminal victimization “to also include harmful actions that generally fall outside standard criminal statutes and reporting

of “security” were expanded such that it encompassed harms apart from criminal victimization—“absentee landlords, industrial polluters, predatory financial institutions”<sup>108</sup>—the state would be better positioned to get to the root causes of private violence.<sup>109</sup>

The idea of broadening the concept of security has its skeptics. Some argue that the theoretical move—to “richer” notions of security that incorporate other forms of wellbeing—serves to pivot from the specific issue of individual safety from private violence.<sup>110</sup> In this sense, a new, more expansive conception of security is thought to obscure the inevitable tradeoffs between “liberty” and state protection from private violence in the context of public administration.<sup>111</sup> The alternative is to preserve a more conventional conception of security based on the physical safety of individuals within the sphere of private life.<sup>112</sup> Here, security might be considered “self-preservation” that facilitates “living out the time, which Nature ordinarily alloweth men to live.”<sup>113</sup>

This narrower characterization of security is sometimes assigned a subjective element, in which case, security also pertains to “assurance.”<sup>114</sup> If theorized along this line, security is not achieved merely by objective measures. It also requires the public’s subjective belief in its own protection from private violence. In the absence of this specific subjectivity, the state has not achieved security.<sup>115</sup> Criminological theorists have offered similar conceptual treatments, presenting security as, in part, the absence of concerns—legitimate or not—about one’s physical safety.<sup>116</sup>

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procedures, as well the various injuries perpetrated by state bureaucracies, private companies, and those who may have little to no direct presence in affected communities”).

<sup>108</sup> Bell et al., *supra* note 6, at 1306.

<sup>109</sup> *See id.* (“Arguments centering on the logic of safety production typically seek to decouple the taken-for-granted relationship between public safety and criminal justice, as enforced by police. This entails a broadening of the very conception of public safety beyond the current, narrow focus on criminal victimization . . .”).

<sup>110</sup> *See* Jeremy Waldron, *Safety and Security*, 85 NEB. L. REV. 454, 461-62 (2006) (analyzing the tradeoff between liberty and security).

<sup>111</sup> *Id.* at 461.

<sup>112</sup> *Id.*

<sup>113</sup> *Id.* at 458.

<sup>114</sup> *Id.* at 469.

<sup>115</sup> Waldron suggests security additionally requires protection of “modes of life,” protecting the quality of life as it relates to physical movement apart from protection of the physical body. *Id.* at 466.

<sup>116</sup> *Id.* at 470-71 (“It is not enough that we turn out to be safe. We are not really secure unless we have an *assurance* of safety. We need that assurance because we want not only to *have* our lives and limbs but to *do* things with them, make plans and pursue long-term activities to which an assurance of safety is integral.”). In this sense, if the state has achieved the physical safety of individuals, but those individuals must abandon conventional modes of living in order to preserve physical safety, security has not actually been realized. As Zygmunt Bauman writes,

The forthcoming discussion adopts the conventional conception of security. It defines security as *physical safety from private violence* as part of an effort to relate this specific interest to the African American liberty interest and the African American democratic interest in the field of penal administration.<sup>117</sup>

## 2. The Democratic Interest

African Americans also hold a democratic interest in criminal justice, no different from other racial and ethnic groups. This Article conceptualizes the democratic interest in penal administration in two parts: as an interest in exercising political influence over penal institutions by way of the democratic process, and an interest in bureaucratic representation within these same institutions. The forthcoming discussion explains the democratic interest in a bit more detail. It then turns to the question of the degree to which the African American democratic interest lies in tension with the liberty interest.

To say that African Americans have a democratic interest in penal administration is merely to suggest that African Americans stand to benefit from exercising more influence over penal institutions. When this interest is identified within public discourse it is sometimes described as an interest in

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It is perhaps a happy coincidence for political operators and hopefuls that the genuine problems of insecurity and uncertainty have condensed into the anxiety about safety; politicians can be supposed to be doing something about the first two just because being seen to be vociferous and vigorous about the third.

ZYGMUNT BAUMAN, *GLOBALIZATION: THE HUMAN CONSEQUENCES* 117 (1998). See generally EVI GIRLING, IAN LOADER & RICHARD SPARKS, *CRIME AND SOCIAL CHANGE IN MIDDLE ENGLAND: QUESTIONS OF ORDER IN AN ENGLISH TOWN* 170 (1999) (“We *do* want to insist, however, that people’s worries and talk about crime are rarely merely a reflection of behavioral change and ‘objective’ risk (though they represent lay attempts to make sense of such changes and risks), but are also ‘bound up in a context of meaning and significance, involving the use of metaphors and narratives about social change’ . . . . [C]rime works in everyday life as a cultural theme and token of political exchange . . . it serves to condense, and make intelligible, a variety of more difficult-to-grasp troubles and insecurities—something that tends to blur the boundary between worries about crime and other kinds of anxiety and concern.”).

<sup>117</sup> This conception will be unsatisfying to some readers given that it excludes security from police violence. This exclusion is convenient for analytical purposes but can also be justified on the grounds that its inclusion does not change the Article’s conclusion, namely, that these various penal interests lie in tension and a credible theory of racial equity in penal administration must propose a plan by which to overcome these tensions and advance these various interests concurrently.



democratic criminal justice<sup>118</sup> or community control of police.<sup>119</sup> I have argued in other work that the value of democratic crime governance is sometimes overestimated within the larger project of penal reform, particularly relative to substantive change in crime policy itself.<sup>120</sup> Put another way, the criminal justice reform movement should prioritize the ends of policy reform over the means.<sup>121</sup> But this specific ranking of reform principles should not be taken to dismiss entirely the interest marginalized social and political groups have in exercising influence over the crime policymaking process. The African American community, for instance, holds a discrete interest in exercising influence over the process of crime policy formulation, an interest based on the value of self-determination. It is a freestanding interest that exists independent of its consequences, which is to say, independent of the quality of governance flowing from self-rule or majoritarian policy preferences.<sup>122</sup>

Criminal–legal scholars have long been attentive to the democratic interest held by the poor and working-class African American neighborhoods

<sup>118</sup> Joshua Kleinfeld offers a helpful definition of democracy in relation to criminal justice:

“Democracy” as we use that term in the movement to democratize criminal justice refers to a form of criminal law and procedure that is responsive to the laity rather than solely to officials and experts; that cares about prudential, equitable, and individualized moral judgment rather than merely formal rule compliance and technical expertise; that is more value rational than instrumentally rational; that submits the law and administration of criminal justice to public deliberation and to the values embedded in the way we live together as a culture, rather than treating it mainly as a tool of social management under the control of our institutional bureaucracies . . . .

Joshua Kleinfeld, *Manifesto of Democratic Criminal Justice*, 111 NW. U. L. REV. 1367, 1397 (2017).

<sup>119</sup> Jocelyn Simonson summarizes this concept:

Local activists focused on police violence have in recent years returned to ideas of “community control of the police” as a way to approach large-scale reform of police departments. Unlike policies associated with traditional notions of community policing—such as civilian review boards that recommend discipline of individual officers or civilian advisory boards that make nonbinding resolutions—the idea of community control as articulated by these activists requires ‘civilian’ controlled bodies with the power to set binding policies and priorities of police departments.

Simonson, *Police Reform Through a Power Lens*, *supra* note 6, at 813–14 (2021). See also K. Sabeel Rahman & Jocelyn Simonson, *The Institutional Design of Community Control*, 108 CALIF. L. REV. 679, 681 (2020) (describing democratic governance and community control).

<sup>120</sup> See Trevor G. Gardner, *By Any Means: A Philosophical Frame for Rulemaking Reform in Criminal Law*, 130 YALE L.J.F. 798, 806 (2021) (explaining that community-based crime policymaking delivers a range of outcomes with varying values) [hereinafter Gardner, *By Any Means*]. For a more expansive argument along the same lines, see John Rappaport, *Some Doubts About “Democratizing” Criminal Justice*, 87 U. CHI. L. REV. 71, 716–17 (2020).

<sup>121</sup> See Gardner, *By Any Means*, *supra* note 120, at 800 (arguing that crime policy transformation should be a priority over an egalitarian process).

<sup>122</sup> See Rahman & Simonson, *supra* note 119, at 681–82 (explaining the interest of Black communities in community control over policing regardless of its consequences).

often subject to both high rates of crime and police abuse.<sup>123</sup> The literature on democracy and penal administration has generally held that more democracy in crime governance translates to better crime governance.<sup>124</sup> Democratic crime governance, then, is not merely about self-rule; it is also about conveying influence to the lay citizens who are presumed to be best situated to design the crime policy to which they will be subject.<sup>125</sup> But the way democratization cuts is uncertain. Long ago, the “democratizers”<sup>126</sup> of the criminal–legal literature sought to convey more influence over crime governance to minority communities with the expectation that these communities would opt into a more aggressive criminal law enforcement regime, one capable of addressing the high rate of crime in a given neighborhood community.<sup>127</sup> More recently, though, democratizers have anticipated that more democracy will deliver just the opposite. Reformers calling principally for more democracy in crime governance now press the democracy principle to empower minorities to relieve themselves of law enforcement aggression.<sup>128</sup>

Indian sovereignty as it relates to criminal jurisdiction serves as a helpful analogy by which to clarify the African American democratic interest in penal administration. The analogy is flawed from a legal standpoint, but helpful in conveying the nature of the democratic interest in penal administration as articulated in this Article, and its tension with other interests in the penal

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123 See Tracey L. Meares & Dan M. Kahan, *The Wages of Antiquated Procedural Thinking: A Critique of Chicago v. Morales*, 1998 U. CHI. LEGAL F. 197, 198 (describing how inner city communities have a democratic interest in innovative community policing measures). For more recent iterations of this argument, see Rahman & Simonson, *supra* note 119, at 683. The contrast between the respective substantive policy objectives of Meares and Kahan and Rahman and Simonson suggests the unpredictable effects of conveying more policymaking power to racial minorities.

124 See, e.g., WILLIAM J. STUNTZ, *THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE* 7-8 (2011); BARRY FRIEDMAN, *UNWARRANTED: POLICING WITHOUT PERMISSION* 16 (2017); Rahman & Simonson, *supra* note 119, at 681-82; Joshua Kleinfeld, *Three Principles of Democratic Criminal Justice*, 11 NW. U. L. REV. 1455, 1456 (2016).

125 But see RACHEL BARKOW, *PRISONERS OF POLITICS: BREAKING THE CYCLE OF MASS INCARCERATION* 14-15 (2019) (explaining that citizens often make myriad mistakes when designing laws and policies related to crime); Rappaport, *supra* note 120, at 716-17 (arguing that empirical evidence shows that greater democratic participation in criminal justice leads to worse outcomes); Gardner, *By Any Means*, *supra* note 120, at 806 (“[I]t seems only prudent to remain agnostic, equivocal, and instrumentalist (rather than ideological or fundamentalist) as to the value of democratic or microdemocratic crime-policymaking process.”).

126 Rappaport, *supra* note 120, at 716 (coining the term “democratizers”).

127 Meares & Kahan, *The Coming Crisis*, *supra* note 94, at 1154 (“In numerous cases, courts have invalidated new community policing strategies on the ground that they involve excessive police discretion. Although the civil liberties groups that have brought these cases purport to be enforcing the rights of inner-city minorities to be free from police harassment, their suits are frequently opposed by minority residents themselves.”).

128 Rahman & Simonson, *supra* note 119, at 681.

field. As a collective, Indian tribes have an interest in extending criminal jurisdiction over anyone that commits a crime on tribal land. Indian scholars have described this interest as “one of the most important incidents of sovereignty[,]”<sup>129</sup> making self-governance in the field of penal administration a critical group interest irrespective of the quality of the individual criminal rights regime in tribal criminal courts. It could be that certain tribes extend fewer criminal rights than their U.S. counterpart or treat defendant-subjects more harshly as a general matter. For tribal members, the democratic interest and the liberty interest, as conceived above, would, in such circumstances, lie in tension. The prospect of such an interest tension is entirely consistent with the notion that marginalized social groups have a general interest in self-governance. The African American racial group is no exception.

The second part of the two-part democratic interest pertains to institutional representation. In addition to the African American interest in exercising greater political influence over penal institutions is an interest in expanding African American representation in the same institutions. Contemplating the general character of this normative interest, public policy scholars developed *representative bureaucracy theory* as a framework by which to assess the value of diversity in public administration.<sup>130</sup>

Donald Kingsley introduced the term “representative bureaucracy” in 1944 as part of an effort to facilitate the transition of governing authority from the English aristocracy to a system of public administration that could be credibly characterized as democratic rule.<sup>131</sup> Kingsley was principally concerned with the quality of class representation within England’s public institutions and argued that the pursuit of democratic legitimacy required nothing less than the proportionate representation of the working class.<sup>132</sup>

In conceptualizing the second of the two-part democratic interest, this Article similarly proposes that African Americans have an interest in having African American group members serve as representatives in penal institutions. This interest is a bit different than the more general interest society holds in maintaining diversity among the bureaucrats serving in

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<sup>129</sup> Addie C. Rolnick, *Tribal Criminal Jurisdiction Beyond Citizenship and Blood*, 39 AM. INDIAN L. REV. 337, 338 (2014-15).

<sup>130</sup> See Vicky M. Wilkins & Brian N. Williams, *Black or Blue: Racial Profiling and Representative Bureaucracy*, 68 PUB. ADMIN. REV. 654, 660-61 (2008) (examining the effect of Black bureaucrats on improving outcomes for Black people they regulate).

<sup>131</sup> J. DONALD KINGSLEY, REPRESENTATIVE BUREAUCRACY (1944); see also Norma M. Riccucci, Gregg G. Van Ryzin & Huafang Li, *Representative Bureaucracy and the Willingness to Coproduce: An Experimental Study*, 76 PUB. ADMIN. REV. 121, 121-22 (2016) (describing the evolution of the theory of representative bureaucracy since its proposal by Kingsley in 1944).

<sup>132</sup> KINGSLEY, *supra* note 131, at 1013-1014; see also Norma M. Riccucci & Greg G. Van Ryzin, *Representative Bureaucracy: A Lever to Enhance Social Equity, Coproduction, and Democracy*, 77 PUB. ADMIN. REV. 21, 21 (2016).

public administration. The societal interest in diversity in public administration is a broad interest that conveys, in part, the benefits associated with incorporation of the African American life perspective. Alternatively, the African American interest in African American representation in penal institutions is based on value narrowly conveyed to racial group members. African American representation in penal administration holds symbolic value for group members in that it shows Africans Americans to be full citizens as indicated by their meaningful participation in public governance. The interest in bureaucratic representation is also substantive in that group members are thought to be more likely than their non-Black counterparts to serve idiosyncratic racial peer group interests by way of their position within the institution.

The democratic interest as defined in the forthcoming analysis should thus be understood as an interest advanced either through the expansion of African American political influence over crime policy as exercised by African American individuals and groups external to penal institutions, or, alternatively, by African American representation in penal administration.

### B. *Conflicts*

This Article principally argues that African American liberty, security, and democratic interest lie in tension within contemporary penal administration. To establish the emergence of a conflict among these penal interests, this Section begins with a sketch of the African American public security narratives arising just after the fall of Reconstruction. It then turns again to Randall Kennedy's claim in the mid-1990s of state underenforcement of the criminal law in African American neighborhood communities. Among other points, Kennedy argued a link between the White racially motivated violence of the post-Reconstruction era and the African American intraracial street violence of the 1980s and 90s.<sup>133</sup> This Section observes, first, that Kennedy's theory regarding the historical arch of African American criminal victimization rightly captured the precarity of the African American life experience over the past century; and second, that his theory missed something important. Specifically, it ignored as a racial equity matter the rising racial inequality in penal outputs. This point is not meant as a criticism of Kennedy's work with the benefit of nearly three decades of hindsight. Rather, it is to suggest that Kennedy's underenforcement thesis (and responsive criticisms of the thesis) provides a useful prism by which to consider this Article's claim of tension among the African American liberty, security, and democratic interests in penal administration. The

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<sup>133</sup> See generally RANDALL KENNEDY, RACE, CRIME, AND THE LAW 29-75 (1997).

underenforcement debate also serves to demonstrate how critical African American interests in penal administration tend to get lost within the normative criminal-legal literature. The unease that accompanies careful consideration of any one of these interests may work to obscure or diminish the value of the others.

1. The Security Interest and the Interest in Racially Proportionate Penal Outputs

If we take the security interest to represent state protection from private violence and the liberty interest to relate not merely to the law of criminal procedure or the execution of criminal procedures, but also to the sheer number of penal outputs in the form of stops, arrests, and prison admissions, we gain a much better sense of the range of African American interests in the field of penal administration. These interests show a historical arch that complicates normative theorizing of racial equity in penal administration. Next to the rank racial oppression evident in drug enforcement, capital punishment, and instances in which African Americans are subject to police brutality is the extraordinary level of private violence to which members of the African American underclass are subject. Kennedy was not wrong in arguing that African American violent crime victimization shows an underappreciated historical arch and represents a longstanding form of state neglect.

- a. *State Protection from Racial Violence*

The state's inability or unwillingness to protect African Americans from private violence is central to the founding of the National Association for the Advancement of Colored People (NAACP). The book, *Freedom's Sword*, offers an origin story of the NAACP that begins with the lynching of a man identified as Sam Hose.<sup>134</sup> Hose had traveled from rural Georgia to Atlanta in search of work, leaving behind his mother and a mentally disabled brother, both of whom Hose supported financially.<sup>135</sup> He had been hired onto the

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134 GILBERT JONAS, *FREEDOM'S SWORD: THE NAACP AND THE STRUGGLE AGAINST RACISM IN AMERICA, 1909-1969* 2, 7-8 (2005). One scholar analyzing the political fallout from Hose's murder within religious circles finds that "Sam Hose" was a pseudonym and that the victim's name was Samuel Wilkes. See Darren E. Grem, *Sam Jones, Sam Hose, and the Theology of Racial Violence*, 90 GA. HIST. Q. 35, 35 (2006).

135 JONAS, *supra* note 134, at 7. Paul Butler references this work in commenting on the link between African American criminal victimization and civil rights:

The NAACP began as a response to the domestic terrorism of rampant lynchings, which were mainly in the South but all over the country. Most of the victims were African-American but there were Latino, Jewish, and immigrant victims as well. Thus,

plantation of a White farmer and worked in this capacity for several months. At some point, Hose and the farmer ended up in a dispute over the terms of Hose's employment that turned physical.<sup>136</sup> The employer held a pistol, Hose an axe. Hose killed the employer. A detective, described as an independent investigator in one historical account, found that the killing was in self-defense, a response to the farmer pointing a gun at Hose.<sup>137</sup>

At the time, perhaps not so different from today, local newspapers routinely stoked White fear of African Americans. It was in this spirit that Atlanta newspapers published articles alleging that Hose had crushed the farmer's skull and raped his wife in front of the couple's children.<sup>138</sup> To call what happened in the wake of these reports a lynching would not do justice to the facts.<sup>139</sup> In a review of the arch of the racial lynchings of the Post-Reconstruction era, Lawrence Friedman briefly summarizes the assault:

Sam Hose, accused of killing a white man, was lynched in 1899, before a huge crowd near Newman, Georgia. His ears, fingers, and genitals were cut off; his face was skinned; he was soaked with kerosene, and set on fire while still alive; afterward, his body was cut to pieces and his bones crushed; some bits were sold as souvenirs. Nobody in the crowd was masked, and leading citizens took part in this horrible ritual.<sup>140</sup>

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the main race and crime problem, as identified by the first significant civil rights organization was black victimization by white criminals.

Butler, *One Hundred Years*, *supra* note 15, at 1043-44.

<sup>136</sup> Jonas, *supra* note 134, at 7.

<sup>137</sup> Grem, *supra* note 134, at 43.

<sup>138</sup> *Id.*

<sup>139</sup> JONAS, *supra* note 134, at 7-8.

<sup>140</sup> LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 487 (4th ed. 2019). Friedman notes that White mob lynchings were commonplace between the 1880s and 1940s with 4,700 lynchings. African Americans were the victims in seventy-three percent of these killings. Notably, four of five lynchings occurred in the South, where the African American portion of victims rose to eighty-three percent. *Id.* at 486-87.

After recounting Hose's murder, Friedman situates lynching within the context of the racial distribution of political power in the region:

White supremacy in the deep South was total, as a matter of governance. Blacks had zero political power. The Constitution guaranteed the right to vote; this was the direct command of the Fifteenth Amendment. But these were empty words. In fact, black southerners, after the end of Reconstruction, were stripped of this right, through one device or another.

*Id.* at 487. The political context Friedman offers is significant to this Article's consideration of African American interests in penal administration as it suggests that the lynchings of the late 19<sup>th</sup> and early 20<sup>th</sup> centuries were at least in part the product of a close correlation between the African American democratic interest and the African American security interest. Another account shows 171 recorded lynchings between 1927 and 1946, 160 of which occurred in the former Confederacy.

In his book, *Dusk of Dawn: An Essay Toward an Autobiography of a Race Concept*, W. E. B. Du Bois addresses Hose's brutal murder in relation to his early intellectual aspirations.<sup>141</sup> As a young scholar, Du Bois had been convinced that the "Negro problem" was a function of a collective stupidity (Du Bois's words) in the U.S. regarding race and that this affliction could be effectively addressed through scientific investigation and reporting.<sup>142</sup> In Du Bois's own words:

At the very time my studies were most successful, there cut across this plan which I had as a scientist, a red ray which could not be ignored . . . [A] poor Negro in central Georgia, Sam Hose, had killed his landlord's wife. I wrote out a careful and reasoned statement concerning the evident facts and started down to the *Atlanta Constitution* office . . . I did not get there. On the way news met me: Sam Hose had been lynched, and they said that his knuckles were on exhibition at a grocery store farther down on Mitchell Street, along which I was walking. I turned back to the University. I began to turn aside from my work.<sup>143</sup>

Responding to this biographical account, scholars note that Du Bois's work in the aftermath of the Hose murder had two dimensions: race scholarship and political organizing.<sup>144</sup> In 1905, Du Bois led a group of thirty African American professionals and leaders who formed a loose-knit civil rights organization called the Niagara Movement.<sup>145</sup> The organization dissolved prematurely, but former members soon regrouped to publish a document referred to at the time as *The Call*.<sup>146</sup>

*The Call* was a manifesto of sorts, detailing Negro oppression across the United States and presenting a list of demands by which government would aggressively root out those responsible.<sup>147</sup> Chief among the demands was that the federal government address "the spread of lawless attacks upon the Negro, North, South, and West—even in the Springfield made famous by Lincoln—

NAOMI MURAKAWA, *THE FIRST CIVIL RIGHT: HOW LIBERALS BUILT PRISON AMERICA* 37 (2014).

<sup>141</sup> Thomas C. Holt, *Marking: Race, Race-making, and the Writing of History*, 100 AM. HIST. REV. 1, 3 (1995) (quoting W.E.B. DU BOIS, *DUSK OF DAWN: AN ESSAY TOWARD AN AUTOBIOGRAPHY OF A RACE CONCEPT* 51, 58, 67 (1940) [hereinafter DU BOIS, *DUSK OF DAWN*]).

<sup>142</sup> *Id.*

<sup>143</sup> DU BOIS, *DUSK OF DAWN*, *supra* note 141, at 34.

<sup>144</sup> See Holt, *supra* note 141, at 4 (celebrating Du Bois's race scholarship); JONAS, *supra* note 134, at 20 (explaining Du Bois's political organizing in the NAACP).

<sup>145</sup> JONAS, *supra* note 134, at 10.

<sup>146</sup> *Id.* at 11. See generally Mary White Ovington, *The National Association for the Advancement of Colored People*, 9 J. NEGRO HIST. 107 (1924) (overviewing the history of the NAACP and its formation).

<sup>147</sup> Ovington, *supra* note 146, at 109-11.

often accompanied by revolting brutalities.”<sup>148</sup> Ida B. Wells, at the time one of several anti-lynching activists gaining national prominence, framed the prospect of federal criminal enforcement action against lynchings as a question of whether the humanity of African Americans would be affirmed: “[L]awbreakers must be made to know that human life is sacred and that every citizen of this country is first a citizen of the United States and secondly a citizen of the state in which he belongs.”<sup>149</sup>

Signatories to *The Call* asked for a national conference regarding Negro welfare and it was this conference that produced the NAACP.<sup>150</sup> Though the NAACP is now attentive to various African American interests, the organization’s origin story is rooted in a desperate call for criminal enforcement. The murder of Sam Hose is thus helpful in theorizing the African American security interest in penal administration. It demonstrates

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<sup>148</sup> *Id.* at 110.

<sup>149</sup> MANNING MARABLE & LEITH MULLINGS, LET NOBODY TURN US AROUND: VOICES OF RESISTANCE, REFORM, AND RENEWAL: AN AFRICAN AMERICAN ANTHOLOGY 194 (2d ed. 2009). Both Du Bois and Ida B. Wells were signatories on *The Call*. KHALIL GIBRAN MUHAMMAD, THE CONDEMNATION OF BLACKNESS: RACE, CRIME, AND THE MAKING OF MODERN URBAN AMERICA 164 (2011). Murakawa comments that Wells and fellow anti-lynching activists “turned to the federal government to provide real law-and-order.” MURAKAWA, *supra* note 140, at 44. She identifies this impulse and the federal government’s crackdown on lynching via federal criminal administration as the initiation of the liberal “right to safety,” and later, disparagingly, as “liberal law-and-order” given that Truman’s anti-lynching initiative via the President’s Committee on Civil Rights (PCCR) and Congressmen from the Democratic party acted in the interest of what this Article has referred to as the African American liberty interest. *Id.* at 47-49. Murakawa further explains:

[T]he President’s Commission on Civil Rights proposed modernization with the keywords of the early federal civil rights—ending discriminatory practices, formalizing racially fair procedures, and protecting “the unpopular, weak, [and] defenseless” . . . Following the President’s Committee on Civil Rights, northern Democrats introduced a flurry of bills to build a stronger and more racially fair criminal justice system.

*Id.* at 47.

<sup>150</sup> In *Freedom’s Sword*, Gilbert Jonas argues that the African American Civil Rights Movement began in 1909 with African American mobilization around lynching. JONAS, *supra* note 134, at 1-2. Jonas observes that, in the decades after Dr. King’s assassination, “dozens of books” and the mass media had focused on the Student Non-Violent Coordinating Committee (SNCC), the Committee on Racial Equity (CORE), and the Southern Christian Leadership Conference (SCLC), “each claiming the subject organization has been preeminent in the struggle” for civil rights. *Id.* But Jonas rejects that narrative as ahistorical because “the modern civil rights movement began in 1909 with the call to create a new organization to achieve for Negroes the rights guaranteed by the Constitution to protect them from lynchings and pillagings by White Americans.” *Id.* at 2. Thus, the organization at the forefront of the civil rights struggle was not SNCC, CORE, or even Dr. King’s SCLC, it was the NAACP, which, in 1910, “entered the public life of our nation by defending Negroes against injustice and by seeking to outlaw lynching.” *Id.* Over the next century, “the NAACP became the largest, most powerful, most feared, and most respected civil rights organization in the nation’s history and perhaps in the history of the world.” *Id.*



the barbarous quality of White extrajudicial killings of African Americans post-Reconstruction gave rise to the political organizing that produced the NAACP.<sup>151</sup> In founding the NAACP, African Americans sought to correct for criminal underenforcement, which was considered a critical civil rights issue of the moment.

To the extent that African Americans expand their political influence over penal institutions, they could limit racial violence.<sup>152</sup> More political power would help to protect against police inaction. Thus, at this particular juncture in African American history, the African American security, democratic, and liberty interests showed relatively little tension. The primary threat to African American security, at least as conceived in African American civil rights discourse, was external rather than internal. African American civic leaders and publics sought to direct the machinery of the penal system against the racially motivated violence to which they were subject.

The African American security deficit that informed early twentieth century African American political organizing extended beyond Southern

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<sup>151</sup> See *id.* at 10–11. The NAACP began with a document—*The Call*—signed by 60 individuals, White and Black. The document proposed a new organization oriented toward the pursuit of political and civil liberty for Negroes. *Id.* at 11. In justifying the proposal, the document’s authors referenced the harms to which Blacks continued to be subject. “Segregation” and “deprivation” were mentioned, but anti-Black violence took on unique significance. “Above all, ‘The Call’ demanded an end to the ‘spread of lawless attacks upon the Negro, North, South, and West . . . often accompanied by revolting brutalities, sparing neither sex nor age nor youth.’” *Id.* See also PATRICIA SULLIVAN, LIFT EVERY VOICE: THE NAACP AND THE MAKING OF THE CIVIL RIGHTS MOVEMENT 4 (2009) (“Villard outlined his ideas for what he called a ‘Committee for the Advancement of the Negro Race’ in a speech to the Afro-American Council late in 1906. In what reads like a blueprint for the NAACP, Villard imagined that such an organization would include . . . a special committee to investigate lynching . . .”); KENNEDY, *supra* note 19, at 47. (“The most significant black protest organization in American history, the National Association for the Advancement of Colored People (NAACP), was born as a direct result of efforts to combat racially motivated mob violence.”); MEGAN MING FRANCIS, CIVIL RIGHTS AND THE MAKING OF THE MODERN AMERICAN STATE 4 (2014) (“From the beginning, the NAACP remained committed to raising national awareness to the injustice of racial violence. Particularly notable was the development of its anti-lynching and mob-violence-reduction campaign.”).

<sup>152</sup> Máximo Langer makes a similar point:

It is also important to highlight that punishment of harmful conduct has been a long-standing demand of many Black leaders and the civil rights movement in the United States. Both have seen criminal law and criminal punishment, including prison, as important tools to fight against white rule and white supremacy and to have the rights of Blacks protected. This was the explicit demand of Black leaders and intellectuals and civil rights organizations like Ida B. Wells-Barnett, W.E.B. Du Bois, Al Sharpton, and the American Civil Liberties Union.

Langer, *supra* note 62, at 61–62. Langer further rejects the idea that protests of underenforcement equate to affirmation of contemporary penal affairs, and instead argues that “fully discarding criminal law enforcement, involuntary confinement, and punishment as social responses to harm may be unfair, inhumane, and unprotective of individuals and communities, including individuals and communities of color.” *Id.* at 63–64.

lynchings to mob violence in the North. While mob violence on the streets of Northern cities was more akin to conventional street violence, this violence, similar to lynchings, instilled fear among local African American residents. Police offered little help as they often facilitated the racially motivated White riots. In some instances, police disarmed African Americans in the moments just before a riot, entering African American homes to identify and confiscate firearms.<sup>153</sup> Rather than offer protection, police would often advise the weaponless resident to remain indoors, warning that they—the law enforcement officers—would not be in position to intervene.<sup>154</sup> As a general matter, enforcement of the criminal law against White rioters was spotty at best, and it was not unusual for police to openly sympathize with the rioting and invite, by way of inaction, its terroristic ends.

In a related narrative based in Philadelphia, police unlawfully entered the homes of two African American city residents, Joseph Bush and Henry Gillison.<sup>155</sup> They confiscated Bush and Gillison's firearms and left them for the mob.<sup>156</sup> Rioters beat the two residents, after which the residents were placed under arrest by the same officers.<sup>157</sup> In another example from Philadelphia, a White mob attacked two Black men, one of whom suffered a gunshot wound. Both men were then beaten by their attackers and subsequently arrested. Just one night earlier, three African Americans had been "chased and beaten" by a group of one hundred Navy sailors at the Philadelphia Naval Yards.<sup>158</sup> One of the victims died, while the other two found refuge in an African American church. Police arrested the two survivors and charged them with carrying

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153 MUHAMMAD, *supra* note 149, at 215.

154 *Id.* at 215-16. The larger social context for these riots included African American migration from the South, an extremely tight housing market, native African American migration to White neighborhoods as a result of the housing shortage, and subsequent White backlash.

The housing shortage . . . was the most critical issue affecting migrants. To make matters worse, whites violently resisted black expansion into predominantly white areas, and landlords raised rents on already overcrowded and dilapidated housing. The higher wages that brought the migrants to the north were canceled out by price gouging in the segregated Black areas.

*Id.* at 209. And later, "[b]y the third year of wartime migration, many upwardly mobile blacks who could afford to move away from the most densely populated Black neighborhoods began to do so. Many black homeowners and renters suffered fierce and violent opposition from their new white neighbors." *Id.* at 213.

155 *Id.* at 216.

156 *Id.*

157 *Id.*

158 *Id.*

concealed weapons;<sup>159</sup> but a local newspaper reported that no weapons had been found on the victims.<sup>160</sup>

Capturing the racialized quality of policing in Philadelphia, a 1926 study titled, “Survey of Crime among Negroes in Philadelphia,” observed that “the antagonism of the Irish policeman to the Negro in general is the basis of many jokes around City Hall.”<sup>161</sup> A Chicago newspaper, the *Chicago Defender*, reached a similar conclusion, specifically in regard to police field behavior: “Police activity has been so deliberate and brazenly neglectful that one might construe that they are working in harmony with the bomb throwers.”<sup>162</sup>

Historical treatments of northern race riots argue that African American insecurity deepened in response to police abdication, pushing the African American community to organize private efforts at protection from racially motivated violent crime.<sup>163</sup> Striking a similar note, Christopher Muller, a prominent sociologist of the linkages between race and incarceration, describes the African American southern migrant community in the North as developing an early understanding upon resettlement that they would not receive meaningful state protection from racially motivated criminal violence. “More than simply a remnant of the southern environment they left behind,” Muller writes, “African-Americans’ distrust of the criminal justice system sprang from early evidence that they could not rely on police—even in the promised land—to protect or process them impartially.”<sup>164</sup> Of note, Muller

<sup>159</sup> *Id.*

<sup>160</sup> *Id.* The racial subtext of such encounters was fairly layered as it included African Americans native to the North, African American migrants from the South, Irish police, and “native” Whites. Irish police, often working professionally at the social margins, and given that they had recently been relegated to a similar position, held a special power as law enforcement agents. According to Noel Ignatiev,

The Irish cop is more than a quaint symbol. His appearance on the city police marked a turning point in Philadelphia in the struggle of the Irish to gain the rights of white men. It meant that thereafter the Irish would be officially empowered (armed) to defend themselves from the nativist mobs, and at the same time to carry out their agenda against black people.

Christopher Muller, *Northward Migration and the Rise of Racial Disparity in American Incarceration, 1880-1950*, 118 AM. J. SOCIO. 281, 294-95 (internal citation omitted). This was the cultural backdrop upon which African Americans pursued their security interests in the North in the post-Reconstruction era.

<sup>161</sup> Muller, *supra* note 160, at 295.

<sup>162</sup> *Id.* at 295.

<sup>163</sup> *Id.* at 312-13.

<sup>164</sup> *Id.* at 313. Criminal enforcement patterns in Chicago did not always fall cleanly along racial lines, yet the patterns consistently served perceived White interests. In the classic text, *Black Metropolis*, sociologists St. Clair Drake and Horace R. Clayton report that in the early 1900s racial tension in midwestern cities sometimes centered on the issue of beach access. 1 ST. CLAIR DRAKE & HORACE R. CLAYTON, *BLACK METROPOLIS: A STUDY OF NEGRO LIFE IN A NORTHERN CITY* 104-05 (1st Harper Torchbook ed., 1962). In Chicago, African American beach goers were frequently

draws a line from the historical narrative of racism-infused policing in the post-Reconstruction North to African American distrust of police in the contemporary context. He references a 2007 study showing African American youth in high-crime Philadelphia neighborhoods to be “negatively disposed toward the police,” so much so that most of the subjects expressing a negative view would not call the police if facing an emergency.<sup>165</sup> Muller describes the police abdication in the era of northern urban White riots as “racially motivated police misconduct” that might inform the willingness of African American citizens to engage the police.<sup>166</sup>

As part of an effort to stamp out racially motivated private violence, the Roosevelt White House published a report noting the unscrupulous role municipal police often played in facilitating related crimes.<sup>167</sup> The report found that in 1943 U.S. cities had collectively been subject to 242 violent racial altercations.<sup>168</sup> A prominent example was the zoot suit riots where 1,000 Whites, many of whom were soldiers, assaulted Mexican Americans, African Americans, and Filipino Americans wearing “zoot suits,” a popular style at the time. One author compared the suits to today’s baggy pants and hoodies,

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subject to harassment, insults, molestation, and threats by Whites (identified by the authors as “white hoodlums”) who resented the growing African American presence at Chicago public recreation sites. *Id.* at 104. A local African American newspaper reported that the beach park police officers tended not to take the complaints of African American bathers seriously and, likewise, tended to take the side of the White bathers who were the subject of their complaint. *Id.* A *Chicago Tribune* article headline captured the role of Chicago police in the dispute: “Colored Leaders Ask Equal Rights at City Beaches; Seek Police Protection for Negro Bathers.” *Id.* An African American newspaper, in turn, claimed that police were central to the ultimate resolution, arguing that “the responsibility for keeping down these interracial conflicts rests . . . upon the shoulders of those officers of the law who are stationed at the beaches.” *Id.* The paper added that these were precisely the same circumstances that had produced White race riots about a decade earlier. *Id.*

As the African American population in Chicago continued to grow, a ten-mile portion of the Chicago lakefront became accessible to the Chicago residential area known as the Black Belt. The ready access of the lakefront to African American Chicagoans fed the tension over beach access. *Id.* at 105. A pattern of self-segregation emerged with Whites and African Americans using separate sections of the beach. *Id.* At some point, a fence went up, reflecting what appeared to be an informal segregation-based truce. *Id.* When a group of White youth (many of them University of Chicago students) crossed the fence, seemingly to probe the meaning of the informal racial boundary, the youth were promptly arrested. Police accused them of being communists. *Id.*

<sup>165</sup> Muller, *supra* note 160, at 313.

<sup>166</sup> *Id.* (“If, owing to a history of racially motivated police misconduct, law-abiding African-Americans avoid contact with police to a greater extent than other groups, police will encounter a biased sample in their efforts to enforce the law.”) It is important to again note that underenforcement is only a partial accounting of African American interests in penal administration. There is also the prospect of overenforcement in minority residential communities. Drug enforcement, stop-and-frisk, misdemeanor enforcement, and the derivative proliferation of criminal records tend to be obscured by the elevation of the underenforcement thesis.

<sup>167</sup> MURAKAWA, *supra* note 140, at 27-28.

<sup>168</sup> *Id.* at 27.

with much of society associating the look with deviant behavior.<sup>169</sup> In the same year, the Office of War Information counseled President Roosevelt not to address the nation's anti-Black racial violence because it would infer an oppositional stance on the issue of White brutality.<sup>170</sup> President Truman, Roosevelt's successor, instead chose to squarely face the issue.<sup>171</sup> With the nation's rising awareness of White mob violence as a backdrop, Truman commissioned the President's Committee on Civil Rights (PCCR) by way of Executive Order 9808.<sup>172</sup> The Committee's report presented a number of standard claims in American political discourse: the right to freedom of conscience and expression, the right to equality of opportunity, and the right to citizenship and its privileges.<sup>173</sup> But first among these rights, according to the PCCR, was the right to "safety and security of the person."<sup>174</sup> The Committee situated the right to safety as a predicate to the other noted rights.

[F]reedom can exist only where the citizen is assured that his person is secure against bondage, lawless violence, and arbitrary arrest and punishment . . . . Where the administration of justice is discriminatory, no man can be sure of his security. Where the threat of violence by private persons or mobs exists, a cruel inhibition of the sense of freedom of activity and security of the person inevitably results. Where a society permits private and arbitrary violence to be done to its members, its own integrity is inevitably corrupted. It cannot permit human beings to be imprisoned or killed in the absence of due process of law without degrading its entire fabric.<sup>175</sup>

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169 *Id.* at 27-28.

170 *Id.* at 28.

171 *See id.* at 28-29 (describing Truman's response to "white lawlessness").

172 *Id.* at 39.

173 *Id.* at 41-43.

174 *See id.* at 41 (describing the right to safety and security as a prerequisite of freedom).

175 *Id.* at 41, 43 (internal citation omitted). Murakawa pejoratively characterizes the PCCR's philosophical orientation to White racial violence as "liberal law-and-order." *Id.* at 29. She explains liberal law-and-order projects as having the collateral effect of obscuring the penal system's own racial violence against the marginal group(s) it sets out to protect. *See id.* at 29-30 (noting how liberal lawmakers created a distinction between private violence and state-sanctioned violence).

While Murakawa's argument is emblematic of abolitionists' critique of penal reform (namely, that penal reform produces perverse effects, Margo Schlanger, *No Reason To Blame Liberals (Or, The Unbearable Lightness of Perversity Arguments)*, NEW RAMBLER (2015), <https://newramblerreview.com/component/content/article?id=49:no-reason-to-blame-liberals> [<https://perma.cc/8AUG-YHYF>], it is nonetheless startling to consider the argument in relation to racial lynchings in the Jim Crow era. The arch of Murakawa's "liberal law-and-order" historical argument is that liberals, in attempting to correct for racial bias from criminal procedure, have validated a penal system that would inevitably be turned back against African Americans, beginning with Truman's efforts against lynching. Murakawa situates the Truman administration's efforts at quelling private racial violence against the position taken by the National Negro Congress and the Civil Rights Congress that the criminal-legal system served as "the very core of state-sanctioned racial violence." MURAKAWA, *supra* note 140, at 29. Similarly, Murakawa later states, "[T]he political

The contemporary penal reform project, while expressly committed to the advancement of the African American security, democratic, and liberty interest, presents as a more difficult logistical matter than the African American penal reform project of the 1910s and 1920s. Pursuit of the African American security interest in the early twentieth century was distinctly cultural and political—hearts and minds. Conversely, pursuit of the African American security interest in the contemporary context may bump up against both the African American interest in unbiased criminal procedure and the African American interest in racially proportionate penal outputs. In considering what to do about African American violent-crime victimization at the hands of the White mobs of the early 1900s, the federal government did not have to negotiate this sort of logistical complexity.

b. *State Protection from Street Violence*

Randall Kennedy is the most important late twentieth-century scholar of the African American security interest, taking the torch from Du Bois. And not without controversy. Kennedy expressly linked the White racial violence of the Post-Reconstruction era to a rising tide of violent crime on the streets of urban America.<sup>176</sup> He unrepentantly posed the two phenomena as representing the continuity of state neglect of African American individuals and communities by way of underenforcement of the criminal law.<sup>177</sup> Roughly ninety years before the publication of Kennedy's *Race, Crime, and Law*, Du Bois had characterized the African American security interest in penal

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responses from Truman and the Democratic Party also constrained the scope of understanding of white violence in relation to state violence. As reframed by race liberals, southern lynching was a regional exception to federal law-and-order, which was fully competent in differentiating lawful from lawless white violence." *Id.* at 39.

There is something deeply unsettling about an objection to federal efforts to criminally punish those participating in gruesome racial lynchings, even after accounting for the prospect of unintended consequences. In encountering Murakawa's objection, one is left to wonder about the degree to which the abolitionist position, when fully unraveled, accounts for the African American security interest.

<sup>176</sup> KENNEDY, *supra* note 19, at 69 ("Thus far, this chapter has mainly focused on ways that governments have failed, often by design, to protect blacks from racially motivated violence perpetrated by whites. Now the focus shifts to ways in which governments have failed, again often by design, to protect blacks from 'ordinary' criminality, much of it perpetrated by blacks.").

<sup>177</sup> See *id.* (describing ways in which the state implicitly condoned intraracial Black lawlessness as opposed to interracial lawlessness). In a conceptual article extending Kennedy's underenforcement thesis, specifically in relation to street violence, Alexandra Natapoff argues that we should understand criminal underenforcement as "one way the state participates in social contests over resources, power, and legitimacy by staying its enforcement hand in selective ways." Alexandra Natapoff, *Underenforcement*, 75 FORDHAM L. REV. 1715, 1719 (2007); see also Lewis & Usmani, *The Injustice of Under-Policing*, *supra* note 6, at 101 ("[W]hen serious crime runs unchecked in poor neighborhoods, it has any number of negative *n*th-order consequences on political, social, cultural, and economic life.").

administration in strikingly similar terms. In *The Philadelphia Negro*, Du Bois condemned African American victimization in the context of White mob violence as well as the sort of random criminal victimization that occurs intraracially in the context of street violence.<sup>178</sup> Together, the two African American scholars represent a distinctive line of thought regarding the African American security interest.

To be sure, Kennedy offered the race-based underenforcement thesis against a different empirical backdrop. He advanced the thesis in the mid-1990s, just as other African American scholars began to argue the rate of incarceration for African American men to be a major and underappreciated social problem. Given the bitter reality of mass incarceration, it may seem as though Kennedy's underenforcement argument has not aged well. Yet, there is no denying that Kennedy's argument closely tracks the arch of post-Reconstruction African American discourse regarding the African American security interest, conveying the continuity of African American suffering under criminal violence over the course of American history. African Americans have been subject to over a century of high-stakes criminal victimization.

And the saga continues. The rate of African American violent-crime victimization climbed rapidly in the 1980s, concurrent with the crack epidemic.<sup>179</sup> It reached its peak in 1991, with the African American homicide victimization rate at 39.4 per 100,000.<sup>180</sup> This rate fell over the next several years and stabilized at twenty per 100,000 in 1999. The rate of 19.6 homicides per 100,000 in 2008 was, nevertheless, six times higher than for Whites (3.3 homicides per 100,000).<sup>181</sup>

Responsive to these dispiriting statistics, Kennedy argued criminal underenforcement as an underappreciated form of structural racial inequality

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<sup>178</sup> See generally W.E.B. Du Bois, *The Philadelphia Negro: A Social Study*, in PUBLICATIONS OF THE UNIVERSITY OF PENNSYLVANIA, SERIES IN POLITICAL ECONOMY AND PUBLIC LAW (Paper No. 14, 1899).

<sup>179</sup> Heather Warnken & Janet L. Lauritsen, *Who Experiences Violent Victimization and Who Accesses Services?*, CTR. FOR VICTIM RSCH. 9–10 (Apr. 2019), [https://navaa.org/wp-content/uploads/2021/02/CVR-Article\\_Who-Experiences-Violent-Victimization-and-Who-Accesses-Services-1.pdf](https://navaa.org/wp-content/uploads/2021/02/CVR-Article_Who-Experiences-Violent-Victimization-and-Who-Accesses-Services-1.pdf) [<https://perma.cc/AC4J-LQ6C>]. Though the rate of African American serious violent crime victimization fell precipitously after Kennedy published his book, the ratio of Black–White serious violent crime victimization remains roughly the same as it did in the 1970s. “Over the past four decades, blacks’ risk for serious violence have remained roughly 1.5-2 times greater than those of whites, and risks among Hispanics have been roughly 1.2-1.5 times greater than those of those of whites.” *Id.* at 10-11.

<sup>180</sup> Alexia Cooper & Erica Smith, *Homicide Trends in the United States, 1980-2008*, U.S. DEP’T OF JUST., OFF. OF JUST. PROGRAMS, BUREAU OF JUST. STAT. 11 (Nov. 2011), <https://www.ojp.gov/ncjrs/virtual-library/abstracts/homicide-trends-united-states-1980-2008> [<https://perma.cc/WSH2-A8ZU>].

<sup>181</sup> *Id.*

in the U.S. and as a social disaster that preyed upon the African American community with a “special vengeance.”<sup>182</sup> “[A]t most income levels, [African Americans] are more likely to be raped, robbed, and assaulted, and murdered than their White counterparts. Thus, at the center of all discussions about racial equity and criminal law should be a recognition that black Americans are in dire need of protection against criminality.”<sup>183</sup>

The crime data informing Kennedy’s position was overwhelming. African American teenagers were nine times more likely to be murdered than their White counterparts.<sup>184</sup> While African Americans in 1960 were murdered at the rate of 45 per 100,000 that rate had climbed to 140 per 100,000 by 1990.<sup>185</sup> One in every twenty-one African American men could expect to be murdered, “a death rate double that of American serviceman in World War II.”<sup>186</sup> Needless to say, if Kennedy’s characterization is taken at face value, the African American security interest in 1997 presents as a far more complicated problem than the White racial violence of the prior era. When considered from the standpoint of African American interests in penal administration, the African American security interest, as identified in the 1990s, showed a clear and direct tension with the interest in racially proportionate penal outputs.<sup>187</sup> Over the course of this period, the Black–White racial disparity in jail and prison admission spiked, doubling between 1980 and 1990.<sup>188</sup> The Black–White disparity in prison admission alone, generally a function of a criminal sentence of a period of more than one year, tripled between 1970 and 1986.<sup>189</sup>

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182 KENNEDY, *supra* note 19, at 11–12.

183 *Id.*

184 *Id.* at 19–20.

185 *Id.* at 20.

186 *Id.* (emphasis added). For additional research on the spike in urban violent crime in the 1980s, see, for example, Alfred Blumstein & Joel Wallman, *The Recent Rise and Fall of American Violence*, in CRIME, INEQUALITY AND THE STATE, *supra* note 58, at 103.

187 State prison admissions based on a violent offense rose steadily during this period, from 173,300 in 1980 to 316,600 in 1990 to 724,300 in 2009. Violent crime admissions in general accounted for 36% of the growth in state prison populations between 1980 and 1990 and 60% of the growth between 1990 and 2009. PFAFF, *supra* note 48, at 33. As a point of reference, property crimes were responsible for 22% of state prison growth between 1980 and 1990, and 13% between 1990 and 2009. *Id.*

188 NAT’L RSCH. COUNCIL, GROWTH OF INCARCERATION IN THE UNITED STATES, *supra* note 48, at 58.

189 *Id.* Critical to the proper recognition of African American violent crime offending and victimization is the exceptionally violent national context in which it takes place. Careful study of race and violent crime in the U.S. reveals that even if violent crime committed by African Americans were entirely removed from the equation, the U.S. would well exceed its peers in the rate of violent crime commission. See FRANKLIN E. ZIMRING & GORDON HAWKINS, CRIME IS NOT THE PROBLEM: LETHAL VIOLENCE IN AMERICA 81 (1997) (“[T]he total exclusion of offenses attributed to blacks would not alter the distinctive position of the United States as an industrial democracy with extraordinarily high rates of high-lethality violence.”).



Moving beyond descriptive statistics, two recent historical case studies in the qualitative criminology literature—*Black Silent Majority* and *Locking Up Our Own*—show that Kennedy was not an island in his characterization of criminal underenforcement as race-based state neglect. Both pieces convey an African American political discourse in the 1980s that at times bears a striking resemblance to the law-and-order politics and punitive populism now thought to be responsible for the size of the American prison population.

Michael Fortner offers that he wrote *Black Silent Majority* to give voice to African American victims of crime, arguing that these victims have been “invisible” in much of the historicizing of the American criminal justice system.<sup>190</sup> In this respect, Fortner intended not only to highlight the African American security interest in penal administration, but also to suggest why this interest may be underappreciated by the state and by academics.<sup>191</sup>

Fortner takes his title from Daniel Patrick Moynihan, who coined the term “silent Black majority” in a memo to Richard Nixon following the publication of his controversial report, *The Negro Family: The Case for National Action*.<sup>192</sup> Moynihan argued in the memo that, similar to Whites, the African American middle and working classes were locked in a silent conflict with the African American poor, and proposed that this conflict could be used to Nixon’s political advantage.<sup>193</sup> In a crude but familiar framing, Moynihan distinguished the African American middle and working classes from a third class he identified as an “unskilled, poorly educated” group subject to a “tangle of pathologies.”<sup>194</sup>

In response to Moynihan’s conclusions, Charles Hamilton, a prominent African American political scientist, noted that unlike Nixon’s quietly conservative “silent white majority,” African Americans in the working and

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<sup>190</sup> FORTNER, *supra* note 94, at xii.

<sup>191</sup> Fortner hopes that

advocates and scholars continue to lay bare the bewildering immorality of the criminal justice system and its blatant inhumanity . . . I wrote this book to redeem the agency of black people who are portrayed, at best, as backbenchers to history, treated either as hostages of white supremacy or as the collateral damage of neoliberalism.

*Id.*

<sup>192</sup> *Id.* at 133–34.

<sup>193</sup> In the memo, Moynihan describes the “silent Black majority” as “politically moderate (on issues other than racial equality)” and as sharing “most of the concerns of its white counterpart.” *Id.* at 133. Prominent among these concerns, according to Moynihan, was anti-social behavior. *Id.* at 134.

<sup>194</sup> *Id.* at 133–34. Ironically, the thrust of Moynihan’s report was to demonstrate the uniquely difficult structural position of African Americans given African American poverty and employment opportunities. See OFF. OF POL’Y & RSCH., U.S. DEP’T OF LAB., *THE NEGRO FAMILY: THE CASE FOR NATIONAL ACTION* 47 (1965) (“We have shown a clear relation between male employment, for example, and the number of welfare dependent children. Employment in turn reflects educational achievement, which depends in large part on family stability, which reflects employment.”).

middle classes embraced federal antipoverty programming because of their intimate knowledge of the circumstances of the African American poor.<sup>195</sup> Hamilton conceded that members of the silent Black majority were “as concerned about ‘crime in the streets’ as any middle-class person,” but histories of police corruption and brutality “fostered profound mistrust [of police] rather than unconditional support.”<sup>196</sup>

Of note, the Kerner Report, issued by the National Advisory Commission on Civil Disorders in 1968, published similar findings.<sup>197</sup> In its chapter titled, “Police and Community,” the Commission attempts an explanation of the basis for African American dissatisfaction with police:

The strength of ghetto feelings about hostile police conduct may even be exceeded by the conviction that ghetto neighborhoods are not given adequate police protection. This belief is founded on two basic types of complaint. The first is that the police maintain a much less rigorous standard of law enforcement in the ghetto, tolerating there illegal activities like drug addiction, prostitution, and street violence that they would not tolerate elsewhere. The second is that police treat complaints and calls for help from Negro areas much less urgently than from White areas. These perceptions are widespread.<sup>198</sup>

The Commission’s assessment that African American public opinion subscribed to the underenforcement thesis appears credible given its resonance with Fortner’s account, and also because several of Commission’s members appear to have been well left-of-center. Some members described

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<sup>195</sup> FORTNER, *supra* note 94, at 135.

<sup>196</sup> *Id.* at 136. Fortner argues in response that, contrary to Hamilton’s assertions, there is evidence that many African Americans viewed street crime as a more significant threat than police brutality. *Id.* at 170. He points to Bill Webster, an African American novelist and superintendent in Oakland, California, who sought to depict “the frustrating dilemma of the Black Middle Class and its confusion resulting from heightened militancy among Blacks.” *Id.* at 136. Webster described the moral of his novel as one capturing a very specific form of African American resentment: “The Black middle class is caught between two diametrically opposed value systems. The militant is rejecting White middle class values while the silent majority of Black people are aspiring toward those same values. While they emphasize and support the activists, they don’t want to be sacrificial lambs.” *Id.* at 137.

<sup>197</sup> NAT’L ADVISORY COMM’N ON CIV. DISORDERS, THE KERNER REPORT (Princeton Univ. Press rev. ed. 2016) [hereinafter KERNER REPORT]. The report’s claims are difficult to verify without intensive historical analysis, but they seem of value, at least to the extent to which they resonate with the accounts of late twentieth-century African American public opinion reviewed in this section. Also lending credibility to the report’s claims regarding 1960s African American public opinion on underenforcement is President Johnson’s reported belief that the Kerner Report itself was “politically cockeyed and irresponsible” (i.e., slanted in favor of a progressive world view), and the Nixon campaign’s claim that the report indicated a perverse outlook that “turned social deviants into political heroes[.]” *Id.* at x-xi.

<sup>198</sup> *Id.* at 309.

the race riots of the 1960s as “righteous political protests against racist institutions.”<sup>199</sup> Yet, the Commission found the hostility of African American residents in urban neighborhoods toward police to be based in substantial part on anger over the racially unequal distribution of state protection from crime.<sup>200</sup>

Forman presents the same finding in the book, *Locking Up Our Own*. He specifically argues that in 1975, the African American political discourse in Washington, D.C. was squarely focused on the city’s crime problem. D.C.’s African American city newspaper—*The Afro*—demanded action from city leaders that would make it so “crime doesn’t pay.”<sup>201</sup> An *Afro* editorial describing crime as having overrun the city’s African American neighborhoods was coupled with a cartoon showing a group of African American leaders huddled together at a conference table. Large human shadows hovering over the leaders are tagged with the label, “GROWING CRIME MENACE.”<sup>202</sup> The editorial itself described the demoralizing effect of the crime surge in granular terms, noting that it was “increasingly shocking, discouraging and frightening . . . to turn on the radio or television or pick up the newspaper, daily or weekly, and learn that one of their neighbors has been a victim of crime.”<sup>203</sup>

The homicide rate had tripled in the majority African American city between 1960 and 1969.<sup>204</sup> Fortner contends, moreover, that a sober historical view of the period reveals intraracial class conflict among African Americans regarding criminal enforcement rather than African American empathy for perpetrators.<sup>205</sup> In 1975, the year of the referenced editorial, the national African American homicide victimization rate was between seven and eleven times that of Whites.<sup>206</sup>

To be clear, this Section takes Kennedy’s scholarly work along with the historical accounts from Fortner and Forman as emblematic of a concern—adamantly expressed within African American political discourse in the 1970s,

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<sup>199</sup> *Id.* at x.

<sup>200</sup> *Id.* at 309 (“The strength of ghetto feelings about hostile police conduct may even be exceeded by the conviction that ghetto neighborhoods are not given adequate police protection.”).

<sup>201</sup> JAMES FORMAN JR., *LOCKING UP OUR OWN: CRIME AND PUNISHMENT IN BLACK AMERICA* 47 (2017).

<sup>202</sup> *Id.* at 52.

<sup>203</sup> *Id.* at 51-52.

<sup>204</sup> *Id.* at 48.

<sup>205</sup> See FORTNER, *supra* note 94, at x-xi (referencing and challenging Glenn Loury’s claims in *Listen to the Black Community* that “[t]he young Black men wreaking havoc in the ghetto” in the early 1990s were “still ‘our youngsters’ in the eyes of many of the decent poor and working-class Black people who are sometimes their victims” and further writing that “[t]he hard edge of judgement and retribution is tempered for many of these people by a sense of sympathy for and empathy with the perpetrators”).

<sup>206</sup> FORMAN, *supra* note 201, at 57.

80s, and 90s—with the state’s efforts and efficacy in satisfying the African American security interest. This is to place the African American democratic interest, taken here as the influence of African American political majorities over crime policy, and set it next to the African American security interest and the African American interest in racially proportionate penal outputs. In the closing decades of the twentieth century, African Americans had an interest in reducing the punishing rate of African American violent crime victimization. And yet, there is substantial evidence of a countervailing interest in winnowing the heavy flow of African American men assigned by the state to spend weeks, years, or decades subject to sensory deprivation—in tiny concrete rooms, subject to the erosion of meaningful social connection. This latter condition speaks to the African American interest in a “normal” rate of incarceration, one that, at the very least, approximates White counterparts.<sup>207</sup>

## 2. The Democratic Interest and the Interest in Racially Proportionate Penal Outputs

Apart from the African American security interest and the interest in racially proportionate penal outputs are the policy preferences of African American majorities and the African American interest in state adoption of these preferred policies. Consider in this light the earlier assessments of Hamilton, Fortner, and Forman. There is meaningful, if not overwhelming, evidence that at least some African Americans have, over the past half century, called for *more* rather than less criminal law enforcement. They have on any number of occasions called for police and prosecutors to be more aggressive.<sup>208</sup> It bears repeating that the relevant point is not to affirm the instances in which African American majorities embrace punitive politics and apply marginalizing frames to same-race offenders. (My own normative orientation is to do just the opposite.) The point is instead to surface the historical arc of the conflict between the will of African American majorities and the African American interest in racially proportionate penal outputs. While the tension between the African American security interest and the group’s interest in racially proportionate penal outputs has been

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<sup>207</sup> See *supra* note 189.

<sup>208</sup> The call for more aggressive policing can be found throughout the Fortner and Forman books and is also evident in the arch of the African American penal majoritarianism scholarship of the 1990s. See, e.g., Meares & Kahan, *The Coming Crisis*, *supra* note 94, at 1163 (“[B]ecause crime disrupts so many social institutions, many African-American citizens see rampant crime as one of the most substantial impediments to improving their economic and social status. This sentiment translates into a demand within the African-American community for higher levels of law-enforcement.”). For analysis of this normative project in relation to the proposed African American public security paradox, see *infra* Part III.

acknowledged in historical projects in the criminal-legal literature, presentation of the tension rarely extends to the democratic interest. African American majorities may support crime policies that worsen rather than remedy the racial disproportionality in penal outputs.<sup>209</sup>

The tension between the African American democratic interest and the interest in racially proportionate penal outputs surfaced most recently in Eric Adams's win in the Democratic primary in New York City. Adams ran on what was broadly received as a law-and-order platform, leading to an inevitable clash with leaders of the city's Black Lives Matter (BLM) affiliate.<sup>210</sup> Among other requests, BLM leaders asked Adams to rescind his promise to reinstate an antigun unit of plainclothes police that had previously been subject to intense criticism by the city's minority residents.<sup>211</sup> The disbanded unit was known for its high rate of fatal shootings and civilian complaints.<sup>212</sup> In explaining his earlier decision to shut down the unit, former mayor Bill DeBlasio characterized the unit's methods as a reflection of the backward policing of the city's past.<sup>213</sup> Former NYPD Commissioner Dermot F. Shea described the unit as an unfortunate vestige of the stop-and-frisk policy of prior administrations.<sup>214</sup> Adams's unwavering support of the unit and his general orientation to public safety governance struck many of the city's progressives as distinctly regressive.<sup>215</sup>

In a statement that made national news, New York City BLM leader Hawk Newsom conveyed to Adams that, if he reinstated the antigun unit, the

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209 See Lydia Saad, *Black Americans Want Police to Retain Local Presence*, GALLUP (Aug. 5, 2020), <https://news.gallup.com/poll/316571/Black-americans-police-retain-local-presence.aspx> [<https://perma.cc/D6R6-3AJ6>] (summarizing research finding that eighty-one percent of Black Americans polled want local police presence to remain the same in their area). Moreover, the notion that African American punitive populism can be reduced to a desperate attempt by the group to achieve public safety given limited policy options belies the moralizing tropes of African American offenders that have circulated in African American discourse.

210 Kevin L. Clark, *NYC Mayor-Elect Eric Adams Reinstating Police Unit Behind Fatal Shootings, Prompting Activist Backlash*, ESSENCE (Nov. 15, 2021), <https://www.essence.com/news/adams-police-unit> [<https://perma.cc/W3PF-WQH2>].

211 Adams dismissed Hawk Newsome's threat and said he would move forward with the plan to restore anticrime units. *Id.*

212 See *id.* (describing the disbandment of the unit following "allegations that they used heavy-handed tactics in Black American and Hispanic communities.").

213 See Quil Lawrence, *NYPD Eliminates Plainclothes Anti-Crime Units Implicated In Many Shootings*, NPR (June 16, 2020, 1:17 PM), <https://www.npr.org/sections/live-updates-protests-for-racial-justice/2020/06/16/878226021/nypd-eliminates-plainclothes-anti-crime-units-implicated-in-many-shootings> [<https://perma.cc/DGK8-8EKF>] (reporting on DeBlasio's description of past policing as "overly aggressive").

214 *Id.* (giving the history of plainclothes units and the alternative approach taken by Commissioner Shea).

215 See Clark, *supra* note 210 ("Adams had already drawn ire from progressives after vowing on the campaign trail to reinstate the anti-crime units . . .").

city would be subject to “riots . . . fire and . . . bloodshed.”<sup>216</sup> Adams pushed ahead with the plan,<sup>217</sup> though he did couple his law-and-order message with a conventionally progressive one in which he promised to address economic inequality in the city and its impact on the lives of working-class residents.<sup>218</sup>

Within a few months of Adams’s primary win in New York City, London Breed, the African American mayor of San Francisco, declared a state of emergency as part of an effort to challenge what she described as “a reign of criminals” and “mass looting events.”<sup>219</sup> Breed announced that she would first direct the city police department to crack down on the public use of illegal narcotics. Users would be forced to make a choice: treatment or arrest.<sup>220</sup> Breed claimed that the emergency declaration allowed her to, in short order, increase police funding, execute felony warrant sweeps, and enhance police surveillance powers.<sup>221</sup> In response to her progressive critics—who pointed out that thefts in the city had decreased and expressed concern that issues of homelessness and public drug use were principally based in a housing shortage—Breed resorted to the fear-inducing rhetoric usually reserved for conservative politicians: “The data doesn’t matter when somebody randomly walks up to you who is on crystal meth and socks you in the face and puts you in the hospital.”<sup>222</sup>

<sup>216</sup> See Editorial, *Black Lives Matter vs. Eric Adams*, WALL ST. J. (Nov. 11, 2021, 6:34 PM), <https://www.wsj.com/articles/black-lives-matter-vs-eric-adams-mayor-new-york-city-hawk-newsome-11636670327> [<https://perma.cc/864S-834U>] (revealing that Adams met with BLM leaders to have a conversation and hear their agenda).

<sup>217</sup> See Jasmine Garsd, *New Yorkers Want Gun Violence to End. A Controversial Police Unit Returns to Help*, NPR (Jan. 22, 2022, 6:00 AM), <https://www.npr.org/2022/01/20/1074425809/new-york-return-plain-clothes-police-unit> [<https://perma.cc/2KG7-F4WU>] (describing Adams’s plan to reinstate the plainclothes anticrime police units).

<sup>218</sup> High-ranking supporters in the old guard of the city’s civil rights community predicted that Adams would address the “tale of two cities,” James Barron, *Decoding Eric Adams*, N.Y. TIMES (Oct. 25, 2021), <https://www.nytimes.com/2021/10/25/nyregion/decoding-eric-adams.html> [<https://perma.cc/UY7C-3PMD>], and described Adams as someone who “never stopped fighting for equity and resources for our communities and our people,” Stephen Witt, *Brooklyn Dem Leader Bichotte Hermelyn Endorses Adams for Mayor*, POLITICSNY (Mar. 15, 2021), <https://politicsny.com/2021/03/15/brooklyn-dem-leader-bichotte-hermelyn-endorses-adams-for-mayor> [<https://perma.cc/9V8V-GBFD>]. Eric Adams used the phrase “I am you” on election night and shared his background growing up in Queens, the son of a working-class single mother with plans to address challenges he referred to as a “three-headed crisis” of “Covid, crime and economic devastation” as New York City’s mayor-elect. James Barron, *Eric Adams, Mayor-Elect*, N.Y. TIMES (Nov. 3, 2021), <https://www.nytimes.com/2021/11/03/nyregion/eric-adams-mayor-elect.html> [<https://perma.cc/V9SK-C9XC>].

<sup>219</sup> Thomas Fuller, Shaila Dewan & Kellen Browning, *San Francisco Mayor Declares State of Emergency to Fight City’s ‘Nasty Streets’*, N.Y. TIMES (Dec. 17, 2021), <https://www.nytimes.com/2021/12/17/us/san-francisco-state-of-emergency-crime.html> [<https://perma.cc/DR8J-5QNA>].

<sup>220</sup> *Id.*

<sup>221</sup> *Id.*

<sup>222</sup> *Id.*

All of this is merely to suggest that, rather than waning, the tension among primary African American interests in penal administration seems to be intensifying. At the same moment that African American municipal chief executives (supported in some instances by longstanding African American civil rights leaders<sup>223</sup>) call for more police on the street and the reinstatement of the most aggressive and most criticized units of the police force, many African American progressive activists respond in horror, angry at the potential resurrection of a policing regime unconcerned with the racial skew in criminal enforcement.<sup>224</sup> Placing more police on African American neighborhood streets, in keeping with Adams's public safety agenda, would likely raise the number of African American stops and arrests and worsen the racial disparities in the prison population. Progressive reformers might argue that expanded police presence in African American neighborhoods is in this sense a burden to the residents of these neighborhoods.

And yet polling data shows, time and again, over several decades and seemingly across dozens of national controversies regarding racist policing, that African Americans want *more* rather than fewer police on their neighborhood streets. A national study by Data for Progress, taken between April 2 and April 5, 2021—just a year after George Floyd's murder—found that sixty-five percent of African Americans felt that police patrols in their neighborhood made them feel “more safe” rather than “less safe.”<sup>225</sup> Twenty-six percent answered “less safe” and nine percent answered, “don't know.”<sup>226</sup> How do we square these poll results with the earlier observation that one out of every thousand Black men will be killed by a policeman?<sup>227</sup> How does this comport with the scale of the Floyd protests and the salience of the Black Lives Matter campaign?<sup>228</sup>

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<sup>223</sup> See Patricia Cousar, *The Daughtrys: Saluting Achievement, Part II*, 101 N.Y. AMSTERDAM NEWS, June 24–30, 2010, at 33 (describing a civil rights leader's work with New York City leadership to build a controversial inner-city professional basketball stadium); Spectrum News Staff, *Eric Adams to National Action Network: 'I Won't Be Just Another Black Face in a High Place'*, SPECTRUM NEWS N.Y. 1 (July 10, 2021, 1:47 PM), <https://www.ny1.com/nyc/manhattan/news/2021/07/10/eric-adams-nan-al-sharpton-mayors-race> [<https://perma.cc/L7P5-KUUZ>] (reporting on Al Sharpton's speech about Adams' career path from senator to borough president to democratic nominee for mayor and how he built a coalition behind him to support his ideas).

<sup>224</sup> See Clark, *supra* note 210 (describing Black leaders' criticism of new law enforcement initiatives).

<sup>225</sup> *Data for Progress*, VOX, <https://www.filesforprogress.org/datasets/2021/4/dfp-vox-police-reform.pdf> [<https://perma.cc/33BN-NSJF>].

<sup>226</sup> *Id.*

<sup>227</sup> Edwards et al., *supra* note 106, at 16794.

<sup>228</sup> See Lara Putnam, Erica Chenoweth & Jeremy Pressman, *The Floyd Protests Are the Broadest in U.S. History—and Are Spreading to White, Small-Town America*, WASH. POST (June 6, 2020, 2:10 AM), <https://www.washingtonpost.com/politics/2020/06/06/floyd-protests-are-broadest-us-history-are-spreading-white-small-town-america> [<https://perma.cc/AT7H-WE4G>] (describing the

A Gallup poll from August of 2020 offers a clue. The poll reported that while fewer than one in five African Americans felt “very confident” that police would treat them with courtesy and respect, eighty-one percent wanted police presence in their residential area to either increase or remain the same.<sup>229</sup> Several other studies seem to suggest that while African Americans want the same or heightened police presence, they have relatively low confidence in police based on a combination of negligent criminal enforcement and the quality of police-citizen engagement. A 2006 survey of African Americans found that the group overwhelmingly desired more police patrols and broader surveillance in high crime areas.<sup>230</sup> Eighty percent of African American respondents supported more car patrols, eighty-nine percent supported increased police presence in high-crime areas, and an alarming thirty-eight percent supported more stop-and-frisks.<sup>231</sup> The same study found that African Americans were dissatisfied with police support and believed that police tended to use too much force in their neighborhood communities.<sup>232</sup> The study’s authors ultimately concluded that African Americans and Hispanics “are quite supportive of robust police efforts to fight crime,” that they overwhelmingly endorse more police surveillance, but also that they are very interested in reducing the rate of police misconduct.<sup>233</sup> To remedy the rate of police misconduct, “[t]hey favor both more policing and more humane policing.”<sup>234</sup>

Perhaps most interesting within this subliteration on African American majoritarian crime policy preferences are crime policy views by socioeconomic status. A prominent study found that wealthy African American respondents tended to view police more negatively than lower income African American respondents.<sup>235</sup> Other studies find, similarly, that high victimization/high crime groups show a more nuanced

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unprecedented scale of protests amidst the Black Lives Matter movement following George Floyd’s murder).

<sup>229</sup> Saad, *supra* note 209.

<sup>230</sup> See RONALD WEITZER & STEVEN A. TUCH, RACE AND POLICING IN AMERICA: CONFLICT AND REFORM 152 (2006) (“[B]lack and Hispanics are quite supportive of robust police efforts to fight crime . . . . They overwhelmingly endorse more car patrols and more police surveillance in their cities.”).

<sup>231</sup> *Id.* at 151.

<sup>232</sup> See *id.* at 79 (describing the general dissatisfaction by African American respondents towards the treatment of Black communities by police officers).

<sup>233</sup> *Id.* at 152.

<sup>234</sup> *Id.* This premise begs the question: can the state deliver to African American residential communities more police and less police violence? More police and fewer police arrests? All of the above, and less African American violent-crime victimization?

<sup>235</sup> Ronald Weitzer & Steven A. Tuch, *Racially Biased Policing: Determinants of Citizen Perceptions*, 83 SOC. FORCES 1009, 1018 (2005).



(“sophisticated”<sup>236</sup>) perspective on crime policy than privileged groups.<sup>237</sup> Notably, the researchers behind these studies are not right-wing propagandists. Rather, they are scholars who have invested entire careers to the project of eradicating police abuse and improving police-minority relations.

So, again, what gives? If African Americans tend to suffer far more than White counterparts from the excesses of contemporary American policing, why invite more policing? There are any number of plausible answers to this question. One pertains to homicide “clearance” rates.<sup>238</sup> We know that African American homicide victimization is more than double that of Whites.<sup>239</sup> We also know that, according to some measures, homicide clearance rates have fallen steadily over the past fifty years.<sup>240</sup> In 1960, police cleared ninety percent of homicides;<sup>241</sup> in 2019, just 61.4%.<sup>242</sup> The point being, there is quite a bit of unsolved murder in the United States. If African Americans are far more likely to be murdered than members of other racial groups,<sup>243</sup> and police presence factors significantly into whether murders in your neighborhood are

<sup>236</sup> Lacey & Soskice, *Crime, Punishment and Segregation*, *supra* note 8, at 472.

<sup>237</sup> *Id.*

<sup>238</sup> Police considered a homicide case to have “cleared” if one or more individuals is arrested and charged, and the case is submitted by the police to prosecutors. The homicide clearance rate is thus the ratio of cleared homicide cases in a given year relative to the total number of criminal homicides in the same year.

<sup>239</sup> See *supra* subsection II.B.2 (exploring homicide victimization statistics).

<sup>240</sup> Graham C. Ousey & Matthew R. Lee, *To Know the Unknown: The Decline in Homicide Clearance Rates, 1980-2000*, 35 CRIM. JUST. REV. 141, 141 (2010).

<sup>241</sup> *Id.* Although police practices in the 1960s may make for an imperfect comparison, more recent numbers suggest a dramatic shift. See Weihua Li & Jamiles Lartey, *As Murders Spiked, Police Solved About Half in 2020*, MARSHALL PROJECT (Jan. 12, 2022, 6:00 AM) <https://www.themarshallproject.org/2022/01/12/as-murders-spiked-police-solved-about-half-in-2020> [https://perma.cc/2RFJ-UGQX] (noting that police cleared seventy percent of murders in the 1980s).

<sup>242</sup> *Clearances*, U.S. DEP’T OF JUST., FED. BUREAU OF INVESTIGATION, CRIM. JUST. INFORMATION SERVS. DIV. (2019), <https://ucr.fbi.gov/crime-in-the-u.s/2019/crime-in-the-u.s.-2019/topic-pages/clearances> [https://perma.cc/L7V3-QGTH]. The clearance rate continues to decline, reaching a national average of just 50% in 2020. Li & Lartey, *supra* note 241. There are also significant variations by state. For instance, by one accounting of 2021 data, New York’s clearance rate was 18.7%, Pennsylvania’s rate was 46%, and Maine’s rate was 83.3%. *Clearances Rates: Uniform Crime Report for Homicides: 1965-2021*, MURDER ACCOUNTABILITY PROJECT, <http://www.murderdata.org/p/blog-page.html> [https://perma.cc/3PN9-29Z3]. See generally Lewis & Usmani, *The Injustice of Under-Policing*, *supra* note 6, at 91 (“[I]n comparative context the police in the United States do not solve many serious crimes. America’s [homicide] clearance rate is the lowest of all comparable countries . . . . The median developed country records around one homicide-related arrest per homicide that occurs. In the United States, the figure is 0.56.”).

<sup>243</sup> PATRICK SHARKEY, *UNEASY PEACE: THE GREAT CRIME DECLINE, THE RENEWAL OF CITY LIFE, AND THE NEXT WAR ON VIOLENCE* 70 (2018) (“For every 100,000 white women, just 82 years of life were lost to homicide in 2012. For every 100,000 white men, 192 of potential life were lost, and for every 100,000 black women 230 years of potential life were lost. For every 100,000 black men, on the other hand, 1,341 years of potential life were lost due to homicide.”).

solved and whether you, your spouse, and your children live or die,<sup>244</sup> the choice of more or fewer police patrols and of more or less police surveillance is no choice at all. The normative criminal theory literature might consider taking all of this as a pointed bulletin from the African American collective: *in case there was any doubt, we value our lives.*<sup>245</sup>

Activists bumped up against the stubborn reality of the African American preference for police services in 2021. African Americans in New York City leaned heavily toward Eric Adams in the New York City Democratic primary. An early poll showed 47% of African American city residents supporting Adams, with only 12% of African Americans polled<sup>246</sup> supporting Adams's chief rival in the primary, Andrew Yang.<sup>247</sup> A subsequent poll found that 55% of likely African American primary voters ranked Adams as their top-choice within the city's rank-choice primary voting system<sup>248</sup> with 84% of African American voters favoring Adams for the final election.<sup>249</sup>

Between 1995 and 2002, Adams was a registered Republican.<sup>250</sup> Prior to his political career, he had worked as an NYPD police officer for twenty-two

<sup>244</sup> See Tanaya Devi & Roland G. Fryer, *Policing the Police: The Impact of "Pattern-or-Practice" Investigations on Crime* 34 (Nat'l Bureau of Econ. Rsch., Working Paper No. 27324, 2020) (describing how homicide and overall crime rates increase when police pull back from their duties following a Department of Justice pattern-or-practice investigation); Mirko Draca, Stephen Machin & Roberty Witt, *Panic on the Streets of London: Police, Crime, and the July 2005 Terror Attacks*, 5 AM. ECON. REV. 1010, 2180 (2011) ("We find strong evidence that more police lead to reductions in what we refer to as susceptible crimes . . . including street crimes like robberies and thefts."). See generally Aaron Chalfin & Justin McCrary, *Are U.S. Cities Underpoliced? Theory and Evidence*, 1 REV. ECON. & STAT. 5 (2013); FRANK ZIMRING, *THE CITY THAT BECAME SAFE* (2011).

<sup>245</sup> Another study framed the question of African American support for police as a dilemma: "[T]he central dilemma in African Americans' relationship with police is fear of the police because of historic abuse, while at the same time desiring protection from criminal elements that are disproportionately present in their communities." Susan E. Howell, Huey L. Perry & Matthew Vile, *Black Cities/White Cities: Evaluating the Police*, 26 POL. BEHAV. 45, 47 (2004).

<sup>246</sup> Sally Goldenberg, *Yang Falls Behind Adams for First Time in New York Mayor's Race Poll*, POLITICO PRO (May 5, 2021, 5:21 PM), <https://subscriber.politicopro.com/states/new-york/city-hall/story/2021/05/05/yang-falls-behind-adams-for-first-time-in-new-york-mayors-race-poll-1380457> [<https://perma.cc/2ZJ8-JHHF>].

<sup>247</sup> Yang also ran on an agenda that opposed the defunding of police. See Micheal Schnell, *Yang: 'Defund the Police Is the Wrong Approach for New York City'*, THE HILL (May 13, 2021, 10:59 PM), <https://thehill.com/homenews/state-watch/553496-yang-defund-the-police-is-the-wrong-approach-for-new-york-city> [<https://perma.cc/6YTU-7Q6F>].

<sup>248</sup> Deb Otis, *New York City Mayoral Primary Poll Results*, FAIRVOTE (June 21, 2021), [https://www.fairvote.org/nyc\\_poll\\_mayor2021#race=Black](https://www.fairvote.org/nyc_poll_mayor2021#race=Black) [<https://perma.cc/3QLL-9NZR>].

<sup>249</sup> *NYC 2021: Adams Poised to be Next Mayor of NYC, Leading Sliwa by 40 Points*, EMERSON COLLEGE POLLING, <https://emersonpolling.reportablenews.com/pr/nyc-2021-adams-poised-to-be-next-mayor-of-nyc-leading-sliwa-by-40-points> [<https://perma.cc/JEM7-UR6T>] (click on "NYC Full Results" on right side of webpage; then open the "Crosstabs" sheet within the spreadsheet).

<sup>250</sup> See The Brian Lehrer Show, *NYC's Next Mayor? Economy & Justice: Eric Adams*, WNYC (May 13, 2021) <https://www.wnyc.org/story/nycs-next-mayor-economy-equity-eric-adams> [<https://perma.cc/BX8V-XAYL>] ("[S]ome of your rivals are pointing out that you were a registered Republican from 1995 to 2002.").

years.<sup>251</sup> Just a month before the primary election, Adams sought to explain his prior Republican party affiliation to a bright blue city constituency, claiming that he had never voted for a Republican but had registered as one in protest.<sup>252</sup> Adams said that this protest had been sparked by his sense that Democrats had refused to address crime in African American communities.<sup>253</sup>

Both the Eric Adams primary run and the London Breed policy shift show the advancement of the African American democratic interest in penal administration, but in a way that in some respects reverts back to punitive populism and cuts against the African American interest in racially proportionate penal outputs. The Adams administration will likely produce more African American stops, arrests, convictions, and jail and prison admissions than were produced under the DeBlasio administration. Is this advancement of the African American democratic interest an example of racial equity in penal administration, or just the opposite? Though this question is theoretical and seemingly removed from the brutal physical realities of street crime and adjacent racially-biased criminal enforcement regimes, it is critical to the development of a criminal justice politics that is in the same moment durable, radical, and duly attentive to African American interests.

### III. BEYOND PROCESS AND PENAL OUTPUTS: RACIAL EQUITY IN PENAL ADMINISTRATION

Criminal justice reform is not built for the more robust conception of racial equity presented in Part I. Among other shortcomings, there is no theory of criminal justice reform that shows (or even claims) the potential to lower the rate of African American imprisonment such that it reflects the racial group's representation in the general population. Section A of this Part argues that the reform movement, as presently conceived, cannot credibly pursue a "normal" rate of both African American incarceration and African American violent-crime victimization. The reform movement's claim of the pursuit of racial equity in penal administration will ring hollow until it adopts social welfarist and employment solutions that elevate the economic position of low-skilled African American workers.

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<sup>251</sup> Matt Flegenheimer, Michael Rothfeld & Jeffery C. Mays, *What Kind of Mayor Might Eric Adams Be? No One Seems to Know*, N.Y. TIMES (Oct. 23, 2021), <https://www.nytimes.com/2021/10/23/nyregion/eric-adams-mayor-nyc.html> [https://perma.cc/HE6F-HTMT].

<sup>252</sup> The Brian Lehrer Show, *supra* note 250.

<sup>253</sup> *See id.* ("I watch crime in our streets where we [saw] the leadership in this city, state, and country ignoring the violence in the inner cities. It was my protest move . . .").

Section B proposes three conceptual distinctions for the study of racial inequity in criminal procedure. Together, the distinctions, as applied to policing and substantive criminal law, demonstrate the need for routine consideration of economic solutions within the reform literature.

A. *Racially Disproportionate Penal Outputs and Cumulative Racial Disadvantage*

Structural racial inequality (i.e., cumulative racial disadvantage) is certainly not the only driver of racially disproportionate penal outputs, but it is one that deserves more careful consideration within the normative criminal-legal literature.<sup>254</sup> Such an accounting would likely benefit from a review of the economic history of mass incarceration, placing this history alongside narratives centered on racial discrimination in criminal procedure. A full account of the late twentieth-century rise in U.S. imprisonment, inclusive of both macroeconomic factors and racial discrimination in criminal procedure, provides better empirical footing for consideration of the range of African American interests in penal administration.

The historical treatments of mass incarceration principally based on the nation's economic culture and derivative policy typically begin with deindustrialization (the collapse of "Fordism"<sup>255</sup>) and the economic shock it posed to the nation. A subset of theoretical criminologists (many observing from Europe) point to the rapid decline in the late twentieth century United States of a system of industrial production that had elevated the working-class labor force.<sup>256</sup> The loss of manufacturing jobs to automation and

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254 For an example of scholarship detailing the nature of the link between criminal procedure and material racial inequality, see Huq, *supra* note 10, at 2427-28. Huq writes: "To be sure, 'macrostructural' forces such as the deindustrialization of central cities and the exit of some middle-class and wealthy African Americans have driven the growth of concentrated, racialized poverty. But these forces have been magnified by 'deliberate policy decisions to concentrate minorities and the poor in public housing.'" *Id.* (footnotes omitted).

255 See LACEY, THE PRISONERS' DILEMMA, *supra* note 18, at 25 n.46 ("'Fordism' refers to the standardised systems of industrial production which depended on high levels of relatively low-skilled labour, and which have been supplanted by technological developments in advanced capitalist economies."). See generally ALESSANDRO DE GIORGI, RE-THINKING THE POLITICAL ECONOMY OF PUNISHMENT: PERSPECTIVES ON POST-FORDISM AND PENAL POLITICS (2006) (describing what the author terms as our modern era of "post-Fordism").

256 See LACEY, THE PRISONERS' DILEMMA, *supra* note 18, at 138, 151-53. Lacey and Soskice provide more context for this trend:

In the early to mid-1960s, the Fordist regime provided, directly and indirectly, employment even for those with weak educational background and low social capital. This was because semi-skilled employment on assembly lines required physical skills but limited analytical or social skills, and unionization was relatively easy to impose on Fordist employers, because of the assembly line system . . . The 1970s and 1980s

offshoring was particularly damaging for unskilled African Americans,<sup>257</sup> arriving at a moment when most African Americans anticipated steady upward socio-economic mobility given the recent fall of Jim Crow and the legal and political gains of the Civil Rights Movement.<sup>258</sup> Whether an African American could continue this upward ascent depended on class status and, by the same token, geographic mobility.<sup>259</sup> Many middle-class African Americans had the resources necessary to exit declining urban centers and

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saw a continual middle class exodus from inner cities, which in itself reduces availability of low-skill service employment in the inner city.

Lacey & Soskice, *Crime, Punishment and Segregation*, *supra* note 8, at 463.

257 WILLIAM JULIUS WILSON, *THE DECLINING SIGNIFICANCE OF RACE* 21-22 (1978) [hereinafter WILSON, *THE DECLINING SIGNIFICANCE OF RACE*] (“[I]n a very real sense, the current problems of lower-class blacks are substantially related to fundamental structural changes in the economy. A history of discrimination and oppression created a huge black underclass, and the technological and economic revolutions have combined to insure it a permanent status.”); *see also id.* at 21 (“These basic concerns [regarding African American civil liberties] were reflected in the 1964 Civil Rights bill which helped to create the illusion that, when the needs of the black middle class were met, so were the needs of the entire black community.”). *See generally* DOUGLAS S. MASSEY & NANCY A. DENTON, *AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS* (1993); SAMPSON, *GREAT AMERICAN CITY*, *supra* note 58, at 61.

258 As Lacey and Soskice describe:

As Fordist jobs were largely eliminated by automation, new jobs increasingly followed middle classes away from city centres—and increasingly demanded analytic and social skills. And as middle classes moved away, so socio-employment networks—which could link those in the inner city with employment opportunities—declined. This in turn led to the collapse in inner city unskilled earnings. Many of the resulting group of unskilled, unemployed men were black Americans who had moved relatively recently, in the middle decades of the 20th century, from the Jim Crow South to the North in search of work and better opportunities—before becoming surplus to the requirements of the labour market in the 1970s. The Civil Rights Act was less than a decade old when the economic collapse overtook the industrial cities . . .

Lacey & Soskice, *Crime, Punishment and Segregation*, *supra* note 8, at 463-65. Compare this to Wilson’s explanation:

[T]he growth of a black middle-class population accompanied the shift from a preindustrial to an industrial system of production . . . I have been careful to point out, however, that the impressive occupational gains made by blacks during these three decades have been partly offset by the effects of basic structural changes in our modern industrial economy, changes that are having differential impact on the different income groups in the black community. Unlike more affluent blacks, many of whom continued to experience improved economic opportunity even during the recession period of the 1970s, the black underclass has evidenced higher unemployment rates, lower labor-force participation rates, higher welfare rates, and more recently, a sharply declining movement out of poverty. The net effect has been a deepening economic schism in the black community that could very easily widen and solidify.

WILSON, *THE DECLINING SIGNIFICANCE OF RACE*, *supra* note 257, at 141.

259 *See* SAMPSON, *GREAT AMERICAN CITY*, *supra* note 58, at 61 (“[D]eindustrialization and the shift to a service economy was disproportionately felt in the inner city.”).

track White flight,<sup>260</sup> leaving poor and working-class African Americans to suffer the compound effect of race and class isolation. William Julius Wilson and others have identified this as a “concentration effect” within isolated urban geographic spaces.<sup>261</sup> Responsive to these and other empirical findings, Wilson argued the economic bifurcation of the African American racial group to be driven in significant part by deindustrialization.<sup>262</sup> In the mid-1970s, in the wake of African American geographic fragmentation, the percentage of African Americans in white-collar employment continued to grow while opportunities for unskilled African Americans dwindled.<sup>263</sup> The decline in factory employment relegated to surplus labor many African American workers whose families had only recently migrated to the North.<sup>264</sup> Moreover, the new service sector jobs available to the unskilled segment of the workforce were located well outside of the urban core in the areas that hosted middle

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260 See WILLIAM JULIUS WILSON, *THE TRULY DISADVANTAGED: THE INNER CITY, THE UNDERCLASS, AND PUBLIC POLICY* 7 (1987) [hereinafter WILSON, *THE TRULY DISADVANTAGED*] (“[T]he black middle-class professionals of the 1940s and 1950s (doctors, teachers, lawyers, social workers, ministers) lived in higher-income neighborhoods of the ghetto and serviced the black community. Accompanying the black middle-class exodus has been a growing movement of stable working-class blacks from ghetto neighborhoods to higher-income neighborhoods in other parts of the city and to the suburbs. In the earlier years, the black middle and working classes were confined by restrictive covenants to communities also inhabited by the lower class . . . .”); see also Lacey & Soskice, *Crime, Punishment and Segregation*, *supra* note 8, at 463 (describing how a “middle class exodus from inner cities” resulted in a concomitant loss of “socio-employment networks” that might otherwise have connected those remaining in the inner cities to employment). Doug Massey and Nancy Denton present a conflicting view:

Our principal objection to Wilson’s focus on middle-class out-migration is not that it did not occur, but that it is misdirected: focusing on the black middle class deflects attention from the real issue, which is the limitation of black residential options through segregation. Middle-class households—whether they are black, Mexican, Italian, Jewish, or Polish—always try to escape the poor. But only blacks must attempt their escape within a highly segregated, racially segmented housing market . . . . [P]oor blacks live under unrivaled concentrations of poverty and affluent blacks live in neighborhoods that are far less advantageous than those experienced by the middle class of other groups.

MASSEY & DENTON, *AMERICAN APARTHEID*, *supra* note 257, at 9.

261 WILSON, *THE TRULY DISADVANTAGED*, *supra* note 260, at 144; see also SAMPSON, *GREAT AMERICAN CITY*, *supra* note 58, at 313 (“The basic thesis is that macrosocial patterns of racial inequality give rise to the social isolation and ecological concentration of the truly disadvantaged, which in turn leads to structural barriers and cultural adaptations that undermine social organization and hence the control of crime.”).

262 See WILSON, *THE TRULY DISADVANTAGED*, *supra* note 260, at 135 (citing a study showing that African Americans are “disproportionately concentrated” in industries most impacted by plant closings in the 1970s, like “the automobile, rubber, and steel industries”).

263 *Id.* at 82.

264 See Lacey & Soskice, *Crime, Punishment and Segregation*, *supra* note 8, at 463-65 (describing how a “collapse in inner city unskilled earnings” left many who relocated from the Jim Crow South without income).

class resettlement.<sup>265</sup> Crippling rates of African American urban underemployment and unemployment<sup>266</sup> went largely unaddressed by the state.<sup>267</sup>

The social and economic position of African American laborers was worsened still by a political system in which local governments directed by small but motivated local voting publics enacted policies that deepened housing and public education segregation and ramped up policing.<sup>268</sup> These local voters, disproportionately homeowners, exhibited a strong aversion to their struggling working-class neighbors, one almost certainly compounded by latent and manifest racial bias.<sup>269</sup> Meanwhile, state governments and the federal government did little to address the emerging landscape of concentrated African American poverty in the American city.<sup>270</sup> This was despite being far better positioned than local governments to design and apply welfarist policy solutions that would directly address the negative impact of the prior economic shock.<sup>271</sup> Or so the story goes.<sup>272</sup>

<sup>265</sup> *Id.* at 463.

<sup>266</sup> See Bruce Western & Christopher Wildeman, *The Black Family and Mass Incarceration*, 621 ANNALS AM. ACAD. POL. & SOC. SCI. 221, 224 (2009) (“From 1969 to 1979, central cities recorded enormous declines in manufacturing and blue collar employment . . . . For young Black men in metropolitan areas, employment rates fell by 30 percent among high school dropouts and nearly 20 percent among high school graduates.”).

<sup>267</sup> *Id.* (“[F]ew social programs were available to supplement the incomes or retrain or mobilize young able-bodied men into new jobs. The welfare system was also poorly equipped to handle the social problems linked to male unemployment. Drug addiction, petty offending, and public idleness all afflicted the neighborhoods of concentrated disadvantage.”).

<sup>268</sup> See Lacey & Soskice, *supra* note 8, at 462-63 (“The decisive voter in local elections is likely to be a home owner with strong concerns to segregate the poor residentially—in the suburbs to keep the poor out, and in the cities to push the poor into their own enclaves; to keep property taxes low if public schools are bad (de facto segregated) or high if they are good, in order to maintain property values; and in any case to promote de facto educational segregation.”).

<sup>269</sup> *Id.*

<sup>270</sup> *Id.*

<sup>271</sup> See *id.* at 474.

<sup>272</sup> The deindustrialization origin story of mass incarceration has been argued by several sociological scholars. See, e.g., *id.* at 463. (“Our argument is that the major [violent crime] trends over time are shaped by the availability of reasonable employment for males from disadvantaged backgrounds in segregated neighbourhoods.”); BRUCE WESTERN, PUNISHMENT AND INEQUALITY IN AMERICA 4 (2006) (“[T]he prison boom was a political project that arose partly because of rising crime but also in response to an upheaval in American race relations in the 1960s and the collapse of urban labor markets for unskilled men in the 1970s.”); Katherine Beckett & Bruce Western, *Crime Control, American Style: From Social Welfare to Social Control*, in CRIME, INEQUALITY AND THE STATE, *supra* note 58, at 165, 177-78 (“[O]ur research suggests the US state has made a significant intervention in the labour market by expanding the penal system in the 1980s and 1990s. Consisting of mostly young, unskilled, able-bodied men of working age, large and growing prison and jail populations conceal a high level of joblessness that, if included in labour market statistics, would contribute about two percentage points to the male unemployment rate by the mid-1990s.”). See generally CRIME, INEQUALITY AND THE STATE, *supra* note 58.

International comparison lends a bit more credibility to this class-based mass incarceration narrative. Several other advanced nations were subject to late twentieth-century deindustrialization,<sup>273</sup> but the governments of these peer nations generally responded with a robust social welfare policy agenda rather than a robust penal agenda.<sup>274</sup> Racial bias in the formulation of economic policy is certainly an important part of this path dependency narrative, but so is federalism. Centralized governments across Europe (identified in one line of analysis as “co-ordinated market econom[ies]”<sup>275</sup>) subject to the same economic conditions and threats to working class life, were much more nimble in pivoting to support working class communities.<sup>276</sup> As a general matter, countries that spend more on social welfare have lower rates of incarceration;<sup>277</sup> in the United States, the same association has been found among its various states.<sup>278</sup>

The late twentieth-century story of the advanced marginalization of the African American industrial worker is well-worn and largely uncontested in the academy. Yet, there is the question of the weight given this story in the normative literature oriented to African American interests in criminal procedure and in penal administration in general. If the tension between the African American security interest and the African American interest in racial proportionality in penal outputs is based in significant part in material racial inequality and must therefore be resolved by way of social welfarist policy solutions bearing upon concentrated African American poverty, social welfarist policy should be front-of-mind in the reform literature if this literature holds to this Article’s conception of racial equity in penal administration. But at this advanced stage, broad-based normative theories of racial equity in the criminal justice reform movement, though attentive to racial disparities in penal outputs, are very rarely formulated such that they address, even theoretically, African American structural disadvantage. In the context of normative criminal theory, criminal justice reform projects are

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273 See Lacey & Soskice, *Crime, Punishment and Segregation*, *supra* note 8, at 456-57 (“These patterns of crime and punishment in the USA greatly magnify corresponding developments in other liberal market economies—Australia, Canada, New Zealand and the UK . . .”).

274 See LACEY, *THE PRISONERS’ DILEMMA*, *supra* note 18, at 56-58, 86-87 (discussing social welfare spending of peer countries).

275 *Id.* at 58.

276 See *id.* (“My suggestion is that such an economy, which . . . incorporates a wide range of social groups and institutions into a highly co-ordinated governmental structure, may be more likely . . . to generate incentives for the relevant decision-makers to opt for a relatively inclusionary criminal justice system.”).

277 *Id.* at 86; David Downes & Kirstine Hansen, *Welfare and Punishment in Comparative Perspective: The Relationship Between Welfare Spending and Imprisonment*, CRIME & SOC’Y FOUND., at 1 (“Put simply, we find that countries that spend a greater proportion of GDP on welfare have lower imprisonment rates . . .”).

278 LACEY, *THE PRISONERS’ DILEMMA*, *supra* note 18, at 86-87.



typically designed to address racial disparities in penal outputs by reducing the total number of penal transactions (e.g., stops, searches, and arrests), by reducing the severity of punishment at sentencing, by insulating criminal procedure from the racial bias of penal bureaucrats, or by paring down the penal code. Each of these objectives is important in its own right, but even if taken collectively they do not represent a credible method by which to close, in the near or far-term, the racial gap in penal outputs. Granted, criminal-legal scholars are expected to produce scholarship based in their expertise in criminal law and crime policy. And yet, if criminal justice reform is limited, by definition and methodology, to penal rule change it is not in and of itself a credible normative framework by which to address the harm of massive racial disproportionality in penal outputs.

When considering this argument regarding economic policy and the maximum value of conventional criminal justice reform, skeptics may object to the uncoupling of racial bias as applied in criminal procedure and structural racial inequality. Race-based policing and prosecution, for instance, would seem relevant to structural racial disadvantage. If we were to take at face value the argument that racially disproportionate penal outputs are principally a function of structural racial inequality, but understand racial bias in criminal procedure to be at least partially responsible for this inequality, what exactly is gained by drawing a distinction between racial bias in criminal procedure and structural racial inequality as causal agents? Given their association, why critique normative scholars for leaning heavily on solutions that address racial bias in criminal procedure?

The answer, again, turns on causal weight and normative emphasis. While racial bias in criminal procedure deepens structural racial disadvantage, it is not considered its primary cause. Sociologists instead identify as primary culprits economic isolation, racial segregation, class segregation, derivative moral<sup>279</sup> and legal cynicism,<sup>280</sup> and the erosion of collective efficacy.<sup>281</sup> To repeat an earlier point, if we were to drain all of the racial bias from criminal procedure, structural racial inequality would be such that the penal system would continue to produce massive racial disparities in the prison

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279 Robert J. Sampson, *Neighborhood Effects, Causal Mechanisms and the Social Structure of the City*, in *ANALYTICAL SOCIOLOGY AND SOCIAL MECHANISMS* 227, 232-33 (Pierre Demeulenaere ed., 2011) (“Another normative feature of neighborhoods, or what might be thought of as an orienting cultural climate, is *moral cynicism*. Even after we adjust for individual characteristics such as income, race, and other traditional factors, neighborhoods vary systematically in the moral cynicism of residents toward law and mutual helping behavior.”)

280 See Monica Bell, *Police Reform and the Dismantling of Legal Estrangement*, 126 *YALE L.J.* 2054, 2066 (2017) (describing the origins of the term “legal cynicism” and noting that scholars have used it to describe ruptures in a community’s social bonds with law enforcement).

281 See generally SANDRA SMITH, *LONE PURSUIT* 166 (2007) (noting a demise in collective trust in many inner-city communities).

population.<sup>282</sup> One could reasonably expect continuing racial disparity in stops and arrests, though the benefits conveyed by the elimination of racial bias to these latter two procedures would be far greater given the relatively high level of bureaucratic discretion inherent to their execution.<sup>283</sup>

Recognizing these bleak fundamentals, many committed to addressing the racially disproportionate inequities in penal administration—abolitionists chief among them—have determined that the reform project is not a credible vehicle. A growing number opt instead for more ambitious normative platforms, some of which, while reasonably taken to hold greater moral legitimacy, strike nonbelievers as eminently impractical and as unserious about the African American security and democratic interests. There is, of course, a third way. One that does not require the abandonment of reform for an amorphous abolition project. The answer is instead to hitch the most ambitious reform platforms to normative projects designed to chip away at structural racial inequality. This coupling would address the full slate of African American interests within penal administration and transcend the tensions among them.

### B. *Three Analytical Principles for the Pursuit of Racial Equity in Penal Administration*

To design a theory of racial equity in penal administration capable of simultaneously advancing the African American liberty, security, and democratic interest within the field, the criminal justice reform literature should establish three interlocking conceptual distinctions: the first between racial bias and material racial inequality as causal explanations for the racial disparity in penal outputs; the second between criminal procedures subject to a high level of bureaucratic discretion and those subject to a low level of bureaucratic discretion; and the third between fields of criminal enforcement.

#### 1. Disaggregate “Racism”

Racial bias and structural racial inequality are different social phenomena. This is not to deny their association but to point out the analytical problems that arise in conflating the two. For example, one cannot squarely address the racial disparities in penal outputs that are principally rooted in racial inequality with solutions that merely address the racial bias held by penal bureaucrats. As mentioned above, studies seeking to explain the racial disparity in the prison population find that this disparity is in substantial part

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<sup>282</sup> See Grunwald, *supra* note 100, at 17 (“[D]eep structural, economic, and social inequality contribute to higher rates of crime in disproportionately Black neighborhoods.”).

<sup>283</sup> For a discussion of this claim in greater depth, see *infra* Section III.B.

attributable to the Black–White disparity in the commission of serious violent crime, which is itself derivative of material racial inequality.<sup>284</sup> It is now conventional wisdom among quantitative criminologists that the racial disparity in criminal offending explains most of the disparity in prison admissions with much of the remainder attributable to the racial bias of penal bureaucrats.<sup>285</sup>

Drawing out the conceptual distinction between racial bias and material racial inequality as causal agents helps to clarify the potential of conventional criminal justice reform. Penal rule change, for instance, presents as an effective platform for challenging the racial bias of penal bureaucrats, which is relatively prominent in misdemeanor and drug enforcement,<sup>286</sup> but a dud if expected to solve for the racial disparities in prison admission, which appear to be rooted in material racial inequality. Moreover, we know that resource deprivation (i.e., “poverty” on several fronts) is the primary driver of serious violent crime.<sup>287</sup> This is true of both African Americans and Whites, but the

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<sup>284</sup> Pettit & Western, *supra* note 18, at 152 (“The leading studies . . . find that arrest rates—particularly for serious offenses like homicide—explain a large share of the black-white difference in incarceration.”).

<sup>285</sup> *Id.* at 153.

<sup>286</sup> Gregory DeAngelo, R. Kai Gittings, Amanda Ross & Annie Walker, *Police Bias in the Enforcement of Drug Crimes: Evidence from Low Priority Laws* 12, (W. Va. Univ., Dep’t of Econ. Working Paper No. 16-01, 2016), [http://busecon.wvu.edu/phd\\_economics/pdf/16-01.pdf](http://busecon.wvu.edu/phd_economics/pdf/16-01.pdf) [<https://perma.cc/PQ4W-F934>] (noting that there is the greatest racial disparity between Whites and nonwhites in misdemeanors and drug arrests, rather than felony arrests); Shytierra Gaston, Race, Neighborhood Context, and Drug Enforcement: A Mixed-Method Analysis of Racial Disparities in Drug Arrests 159 (May 2016) (Ph.D. Dissertation, University of Missouri-St. Louis) (<https://irl.umsl.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1122&context=dissertation>) [<https://perma.cc/GWS4-AYZF>] (“St. Louis has notable racial disparities in drug arrests . . . During 2009–2013, blacks made up 49% of the resident population but comprised 74% of the city’s drug arrests. Whites were underrepresented, as they accounted for 46% of the resident population and only 26% of drug arrests . . . These race and neighborhood disparities in drug arrests are incongruent with patterns of drug involvement.”); Andrew Golub, Bruce D. Johnson & Eloise Dunlap, *The Race/Ethnicity Disparity in Misdemeanor Marijuana Arrests in New York City*, 6 CRIMINOLOGY & PUB. POL’Y 131, 134, 136 (2007) (“Whereas blacks comprised 26% of NYC’s population, they accounted for 51% of all [drug] stops . . . blacks and Hispanics were particularly likely to be treated more harshly if they were charged with a drug offense or a less serious crime.”).

<sup>287</sup> See SAMPSON & WILSON, *supra* note 58, at 315 (“The sources of violent crime appear to be remarkably invariant across race and rooted instead in the structural differences among communities, cities, and states in economic and family organization.”); see also SAMPSON, WILSON & KATZ, *supra* note 58, at 15–16 (noting the relationship between poverty and crime: “According to this perspective, ‘race’ is not a direct cause of violence (or of any other social behavior, for that matter). Instead, race is a marker for the accumulation of social and material adversities that both follow from and constitute racial status in America. For better or for worse, this proposition has been labeled the ‘racial invariance thesis.’”).

structural disadvantage is far more severe for African Americans.<sup>288</sup> For example, while sixty-three percent of White children spend their childhood in areas with a poverty rate below ten percent and a father present, only five percent of African American children receive the benefit of these conditions.<sup>289</sup> In the absence of a normative theory of criminal justice reform that extends to the issue of material racial inequality, reform holds a relatively low ceiling in relation to the goal of racially proportionate rates of prison admission.

Upon recognition that a substantial portion of the racial disparity in imprisonment (separate from stops, convictions, and arrests) derives from structural disadvantage, we also gain a clearer picture of the conflict among African American penal interests. *Material racial inequality comes into view as the lynchpin of the conflict.* This is simply to argue that material racial inequality is the primary basis for the tension between the African American security interest and the African American interest in proportionate penal outputs. It might be helpful to take a moment to unpack this claim. For the state to physically incapacitate African Americans in response to violent crime is, in part, for it to be responsive to the soaring rate of African American violent crime victimization, which is itself a function of material racial inequality; to be responsive to African American violent crime victimization is to feed the racial disparity in prison admission rates. It would seem, then, that the open pursuit of material racial equality is critical to resolving the conflict among African American penal interests. Material racial equality, or significant progress toward this end, seems a precondition for the resolution of the conflict.

## 2. Disaggregate Criminal Procedure

The tendency within the criminal justice reform literature is instead to tie the racial disparities in criminal procedure to racial discrimination by penal bureaucrats. As suggested above, rather than being incorrect, the racial bias

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<sup>288</sup> Sampson, Wilson & Katz, *supra* note 58, at 19 (“Blacks face much greater odds than Whites of experiencing compounded (i.e., simultaneous individual *and* neighborhood level) poverty . . .”).

<sup>289</sup> *Id.* Scholars have argued that the stability of marriage is itself a function of employment opportunity. See Robert J. Sampson, Jeffrey D. Morenoff & Stephen Raudenbush, *Social Anatomy of Racial and Ethnic Disparities in Violence*, 95 AM. J. PUB. HEALTH 224, 231 (“[B]eing reared in married-parent households is the distinguishing factor for children, supporting recent work on the social influence of marriage and calls for renewed attention to the labor-market contexts that support stable marriages among the poor.”); see also David S. Pedulla & Katherine S. Newman, *The Family and Community Impacts of Underemployment*, in UNDEREMPLOYMENT: PSYCHOLOGICAL, ECONOMIC, AND SOCIAL CHALLENGES 233, 238-39 (Douglas C. Maynard & Daniel C. Friedman eds., 2011) (observing that parental unemployment may impact children’s views of their own future employment prospects).

frame is incomplete. This is because the effect of racial bias on penal outputs may vary across criminal procedures—stops, arrests, and jail and prison sentences and derivative admissions.<sup>290</sup> The same can be said about material racial inequality as a causal agent. In other words, the degree to which each of the two causal mechanisms is responsible for producing racial disparity in penal outputs varies depending on the criminal procedure in question.

There would seem, then, to be value in distinguishing racial discrimination and material racial inequality as causal agents driving the racial disparity in penal outputs, and additional value in disaggregating among criminal procedures when assessing the significance of either of the two race-related mechanisms. The relationship between racial *discrimination* in police stops and the racial *disparity* in police stops, for instance, would be analyzed independent of the same analysis for arrests and prison admissions. In addition, the relative weight of racial bias and structural racial inequality in relation to any one category of criminal procedure would inform normative criminal-legal theory, assuming that racial proportionality in criminal procedure is of serious interest. In the absence of such analytical distinctions, there is the risk of distorting the true nature of the disparity.

### 3. Disaggregate the Fields of Criminal Enforcement

In accounting for the impact of anti-Black bias among penal bureaucrats, it would be a mistake to conclude that this impact is constant rather than variable across the various fields of criminal enforcement. Research indicates that racially disparate criminal enforcement is instead concentrated within

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<sup>290</sup> Robert Crutchfield, April Fernandes & Jorge Martinez, *Race and Ethnic Disparity and Criminal Justice: How Much is Too Much?*, 100 J. CRIM. L. & CRIMINOLOGY 903, 909 (2010) (“[W]e must examine multiple decision points in the criminal justice process in order to accurately assess the presence or absence of racial disparity in case processing. Disparity may occur at many different points between a person’s first contact with law enforcement and the prison door.”); see also James Vorenberg, *Narrowing the Discretion of Criminal Justice Officials*, 1976 DUKE L.J. 651, 675 (“Even where the exercise of discretion is not shown to violate individual rights, there are points in the criminal justice system where discretionary power is clearly broader than any rational argument made for such power, and this should be a signal that narrowing is appropriate.”); cf. Allen J. Beck & Alfred Blumstein, *Racial Disproportionality in U.S. State Prisons: Accounting for the Effects of Racial and Ethnic Differences in Criminal Involvement, Arrests, Sentencing, and Time Served*, 34 J. QUANTITATIVE CRIMINOLOGY 853, 877 (2018) (“We find that accountability (i.e., the degree to which racial and ethnic differences in criminal involvement and arrest account for racial disproportionality in prison) varies by crime type. Accountability . . . is highest for murder and non-negligent manslaughter, rape and other sexual assault; forgery, fraud, and embezzlement; and other property crimes. These are crimes for which investigation is most intense. Accountability is lowest for drug possession, drug trafficking, and weapons offenses. These offenses are more responsive to police presence and patrol patterns and are the most sensitive to implicit or explicit racial profiling.”); Shima Baradaran, *Race, Prediction, and Discretion*, 81 GEO. WASH. L. REV. 157, 162 (2013) (“Thus, not only are arrest and detention the first points of contact with the criminal justice system, but they also involve prediction and discretion that are identified as sources of racial bias.”).

specific offense categories.<sup>291</sup> For instance, drug enforcement is uniquely prone to racial bias.<sup>292</sup> But the elimination of racial bias in drug enforcement impacts African Americans differently than the elimination of racial bias in the field of violent crime enforcement.<sup>293</sup> Police and prosecutors exercise far less discretion in the enforcement of felony assault law, presenting an organic limitation on the impact of the racial bias of penal bureaucrats on the size of African American prison population given that most prisoners are incarcerated for commission of a violent crime.<sup>294</sup>

In contrast, the field of misdemeanor criminal enforcement provides penal bureaucrats much more opportunity for the exercise of bureaucratic discretion and application of anti-Black bias. Roughly thirteen million misdemeanor cases are filed every year,<sup>295</sup> and while the annual total has declined over the past two decades, the field of misdemeanor criminal enforcement continues to show large, disconcerting racial disparities. The Black–White arrest rate is two-to-one for a range of common misdemeanors including disorderly conduct, drug possession, simple assault, theft, vagrancy, and vandalism.<sup>296</sup> The disparity rises to roughly five-to-one for prostitution and ten-to-one for gambling.<sup>297</sup> Moreover, criminal-legal scholars have theorized by way of extensive qualitative study that modern misdemeanor courts function primarily as a sorting system for problem populations rather than as a site for the formal determination of guilt and degrees of

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291 See Pettit & Western, *supra* note 18, at 152–53 (overviewing criminal enforcement statistics by race and offense category).

292 Michael Tonry, *Racial Politics, Racial Disparities, and the War on Crime*, 40 CRIME & DELINQUENCY 475, 475–76 (1994).

293 As John Pfaff explains:

Although the share of the prison population serving time for drugs rose during the 1980s, the share was 22 percent at its peak in 1990. By 2013 it had fallen to under 16 percent. Even the 1990 number is surprisingly low—when drug offenders made up the largest share of state prisoners, three in four prisoners were serving time for non-drug offenses.

PFaff, *supra* note 48, at 32. Pfaff shows fifty-two percent of the growth of the state prison population between 1980 and 2009 to be attributed violent crime with twenty-one percent attributed to admission for drug crime and sixteen percent attributable to admission for property crime. The growth in drug-based prison admissions is substantial, but secondary to felony assault-based admissions. *Id.* The premise being that police and prosecutors exercise far less discretion in the enforcement of felonious assault laws, limiting the impact of racial bias on prison admissions.

294 Grunwald, *supra* note 100, at 52 (“Black prisoners are admitted at heightened and roughly constant rates across offense types, with the exception of violent offenses, for which they are admitted at even higher rates.”).

295 Megan Stevenson & Sandra Mayson, *The Scale of Misdemeanor Justice*, 98 B.U. L. REV. 731, 764 (2018).

296 *Id.* at 759.

297 *Id.*

culpability.<sup>298</sup> Bureaucratic discretion—that of police, prosecutors, and judges—drive this sorting system, making misdemeanor criminal enforcement uniquely vulnerable to the application of group bias.<sup>299</sup>

In sum, the effect of anti-Black bias among penal bureaucrats on African American penal outputs hinges on the degree of bureaucratic discretion that attaches to the procedure that produces the output, as well as the field of criminal enforcement in which the procedure is situated. We should think of misdemeanor enforcement and felony drug enforcement as fields in which bureaucratic discretion and the causal weight of anti-Black bias is relatively high, and violent crime enforcement as a field in which bureaucratic discretion and the causal weight of anti-Black bias is relatively low.

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<sup>298</sup> See generally Alexandra Natapoff, *Aggregation and Urban Misdemeanors*, 40 *FORDHAM URB. L.J.* 1043 (2013). Natapoff argues that defendants in misdemeanor court tend to be informally aggregated such that the credibility of the specific criminal allegation and the individual characteristics of the defendant are less relevant to the adjudicative process. “They tend to render substantive decisions based on categorical generalizations or institutional policies in ways that sideline individual defendant characteristics, the most important being the factual question of whether that particular defendant actually committed a particular crime.” *Id.* at 1058.

<sup>299</sup> Natapoff later ties this orientation toward aggregates to bureaucratic discretion:

The police decision to stop and/or arrest a person is the threshold selection function of the criminal process. It is increasingly clear that urban police often make such decisions based not on evidence of individual criminal behavior, but rather on group characteristics and location. The aggregations are iterative: the aggregate qualities of stop and frisk policies have ripple effects on the arrest process, and the arrest process itself is heavily shaped by generalized decision making.

*Id.* at 1061. Immigration enforcement shows strikingly similar features as municipal police can establish misdemeanor arrest to deportation pipelines driven by racial profiling. See Eisha Jain, *Jailhouse Immigration Screening*, 70 *DUKE L.J.* 1703, 1708 (2021) (“Immigration screening necessarily attaches to the engine of misdemeanor arrests, which constitute the vast majority of arrests in the United States each year. Misdemeanors already give police enormous discretion to target common behavior that is too often detached from principles of moral culpability. By relying on criminal arrest, immigration enforcement necessarily absorbs the selection biases underlying domestic policing decisions.”).

In an article reframing the function of modern misdemeanor courts, Issa Kohler-Hausman argues similarly that misdemeanor criminal courts adhere to a managerial model broadly applied to populations perceived to be unstable. Issa Kohler-Hausman, *Managerial Justice and Mass Misdemeanors*, 66 *STAN. L. REV.* 611 (2014). Reflecting some of the arguments core to this Article, Kohler-Hausman argues that the dominant models of criminal-legal system, generally centered on felony adjudication, are a poor fit for the administrative processing that occurs in the field of misdemeanor criminal enforcement. Kohler-Hausman writes:

The adoption of a managerial mode of criminal law administration makes sense of a notable fact about New York City’s experiment in mass misdemeanors: as low-level arrests dramatically climbed as part of an intentional law enforcement strategy, the rate of misdemeanor conviction markedly declined . . . Existing models of criminal law, which have been built up almost entirely around felony adjudication, simply do not fit lower criminal courts.

*Id.* at 615.

Conventional criminal justice reform measures may therefore be relatively effective in regard to the former and relatively ineffective in regard to the latter.

#### CONCLUSION

This Article does not offer a tidy solution to the conflict among African American interests in penal administration. Its more modest goal is to assist in setting a credible conceptual framework for the pursuit of racial equity in this highly contested field. The first step is to recognize racial proportionality in penal outputs as a precondition for racial equity in penal administration given the nation's distinctive racial history. The second is to acknowledge that racial proportionality in penal administration often falls in tension with the African American security and democratic interests in penal administration. To advance each of these interests, and to overcome the tension among them, the reform project will need to broaden to account for social welfare policy as it relates to the American working-class men uniquely vulnerable to both imprisonment and violent crime victimization.