

Intentional Inequalities and Compounding Effects: The State of Race and Justice Theory and Research

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At the founding of the United States, slaves of African origin represented roughly a fifth of the population and the profits from their economic exploitation constituted a critical component of the fledging country's economic engine (US Bureau of the Census, 1793; Baptist, 2014). This institution was legally codified and supported by the apparatus of the criminal justice system. Highly contested issues at the intersection of race, crime, and justice have been central to American public and political life since these beginnings. On one side, claims of Black criminality and immorality have been used throughout US history to rally White citizens concerned with changing race relations and to delegitimize the grievances of Black Americans (e.g., Beckett & Sasson, 2004; Drakulich, Hagan, Johnson, & Wozniak, 2016; Tonry, 2011).¹ On the other side, mass protests and unrest sparked by police misbehavior and unequal treatment were important moments in the civil rights movement, and are echoed in the Black Lives Matter movement of more recent years (e.g., Beckett & Sasson, 2004; Drakulich et al., 2016; Tonry, 2011).

This debate results in competing claims not just about the nature of the connection between race, crime, and justice, but about the basic purpose and role of our criminal justice system. On the one side, the criminal justice system is characterized as serving an important protective function against the dangers posed by Black crime, while the other side points to the long history of the criminal justice system as a weapon used to suppress and exploit Black Americans: from the Fugitive Slave Act, through convict leasing programs, the Black Codes, and Jim Crow laws, to the tough-on-crime policies that arose in the backlash to the civil rights movement. Our goal here is to

shed light on the connection between race, crime, and justice—an important task given the competing claims espoused in public and political debates on the issue.

Any understanding of the link between race and the justice system in the United States must start with two basic and well-established facts. The first is that Black Americans disproportionately experience criminal justice system contact, often by large margins (e.g., Rosich, 2007). The second is that race is not particularly meaningful biologically—instead, the importance of race lies in its social construction and collective meaning (e.g., Haney-López, 1994; Omi & Winant, 2015; Smedley & Smedley, 2005; Yudell, Roberts, DeSalle, & Tishkoff, 2016).

The combination of these two basic facts has several important implications. The first is that the large race differences in criminal justice contact are not explained by race, at least not in any fundamental biological or intrinsic sense. If race is socially constructed, the explanations for the differences must be social. A primary task for theory and research, then, is the identification of where and how these differences emerge within the social structure.

A final implication worth mentioning concerns not the explanation for why the differences exist, but instead an explanation for why some in academic, public, or political spheres continue to advocate explanations that imply biological or intrinsic roots to the problem (e.g., Bobo, Kluegel, & Smith, 1997; Bonilla-Silva, 2010; Jackman & Muha, 1984). Those who treat race as having inherent or biological explanatory power in explaining race differences in criminal justice contact are either unaware of these basic and well-established facts, are actively working to maintain White privilege and Black disadvantage, or are both unaware and racially motivated. In simpler terms, they are either ignorant, racist, or both. This claim is not meant as a flippant accusation, or to be provocative or inflammatory without purpose. Instead, rather than reflecting a mere academic or intellectual disagreement, it is in fact crucial to an understanding of why race differences in contact with the criminal justice system emerge and persist.

The following sections review existing theory and research on these questions and identify both lingering problems and potential solutions within that research. We begin with what we know, first by describing the extreme racial inequalities in contact with the actors and institutions of the criminal justice system. We proceed from there to potential explanations for these disparities and review the relevant history of the role of race and racism in justice policy and practice. The final section identifies key theoretical, methodological, and substantive issues that remain, and proposes potential avenues to resolution where possible.

What We Know about Race and Justice

Race and Contact with the Criminal Justice System

A tremendous amount of research documents the basic racial disparities at the various points of contact with the US criminal justice system. The criminal justice

system is comprised of several functionally distinct but interacting components. Disparities may be produced at the moment of contact with any of these institutions or the actors who populate them. The subsections that follow briefly review some major findings for specific points of contact with the police, courts and sentencing, incarceration, the juvenile justice system, and the death penalty. However, these points of contact, much like the institutions themselves, are not independent. In addition to considering disparities at the level of individual agents or institutions, a more systemic perspective highlights the compounding effects of racial disparities across these institutions, a phenomenon discussed in the following section.

Police African Americans experience substantially more contact with police than do Whites, with young Black men experiencing particularly high rates of contact. African Americans are significantly more likely to be stopped (Bureau of Justice Statistics, 2013; Crutchfield, Skinner, Haggerty, McGlynn, & Catalano, 2012), searched (Baumgartner, Epp, Shoub, & Love, 2017; Baumgartner, Grigg, & Mastro, 2015; Bureau of Justice Statistics, 2013; Rojek, Rosenfeld, & Decker, 2012) and arrested (Baumgartner et al., 2017; Kochel, Wilson, & Mastrofski, 2011; Lytle, 2014; Mitchell & Caudy, 2015) by police than similarly situated Whites. These disparities remain significant even as researchers control for a wide range of other factors in order to isolate the effects of race. The search disparity is particularly concerning in light of evidence suggesting that frisks of White suspects are more likely to find contraband such as drugs and weapons (Jones-Brown, Gill, & Trone, 2010). Black suspects are also more likely to be mistreated by the police (Fryer, 2016). Black victims of fatal police shooting are more than twice as likely as White victims to be unarmed (Nix, Campbell, Byers, & Alpert, 2017).

Moreover, research has shown that many of these disparities cannot be explained by differing rates of offending among Whites and minorities. For example, Mitchell and Caudy (2015) found that “at ages 17, 22, and 27 African-Americans’ odds of drug arrest are approximately 13, 83, and 235% greater than whites, respectively,” despite the fact that “African-Americans and Hispanics reported statistically lower rates of drug offending [compared to Whites] on nearly every measure of drug offending.” These racialized disparities between criminal behavior and contact with the criminal justice system begin early in life, with African American teens more than twice as likely to report having had contact with the police, even after controlling for rates of criminal involvement (Crutchfield et al., 2012).

Courts Racial disparities have been identified throughout the American court system, from initial charge to sentencing, with the most severe disparities experienced by young African American men. African Americans are more likely to be charged when arrested (Wu, 2016), to receive an initial charge carrying a mandatory minimum sentence (Rehavi & Starr, 2014), and in general face harsher criminal charges than do Whites, legally relevant factors notwithstanding (Rehavi & Starr, 2014; Sutton, 2013; Wu, 2016). Among the most robust and consistent findings are

those pertaining to pretrial detention, indicating people of Color, and young African American men in particular, are significantly more likely to be remanded for pretrial detention than Whites (Spohn, Andiloro, Johnson, & Kutateladze, 2014; Sutton, 2013; Wooldredge, Frank, Goulette, & Travis, 2015).

Research analyzing racial disparities in sentence length has been somewhat more mixed. For example, Wooldredge et al. (2015) failed to find significant disparities in sentence length among Black and White felony defendants. However, several factors must be considered in interpreting such findings. First, Wooldredge et al. (2015) found significant racial disparities in conviction rates and overall likelihood of receiving a prison sentence, again with young Black men bearing the most severe burden (60 percent more likely to be convicted and sent to prison). Indeed, racial disparities in the distribution of custodial sentences have been found in multiple recent analyses (Bales & Piquero, 2012; Spohn et al., 2014; Stolzenberg, D'Alessio, & Eitle, 2013; Sutton, 2013).

Second, there may be good reason to distinguish among outcomes for defendants according to the type and severity of criminal charges. Spohn et al. (2014) found variance in racial disproportionality according to the type and severity of the charges brought against defendants in their sample, with the greatest disparity found among misdemeanor drug cases. Felony charges are more likely to carry mandatory minimum sentences, which are likely to attenuate disparities when analysis is isolated to comparably charged felony defendants, as it was in the Wooldredge et al. (2015) study. Finally, despite the standardizing effects of mandatory minimums, research has often found racial disparities in sentence length and severity among misdemeanor and felony cases (Rehavi & Starr, 2014; Stolzenberg et al., 2013; Sutton, 2013).

Incarceration Massive racial disparities exist in the prison population. In 2010, Black Americans were in prison at a rate 4.6 times greater than White Americans (National Research Council, 2014). At the state level in 2014, Black citizens were incarcerated at a rate 5.1 times that for White citizens—the disparity is more than 10 to 1 in five states (Nellis, 2016). These disparities are striking, but considering them across the whole population ignores the concentration of incarceration in one demographic group: economically disadvantaged young Black men. On any given day in 2010, about 35 percent of Black men between the ages of 20 and 39 who had not completed high school were in prison, compared to about 12 percent for young White male drop-outs (National Research Council, 2014). Finally, these disparities are compounded when considering not just a single day, but the cumulative risk of imprisonment over time. Among Black men born in the latter half of the 1970s who did not finish high school, 69 percent would serve time in prison by their mid-thirties, while the same was true for only 15 percent of White dropouts. The absolute numbers are lower among college graduates, but the disparities are actually greater: 7.6 percent of this demographic cohort of Black men versus 1.2 percent of White men (Western & Wildeman, 2009).

Juvenile justice Research on racial disparities in the juvenile justice system reveals a consistent and troubling theme, namely, that minority youth, African Americans in particular, are significantly less likely to receive therapeutic or rehabilitative sentences and accordingly more likely to receive more traditional custodial sentences, the primary function of which is to incapacitate (Cochran & Mears, 2015; Fader, Kurlychek, & Morgan, 2014).

Drawing from cross-sectional data from 40 counties in the United States, Howell and Hutto (2012) found that Black and Hispanic youth were less likely than Whites to receive probation, and accordingly more likely to receive a jail sentence. In a longitudinal study of a sample of 12,906 adjudicated Philadelphia youth, Fader et al. (2014) found similar racial disparities in punitive sentencing and resource allocation. Among their sample, the most common sentence for White youth was a therapeutic facility (57 percent), while for Black and Latino youth the most common disposition was a physical regimen facility. This disparity was not significantly reduced by the inclusion of legally relevant factors. The authors also found that although adjudication for a drug-related offense reduced the odds of a juvenile being placed in a traditional setting rather than a therapeutic setting for all groups, this impact was significantly reduced for Black and Latino youth compared to Whites (Fader et al., 2014).

Death penalty The most consistent form of racial disparity found in analyses of capital cases shows a strong bias related to the victim's race, with cases involving White victims bringing capital charges at two to three times the rate those charges are brought in cases with minority victims (Baumgartner et al., 2015; Donohue, 2014; Phillips, 2012; Radelet & Pierce, 2011). Phillips (2012) found that this disparity doubled when the victim was a White female. Research regarding a possible defendant race bias has been somewhat more mixed. However, this is likely due at least in part to the combination of (1) the fact that most murders are intraracial (Baumgartner et al., 2015; Radelet & Pierce, 2011), and (2) the persistent and robust biasing effect of the victim's race. That is, "Whites tend to kill Whites and Blacks tend to kill Blacks, and the death penalty is far more likely in cases where Whites are killed" (Radelet & Pierce, 2011). African Americans make up roughly half the total homicide victims in the US; however, only 15 percent of executions have been carried out in cases involving Black victims (Baumgartner et al., 2015). Among other troubling aspects, executions appear more common in states with a history of lynchings (Jacobs, Kent, & Carmichael, 2005), and wrongful convictions appear more likely for Black defendants, in part due to misidentification and the "other race effect" (e.g., Garrett, 2011; Wells & Olson, 2001).

The Causes of Racial Disproportionality

As has been described, substantial racial disproportionalities exist in contact with the criminal justice system: Black Americans are stopped, arrested, charged, convicted, and harshly punished more frequently than White Americans.

The critical question is why. We begin with the critical context for any explanation: the stark socioeconomic inequalities experienced by Black versus White Americans. We then draw on prior work to identify three broad possible explanations: that the disparities are produced by true differences in offending, that they are produced by bias in US laws and criminal justice policies, or that they are the product of the bias of individual actors within the criminal justice system. We follow a brief description of these possible explanations with a discussion of compounding effects, the idea that these causes of disparities do not operate in isolation. Finally, given our conclusion that specific policies bear significant responsibility for racial disparities in contact with the criminal justice system, we discuss how these policies arose and why they seem to have racial consequences.

Context: a brief history of race and inequality The social separation of and economic inequality between Black and White Americans have been central features of American life since its inception. For the first near-century of its existence, the institution of slavery legalized racial subjugation and economic exploitation. This institution was central to America, involving a substantial portion of its population and constituting a central place in the American economy through the massive profits generated by not paying wages for labor (Baptist, 2014). After the dismantling of this important social and economic institution in the Civil War, a series of institutions were created to replicate the racial separation, subjugation, and economic exploitation of Black Americans previously achieved by slavery (e.g., Wacquant, 2003)—most directly the postwar Black Codes and the post-Reconstruction Jim Crow laws, both of which legally codified the residential segregation of and economic discrimination against Black Americans. These legally codified forms of segregation and discrimination were largely dismantled in the civil rights era, but de facto discrimination and segregation remained, for instance through discriminatory lending and mortgage practices and disparate educational access (e.g., Knowles & Prewitt, 1969). These racialized social systems persist (e.g., Bonilla-Silva, 1996, 2010). In short, as a consequence of historical and contemporary mistreatment and bias in the labor market, massive racial economic inequalities persist in the United States (e.g., Kochhar & Fry, 2014). Combined with high levels of racial residential segregation, the consequence is that large numbers of Black Americans reside in communities with levels of socioeconomic disadvantage few White Americans ever experience (Peterson & Krivo, 2010).

Three explanations for disparities We organize possible explanations for racial disparities in contact with the criminal justice system into three broad explanations, each pointing toward a different source: differential offending, biased policies and practices, and biased individuals. These explanations are not necessarily competing: each may have some validity and each may compound the effects of the others in producing disparities in criminal justice experiences of Black versus White Americans.

First, the disparity in contact may result from a true difference in offending: that members of racial minority groups offend at higher levels. As noted, race is not particularly meaningful biologically—instead, the importance of race lies in its social construction and collective meaning (e.g., Haney-López, 1994; Omi & Winant, 2015; Smedley & Smedley, 2005; Yudell et al., 2016). However, suggesting that race is socially constructed does not mean that race cannot play a powerful role. As outlined, a combination of historical and contemporary forces has produced a situation in which large numbers of Black Americans reside in communities with levels of socioeconomic disadvantage few White Americans ever experience (e.g., Peterson & Krivo, 2010). These differences in context constitute the most powerful explanation for differences in offending (Krivo & Peterson, 1996; McNulty, Bellair, & Watts, 2013; Peterson & Krivo, 2010; Sampson & Lauritson, 1997; Sampson, Morenoff, & Raudenbush, 2005; Sampson & Wilson, 1995). Additionally, some work has suggested that racism and racial oppression are also direct contributors to crime (Du Bois, 1899; Unnever & Gabbidon, 2011).

Although some level of differential offending appears to exist, substantial racial disparities in criminal justice contact persist even after controlling for differences in offending. Thus, the second possible explanation is that disparities in contact with the criminal justice system may be the product of specific laws and policies that make such disparities inevitable. Policies emerging out of the “war on drugs” appear to fit this pattern (e.g., Tonry, 1995; Provine, 2007). For instance, large disparities exist despite evidence that drug use by minorities is no higher than that by Whites, and may even be lower (Johnston, O’Malley, & Bachman, 2015). The explanation for this appears to be rooted in racial biases in drug sanctions (Mitchell & Caudy, 2013). As an example, from 1986 until 2010 a person needed to possess 100 times more powder cocaine than crack cocaine to trigger the same federal criminal penalties—drugs whose major distinction can be found not in their consequences but in the racial groups with whom they are associated (Provine, 2007).² Other policies criminalize “disorderly” activities enacted in public that are either allowable or ignored when conducted in private for those who have access to such spaces (e.g., Sampson, 2009; Stinchcombe, 1963). More broadly, others have pointed out the disproportionate focus on “street crimes” committed by the poor rather than “suite crimes” committed by the wealthy and powerful—despite the greater harm caused by the latter (e.g., Hagan, 2010).

Finally, other explanations focus on the actions of individuals within the criminal justice system, including police, prosecutors, defense attorneys, judges, juries, prison guards, and others. Some of these actions are influenced by policies, practices, and organizational cultures. Others are the product of biases, animosities, and stereotypes on the part of the actors. Some of these biases and animosities consciously influence actors’ behaviors, others may be less consciously-motivated—the consequence, for instance, of a failure to critically investigate the inconvenient truths of racial privilege.

Compounding effects The sources of bias and disparities, however, do not operate in isolation. A variety of research concerning race and the criminal justice system has sought to account for the compounding nature of the effects of any bias or disparity at a given decision point in the criminal justice process (e.g., Spohn et al., 2014; Stolzenberg et al., 2013; Sutton, 2013; Wooldredge et al., 2015). That is, insofar as the criminal justice system operates as a loosely integrated chain of events and decisions wherein each prior determination influences the next, unequal treatments or biased decisions will be carried forward and magnified as they erroneously inform the subsequent decisions of agents and institutions.

This perspective deepens the significance of racial disproportionalities in police contact early in life which cannot be explained by variance in delinquent behavior (Crutchfield et al., 2012). If Black teens are experiencing twice as much contact with police as their White peers, their relative risk of incurring an early record of deviant or criminal behavior is accordingly doubled. Insofar as this risk disparity is not the result of different rates of delinquent behavior, it is a profound injustice, saddling African American youth with the stigmatizing effects of a criminal record and placing them at a competitive disadvantage before even reaching adulthood.

Police intervention during adolescence more than triples the odds of facing arrest in early adulthood, which has a significant effect on drug use by age 30 (Lopes et al., 2012). Adolescent experiences of police intervention also have significant negative effects on employment and high school graduation, reducing the odds of graduation by three times (Lopes et al., 2012). The consequences of racial disproportionalities found in police contact among adolescents are compounded by the implications of research showing consistently more punitive sentences and less rehabilitative investment for minority juvenile offenders relative to comparably situated White juveniles (Cochran & Mears, 2015; Fader et al., 2014; Howell & Hutto, 2012).

Given the compounding effects of racial inequality at any given point in the criminal process, research identifying such unequal treatment in early stages, such as pretrial detention and prosecutorial decisions, are especially alarming (Rehavi & Starr, 2014; Spohn et al., 2014; Stolzenberg et al., 2013; Sutton, 2013; Wooldredge et al., 2015; Wu, 2016). Research employing more traditional methodologies, focusing on sentencing decisions, for example, takes factors such as custodial status and charge severity as unproblematic givens and holds them constant, often as legally relevant factors, in order to isolate the effects of race, and therefore fails to capture the true racial disparities.

Taken together, this body of research assessing the cumulative effects of racial disparities within the various institutions of the justice system indicates that minority youth, young African American males in particular, find themselves more likely to experience police contact and intervention, which, if the result is processing as a juvenile offender, places them at higher risk for custodial sentencing, reduced access to rehabilitative intervention, and increased risk of arrest as adults, at which point they are more likely to be aggressively prosecuted, subjected to pretrial detention, and given longer, more punitive sentences. This induces a disproportionately severe

criminal stigma the deleterious effects of which can haunt them for decades after (Bales & Piquero, 2012; Cochran & Mears, 2015; Crutchfield et al., 2012; Fader et al., 2014; Howell & Hutto, 2012; Lopes et al., 2012; Rehavi & Starr, 2014; Spohn et al., 2014; Stolzenberg et al., 2013; Sutton, 2013; Wooldredge et al., 2015; Wu, 2016).

Race, justice, and policy Policies with racially disproportionate effects are a major component of any explanation for racial disproportionalities in criminal justice system contact. As noted, these include laws and sanctions as well as the practices and procedures of criminal justice system agents. They also include the policies that helped create and maintain the economic disadvantage and residential segregation that help to explain racial differences in offending. So any true understanding of racial disparities must include an account of why these policies and practices exist.

The consensus suggestion is that the motivation of such policies is the preservation of the current racial hierarchy, with Whites in the position of greatest advantage and Blacks in the position of least advantage (e.g., Peterson & Krivo, 2010). This perspective has its roots in Marxist notions of conflict and group interest. In criminology, conflict theory suggests that those in power will use their control over the lawmaking process and legal institutions to maintain that power (e.g., Chambliss, 1975). Sociological notions of racism similarly draw on the notion of groups and interest, including Blumer's (1958) definition of racism as a sense of group position. As explicit forms of racism became less socially acceptable, new forms of modern racism arose—described by Bobo et al. (1997) as “laissez-faire” racism and Bonilla-Silva (2010) as “colorblind” racism—which still served to preserve status quo group positions. Recent work suggest that even implicit racism—feelings or biases of which the holder may not be aware—is rooted in the same group-based goals (e.g., Drakulich, 2015a, 2015b).

A brief review of the history of these policies is necessary. The United States has a long history of criminal justice system participation in racial control. As with racial economic inequalities, this history begins with chattel slavery, a system legally established in the country's founding documents. The police and other criminal justice system actors assisted in enforcing and maintaining slavery, including through the Fugitive Slave Act, which entailed capturing not only escaped slaves but also free Black citizens from Northern states and returning them to the South (e.g., Campbell, 1970). The constitutional amendment abolishing slavery contained a notable loophole, preserving it solely “as a punishment for crime.” Immediately following this, new legal frameworks—the “Black Codes”—were put into place to preserve the racial control of Black citizens and to continue to exploit their labor. The practice of convict leasing took advantage of the loophole in the Thirteenth Amendment, essentially reestablishing slavery for a large number of recently freed slaves by imprisoning Blacks on petty offenses, including vagrancy, and then leasing their labor to private employers—including in some cases to the same places that had recently lost their slave labor (Blackmon, 2008; Sellin, 1976). At the end of Reconstruction, Jim Crow laws were enacted, legalizing racial segregation and

discrimination in ways that ensured Blacks remained separate from Whites and were forced to work for low wages (e.g., Alexander, 2010). During this period of time, police officers often participated in extrajudicial acts of racial control and subjugation—lynchings—blurring the boundary between the formal legal system and organized vigilante violence (e.g., Tolnay & Beck, 1995).

Jim Crow was largely dismantled during the civil rights era. At this same time, White Southern politicians who feared the changes posed by the civil rights movement began redefining the protests as criminal and using the police and the criminal justice system to actively combat the protestors (e.g., Beckett & Sasson, 2004; Tonry, 2011). This marked the emergence of “law and order” rhetoric in American politics, in which politicians began to call for “tough on crime” policies as a way of signaling to voters who were uncomfortable with the changes posed by the civil rights movement (e.g., Beckett, 1997; Beckett & Sasson, 2004; Tonry, 2011). As the civil rights movement made open expressions of racial antipathy less socially acceptable, law and order rhetoric was used as a “racial dog whistle” to signal to voters uncomfortable with the changes posed by the civil rights movement without openly advocating racial control (e.g., Beckett, 1997; Beckett & Sasson, 2004; Tonry, 2011). This usage continued in subsequent elections, during the “wars” on crime and drugs (Beckett & Sasson, 2004; Tonry, 2011), and even to today, when understandings of crime remain highly racialized (Drakulich, 2015a, 2015b) and when racialized views of criminal justice issues remain important predictors of political behavior (Drakulich et al., 2016; Matsueda, Drakulich, Hagan, Krivo, & Peterson, 2011).

The consequence of the emphasis on tough-on-crime rhetoric has been the establishment of tough-on-crime policies, including the wars on crime and drugs, the rise of aggressive zero-tolerance forms of policing, sentencing reform and mandatory minimums, and the massive expansion of incarceration and the growth of the prison industry (Clear, 2007; Tonry, 2011). These policies have disproportionately harmed African Americans, reinforcing social segregation and maintaining economic inequalities (e.g., Alexander, 2010; Tonry, 2011; Western, 2006). Prison work programs continue the practice of labor exploitation, paying prisoners well below minimum wages while in many cases leasing their labor to private corporations.

In short, a linked chain of institutions exists extending from slavery through the current system of aggressive policing and mass incarceration (Alexander, 2010; Wacquant, 2003). Each of these institutions has served the same two purposes: labor extraction/exploitation and ethno-racial closure (Wacquant, 2003). The persistence of severe inequalities results in social instabilities that are also managed using the instruments of the criminal justice system (Wacquant, 2003). In fact, the existence of racial disparities in imprisonment serves to hide the true magnitude of racial economic inequalities (Pettit, 2012). The politics of crime can serve similar functions: moral panics about crime serve to justify and legitimize racial oppression (Chambliss, 1975). In this light, severe racial disproportionality in contact with the

criminal justice system cannot be understood simply as an unfortunate byproduct of an otherwise race-neutral system—it is instead the product of successful policy efforts to achieve just that end.

Future Directions for Race and Justice

Despite a relative consensus about many aspects of the intersection of race and justice, future theory and research in the area face several core challenges and unanswered questions. The following discusses several of the larger challenges and outstanding questions, organized into theoretical, methodological, and substantive concerns.

Theoretical Directions

Key questions exist about aspects of the most foundational race and justice questions. Among the most basic, definitional questions about race itself remain hard to answer conclusively. A person's self-identified race may differ from the views others have of them, and these external views may vary as well, raising serious question about the meaning or effect of race. Additionally, as a socially constructed rather than biological category, race is fluid and ever changing in its meaning and importance. As race remains an important social and political topic, understandings of race will likely continue to be contested and change. This has important implications for work on race: for instance, it complicates the popular narrative of a looming "majority non-White" America (e.g., Alba, 2016). The scholar's own racial identity and position may also be relevant, recommending a reflexive approach (e.g., Emirbayer & Desmond, 2015).

A closely related theoretical issue is the definition of racism. Racism and bias are often raised as key components for an understanding of racial disparities in criminal justice outcomes, either to explain the actions of individuals or to explain the motivations or support behind race-disparate policies. This is complicated by the seeming decline in explicit and overt expressions of racism (e.g., Krysan & Moberg, 2016; Schuman, Steeh, Bobo, & Krysan, 1997). The product is a seeming paradox in which many White Americans openly eschew racism while supporting policies with racially disparate outcomes (e.g., Drakulich, 2015b). This has forced a rethinking of the definition and forms of racism. Jackman and Muha (1984), for instance, suggest that when racial disparities are challenged, those in the more advantaged group will shift their ideology to explicitly eschew any focus on race and instead emphasize individualism in understanding outcomes while ignoring that members of different groups experience fewer opportunities and greater constraints. In other words, despite the seemingly different focus and language, this new form of racism is consistent with older sociological notions of racism in that it supports the

maintenance of status quo group positions—with White Americans more advantaged and Black Americans more disadvantaged (Blumer, 1958; Bobo et al., 1997; Bonilla-Silva, 2010). Accordingly, justifications for policies with race-disparate consequences have increasingly relied on ideological grounds while fiercely denying any racial motivations. In some cases, those who advocate such ideologies and support racially disparate policies may not be conscious of racial motivations, even when they show implicit signs of racial antipathy (Drakulich, 2015a, 2015b). Even further, some support may be rooted in a semiconscious naivety about race, one rooted in the desire to avoid the inconvenient truths discovered upon more direct considerations of racial privilege. A key theoretical question is whether this is a straightforward extension of older forms of racism or whether new theories and perhaps even new language are needed to describe these cases. For a start on these issues, race and justice scholars should look to work by Lawrence Bobo (Bobo et al., 1997; Bobo & Smith, 1998), Eduardo Bonilla-Silva (2010), and Joe Feagin (2009). However, the openness of racial antipathy in the 2016 presidential election (e.g., Drakulich et al., 2016) raises questions about any linear trend away from explicit racism, and further theoretical work is urgently needed to help account for this development. In sum: to understand the connection between race and justice, we need a firm understanding of racism and racial bias. This means continuing to understand the new, less overt forms of racism, but also the more recent challenges to the notion that older, more explicit forms of racism are declining or anachronistic.

Finally, more theoretical refinement is necessary on the notion of justice itself. For decades, our primary penal philosophy has been a poorly defined focus on toughness, with the implication that such toughness would achieve some equally poorly defined idea of safety (e.g., Clear, 2007). On the other side, “equal treatment” is a similarly problematic goal when it puts disproportionate emphasis on explicit discrimination and ignores the structural sources of differential offending and the racial construction of broader laws and policies. Those calling for police or justice system abolition have been accused of ignoring the strong desire for *effective* criminal justice investment in community safety among many living in predominantly Black communities. Community justice’s focus on the goal of community well-being is laudable, but the work often lacks an explicit account of racial dynamics in our social structure and public institutions and thus its suggestions sometimes seem naive to racial realities. As race and justice scholars advocate a move away from the simplistic, racist, and failed goal of toughness, they must work to better theoretically define the goals and orientations which should inform the future of criminal justice policy and research.

More fundamentally, if justice is the product of a democratic process in which persons regarded as free and equal become both the authors (via representation) and subjects of laws, what does it mean when racial groups are not equal, and indeed when the law is enforced disproportionately against one group without that group’s assent? What does it mean when this same group is alienated from those spheres and institutions by which people exercise their political rights and accrue the duties of

citizenship, in part through the enforcement of these very same laws (e.g., Manza & Uggen, 2006)? This raises serious questions about the development of legal obligation, a question echoed in work on perceptions of criminal injustice and legal cynicism (Hagan, Shedd, & Payne, 2005; Kirk & Matsuda, 2011; Kirk & Papachristos, 2011; Sampson & Bartusch, 1998). These questions are central to understanding the complex interrelationships between crime, the criminal justice system, and the broader social and political structures of society.

Methodological Directions

Many of the core methodological issues facing work on race and justice are related to the problem that much of the data used to investigate the topic is itself racially biased. A central task in race and justice work is the identification of the source of the racially disproportionate outcomes. A variety of work attempting to distinguish criminal justice bias from differential offending do so by controlling for “legally relevant” factors like prior records and the seriousness of crimes, while failing to acknowledge the ways in which those factors—far from being “objective facts”—are often socially constructed along racial lines. Prior records can be the product of differential enforcement, while police and prosecutors both exercise a wide range of discretion in how cases are described, presented, and charged. Failing to account for the cumulative and compounding effects of early-process disparities will lead to an underestimation of racial disparities. This is especially true of research which uses these “legally relevant” variables as some indicator of true threat or culpability, rather than merely as a tool to identify where in the process disparities are produced.

A related problem involves interests and politics in the collection of data, in particular institutional or governmental data collection. One issue that gained visibility in the midst of the Black Lives Matter movement—a movement that gained widespread recognition for drawing critical attention to the deaths of Black Americans at the hands of the police—was the lack of independent data on officer-involved shootings or on officer behavior (or misbehavior) more generally.³ Related to this, federal data collection on race, including through the census and especially for the purposes of showing racial bias, as in the Fair Housing Act, are increasingly being threatened by lawmakers interested in eliminating racial civil rights protections.⁴ This raises a basic question: Is it possible for an institution to collect data in an unbiased fashion which may be used in a way that conflicts with the interests of that organization or its key decision-makers? One solution is independent data collection, though this presents logistical and access hurdles that are not easily resolved on a broad scale. In any case, it is imperative that race and justice scholars pay particularly close attention to these issues when interpreting their work—recognizing, for instance, the potential bias in data about the police that are self-reported by the police.

The measurement of race is itself an issue. Older work often treated race as categorical and even binary (White versus Black, or White versus “other”). Some newer work better recognizes intersections and gradations, including work on skin tone. Work should also continue to move beyond a simplistic binary conception. Until recently, due to the nature of available data, studies on the subject were frequently conducted in binary Black/White terms, with Latinos classified as White (e.g., Sutton, 2013). Therefore, insofar as Latinos are subjected to inequalities in the system, their results were diminishing the contrast in outcomes between Whites and people of Color. As discussed earlier, a central challenge for theories of race is the constantly shifting landscape of race itself. This phenomenon also presents a clear challenge for the measurement of race, and, critically for race and justice scholars, the measurement of racial disparities.

Finally, the measurement of racism is also an ongoing issue, one related to the theoretical issues surrounding racism already described. Open expressions of racial bias and antipathy have declined since the Jim Crow era (e.g., Krysan & Moberg, 2016; Schuman et al., 1997). Some of this likely reflects true shifts in attitudes, but it also likely reflects changes in the social acceptability of expressing these views. Additionally, some may hold racial antipathies or bias without consciously recognizing it (e.g., Banaji & Greenwald, 2013). This presents a very basic barrier to those seeking to investigate the role of racism among criminal justice system actors, jurors, witnesses, or more broadly among those who politically support racially disproportionate policies. One approach is to capture the attitudes through less direct questions. The racial resentment scale is one popular example and includes questions tapping indirectly into views of Blacks as undeserving and as individually responsible for their collective social and economic status (Henry & Sears, 2002). One problem with the measure is that many who hold the views included in the scale insist they are purely ideological and not motivated by race. This is not necessarily a threat to the content validity of the scale, as this objection is predicted by theories of racism (Bobo et al., 1997; Bonilla-Silva, 2010; Jackman & Muha, 1984). It does, however, have implications for the translation of such work into policy change or public understandings of the issue. In short, a core issue for some measures of modern racism is that those identified as racist are likely to reject the measure along with any implications of race and justice research that employs it.

A different approach, informed by social-psychological work on automatic associations and unconscious behavior, attempts to capture evidence of racial bias or animus implicitly, including the Implicit Association Test (IAT) (Banaji & Greenwald, 2013; Greenwald, McGhee, & Schwartz, 1998) and the Affect Misattribution Procedure (AMP) (Payne, Cheng, Govorun, & Stewart, 2005). Key measurement issues remain unresolved for these relatively new techniques, but early work has interesting implications for race and justice scholars. In one study, subjects had an easier time recognizing degraded images of crime-relevant objects like guns when primed with an image of a Black face (Eberhardt, Goff, Purdie, & Davies, 2004). A modified version of the IAT revealed associations between Black faces and

weapons even when the weapons were old-fashioned cannons and swords rather than modern weapons associated with street crime (Banaji & Greenwald, 2013). Finally, those who possess implicit animus toward Blacks—as measured by the AMP—were more likely to hold a whole series of understandings of both crime and economic inequality consistent with maintaining status quo group relations (Drakulich, 2015a, 2015b). As social-psychological work further refines these or suggests new measures, race and justice scholars would do well to investigate their relevance to these issues.

Substantive Directions

We began this overview with two basic and well-established facts: that large racial disparities in contact with the criminal justice system exist, and that race only matters as a social construction. To this we add a third well-established fact: the consequences of this contact with the criminal justice system are severe. Negative contact with the police breeds legal cynicism—a cultural frame in which the police are not only seen as unjust and therefore illegitimate, but also as failing at crime prevention, protection, and in providing public safety (Anderson, 1999; Carr, Napolitano, & Keating, 2007; Kirk & Matsuda, 2011; Kirk & Papachristos, 2011; Sampson & Bartusch, 1998). A lack of confidence in the police also breeds fears of crime and reduces willingness to engage in informal actions against crime (Drakulich, 2013; Drakulich & Crutchfield, 2013). Incarceration has even more devastating familial, social, economic, and political consequences (Clear, 2007; Clear & Frost, 2014; Manza & Uggen, 2006; Mauer & Chesney-Lind, 2002; Pettit, 2012; Pettit & Western, 2004; Western, 2006).

The evidence, then, suggests we have organized our social structure, laws, and criminal justice institutions in ways that unjustly cause disproportionate harm to Black Americans. The major question concerns what can be done to redress it. Some have attempted to address this question solely in technical terms, recommending specific changes to policy or practice, and there is no question that it is useful to have specific policy recommendations that are rooted in the evidence. However, any true accounting of what can and should be done cannot stop at the identification of problematic policies, but must also consider the political and social forces that have put these policies into place.

As discussed, racial disproportionality in the criminal justice system is no mere unfortunate accident. It is instead the successful product of policies designed to maintain the racial order. The criminal justice system is only the most recent iteration of a historic series of institutions whose purpose is ethno-racial separation and labor exploitation. If this is true, it has profound implications for what to do about the problem.

One implication of this group conflict perspective is that advocacy for racial justice will likely be seen as a threat to the existing racial order, and will provoke a

concerted opposition. Much has been written about the “backlash” to the civil rights movement of the 1960s (e.g., Beckett & Sasson, 2004), as well as to the due process and legal protections reforms of the Warren Court (Feld, 2003). Similarly, the Black Lives Matter movement appears to have provoked a backlash of pro-police rhetoric, rooted in racial animus, which played a major role in the 2016 presidential election (Drakulich et al., 2016). If earlier backlashes helped usher in the profoundly damaging “tough on crime” movement, race and justice scholars should be very concerned about the potential consequences of this potential newer backlash.

This provokes a basic strategic question about achieving racial justice: Should proposals specifically target racial injustices or focus on more general criminal justice reforms with the hope that those reforms will benefit Black citizens? The argument for the latter is rooted mostly in its presumed practicality, especially in a country in which White citizens still hold disproportionate political power. Additionally, if the long-term goal is a society in which policies do not have racially disproportionate impacts, this strategy has the obvious appeal of not being race targeted. However, opponents would point out that nonracial attempts to address racial inequalities—for instance, efforts targeted at class or poverty-reduction—are often disproportionately taken advantage of by White rather than Black citizens. Similarly, despite the appeal of nonracial policies, the existing inequalities are themselves the product of explicitly race-based policies that advantaged Whites, meaning new explicitly race-based policies may be necessary to reverse their effects (Katznelson, 2005; Peterson & Krivo, 2010). In addition, associations between race, crime, and the US justice system may be so strong that even reforms framed in race-neutral language will be viewed through racial lenses. Finally, attempts to change policies which both result from and which purposefully serve to reinforce racial disparities in political power may be more likely to fail unless they directly address those disparities in political power. These questions are far from resolved and would benefit from serious theoretical, empirical, and strategic consideration.

Notes

- 1 Note: for the sake of space we focus exclusively on race—ethnicity is covered elsewhere in this volume—and we focus in particular on White and Black Americans who sit, respectively, at the top and bottom of the US racial hierarchy (Peterson & Krivo, 2010) and for whom the greatest disparities in the criminal justice system contact exist. We also, for the sake of space, focus on race and justice issues in the US context, although many of these issues have parallels in other social contexts. On language: we use “Black” and “African Americans” interchangeably, and “White” to refer to non-Hispanic White Americans.
- 2 The 2010 Fair Sentencing Act ostensibly sought to address this blatant disparity, but in the end merely reduced it to 18:1 while failing to make the change retroactive.
- 3 Police may opt in to self-reporting fatal shootings to the FBI, but the large number who do not and the lack of any information on nonfatal encounters severely limits its utility.
- 4 For example, Representative Paul Gosar (R-AZ) and Senator Mike Lee’s (R-UT) companion bills titled “Local Zoning Decisions Protection Act of 2017” (H.R. 482 and S. 103).

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