

## Racial Disparity and the Legitimacy of the Criminal Justice System: Exploring Consequences for Deterrence

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*Abstract:* Minority (over) representation in the criminal justice system remains a puzzle, both from a policy and an intervention perspective. Cross-sectional reviews of the policies and practices of the criminal justice system often find differential rates of involvement in the criminal justice system that are associated with the nature of the criminal charge/act or characteristics of the offender; however, longitudinal reviews of the race effect often show it to be confounded by procedural and extralegal variables. This review focuses on how the cumulative policies and practices of the criminal justice system contribute to *churning*, or the recycling of individuals through the system. In conducting our review, we describe how the same criminal justice processes and practices adversely affect select communities. The consequences of policies and procedures that contribute to churning may affect the legitimacy of the criminal justice system as a deterrent to criminal behavior. A research agenda on issues related to legitimacy of the criminal justice system aimed at a better understanding of how this affects individual and community behavior is presented.

*Key words:* Racial minority, ethnic minority, criminal justice system, legitimacy, procedural justice.

Minority (over) representation in the criminal justice system bewilders policymakers and practitioners, and is widely regarded as a result of individual behavior. The numbers testify to the extent of the problem: nearly 30% of the probation population (approximately 1.2 million people), 44% of the prison population (estimated at 586,300), and over 40% of the parole population (estimated at 309,000) are African Americans. Hispanic proportions of these groups are as follows: 12% of probationers (491,700), 18% of parolees (136,000), and 19% of prison inmates (251,000) are estimated to be Hispanic.<sup>1-4</sup> This amounts to over 2 million African American males and over 800,000 Hispanic males under criminal justice system control. Minority females also account for a larger proportion of those under correctional control than of the general population. Overall, minorities constitute nearly half of the population under correctional control, but a much

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smaller proportion of the 293.5 Americans (where 37.5 million (12.5%) are African American and 41.3 million (13.6%) are Hispanic/Latino).<sup>5</sup>

This article is devoted to describing how policies and practices affect the churning or recycling of individuals and communities through the criminal justice system. Much of the literature discussed in this paper reports current findings on criminal justice system processes and the differential involvement of minorities in each stage of this process. Additionally, we have identified areas in which services are not available to the offender, despite constitutional guarantees of or legal/parole-board mandated conditions requiring the use of these services.

Paradoxically, the current policies and practices of the criminal justice system may weaken both the formal and the informal social control mechanisms affecting both individuals and communities, particularly those areas that are plagued with disadvantages such as persistently high concentrations of poverty. Rather than deter criminal behavior, current policies and practices may actually promote it. This review examines how the decision-making processes of the criminal justice system and operational/programmatic gaps in key services may fail the individual while simultaneously weakening the deterrent effect of the criminal justice system on potential offenders. In conclusion, we provide a research agenda designed to address these issues, particularly those that relate to legitimacy of the same policies and practices that may affect the churning of offenders through the criminal justice system.

## **Theoretical Background**

During the last two decades, deterrence research has covered issues that affect the individual, the community or neighborhood, and specialized social institutions such as law enforcement. The emphasis of much of this research has been on the influence of formal social controls (actions of state-sponsored governmental agencies) and informal social controls (e.g., family, peers, and community organizations) on decisions to desist from criminal behavior. Overall, the literature has focused on four areas: the structure of the communities, legal cynicism that leads to cultural attenuation or anomie, neighborhood attachment or cohesion that supports prosocial values and norms, and levels of satisfaction with actions of law enforcement personnel.<sup>6</sup> Much of this work has been based on examining different theories to understand compliance or desistance based on theories of 1) procedural justice, or the impact of the processes and procedures on individual behaviors; 2) cohesion and collective efficacy in communities where the informal social controls serve to reduce deviance; and 3) subcultural adaptations to meet individual needs.

Fair sanctions have been shown to increase compliance, while sanctions perceived as unfair reduce compliance and therefore also serve to reduce the legitimacy of social institutions.<sup>7,8</sup> Studies on procedural justice have been a central focus of some deterrence-related work over the last 15 years, since Tyler hypothesized that fairness and equity in distribution of actions partially explains adherence to or compliance with existing laws and/or rules.<sup>8-10</sup> Procedural justice theories seek to explain how actions of the agents of social institutions affect the behavior of private individuals.

Other research concerns decisions made by authorities. The decision characteristics studied range from representativeness to consistency, impartiality, quality, ethicality,

and distributiveness. The manner of a decision is the level of dignity, respect, trust, thoroughness, and objectivity used in its administration to the recipient. Both the nature and/or manner of the decision are assumed to affect the recipient's perception of the degree to which it is fair and just; this perception has been shown to shape the likelihood of an individual's conformity to laws or rules. If police treat arrestees in a fair manner,<sup>8,11</sup> or probation officers and treatment providers address drug use behaviors of offenders in a respectful and fair manner,<sup>12</sup> then reductions in recidivism are likely.

Unfairness may be in the eye of the beholder. Conditions of the situation or individual characteristics may predispose a person to perceive unfairness, just as controllable actions or decisions contribute to its perception. Investigating situations that affect perceptions through a series involving college students, Piquero and colleagues examined the impact of an individual's level of self-control and emotions (e.g., anger) as factors in the perception of fairness (in this case a sanction for a violation of a rule).<sup>13</sup> The study had three main findings: that students with low self-control tend to judge sanctions unfair, that anger contributes to sanctions being judged as unfair, and that sanctions perceived as unfair increase the likelihood that the individual will become angry. These emotional triggers alter the assessment of the legitimacy of decisions by legal authorities. The impact of other emotions (such as resentment, rage, and pride) on the perception of fairness is ripe for investigation. While studies of the impact of actions by criminal justice agencies other than police are rare, existing research tends to find that many persistent offenders view the criminal justice system as unfair.<sup>14</sup>

Another theoretical framework focuses on neighborhoods and/or communities and the use of informal social controls to promote prosocial or antisocial behavior. Current work builds on Shaw and McKay's social disorganization theories, which highlighted the differential distribution of crime in communities, and which found crime and disorder to be more common in communities of lower average socioeconomic status.<sup>15</sup> That research has been used to explain the strengths and weaknesses of informal social controls. Poverty, legal cynicism, structural inequities in resources (e.g., presence or absence of playgrounds, religious institutions, schools, businesses), social isolation, and residential instability all have negative effects on building cohesion in the community, as well as on establishing strong, pro-social ties in the community. (For a review of some of the relevant research, see work by Silver and Miller.<sup>6</sup>) Sampson and colleagues, in a series of well-designed longitudinal studies, demonstrate the importance of collective efficacy or the building of social cohesion and trust in the community.<sup>16-21</sup> Their work has also demonstrated the collateral benefits of collective efficacy, showing that communities can reinforce conventional norms and improve outcomes in such areas as teenage pregnancy rates, health conditions, employment, and others. Some of this research finds that communities with less cohesion to norms also tend to believe that the neighborhood itself is stigmatized; this sense of stigmatization contributes to the low value placed on reinforcing or building norms in the community. As stated by Taylor, collective efficacy is the opposite of social disorganization, where trust and social cohesion in a community serve as a protective factor against various types of deviance

(both by individual members of the community and social institutions in the community).<sup>22</sup>

As part of this research on neighborhoods and communities, more attention is being given to building efficacy as a mechanism to reduce crime and disorder. Through a series of carefully designed studies, Sampson and his colleagues have shown that when community members have a shared definition of a problem and take targeted, specific steps to address it, positive changes can occur.<sup>16–21</sup> A key ingredient is the fund of available resources and their equitable distribution. With inequity in resource distribution come declines in social trust and the ability of the community to develop mechanisms to control negative behavior. Addressing the resource issue becomes an important step in developing efficacy.

Related to collective efficacy is the role of the police in many of these communities. A number of studies suggest that perception of the legitimacy of police practices affects the expectations of order within the relevant communities.<sup>23–25</sup> In a recent study of the role of police misconduct in structurally disadvantaged communities, Kane found that areas that are greatly disadvantaged and have a higher degree of police misconduct and tend to have higher violent crime rates than similar neighborhoods that are not exposed to compromised police practices.<sup>25</sup>

The behavior of an individual is considered a function of his or her surroundings, and an individual's surroundings, in turn, affect the norms. Anderson, in his ethnographic work in several Philadelphia communities plagued by poverty and violence, developed the idea that there is a code of the street, a series of subcultural values that may affect an individual's involvement in crime and deviance.<sup>26</sup> For young people in the communities, violence can function as social currency, being used to earn and maintain respect and resolve conflicts; survival entails adapting to the reality of such systems of exchange. Silver and Miller have noted that more work is needed to clarify (i) whether individuals subscribe to a set of norms as a means of protecting themselves, or in order to promote and maintain order in the surrounding area and (ii) whether subcultural norms actually exist, or if such apparent norms are in fact outgrowths of the extent to which shared values enforce conventional norms in the neighborhood/community.<sup>6</sup> The behavior of social institutions (such as the criminal justice system) may be one of the disengaging principles that promote instability. For example, Todd Clear has hypothesized that coercive mobility (the removal of individuals into prisons coupled with an uncertain period of return) creates instability in the community that undermines norms and shared values.<sup>27</sup>

These theories provide a framework within which to consider the impact of the criminal justice system on the experiences of individuals and communities. Unlike other reviews of the literature, which focus on racial disparities, the purpose here is to illustrate how the policies and procedures of the criminal justice system may affect the perception of (il)legitimacy of the criminal justice system. Together, these policies and procedures may serve to undermine the individual's conformity to rules in society and an individual's belief that the criminal justice system can provide the treatments and services necessary to equip him/her to contribute to society.

## The Size and Scope of the Criminal Justice System

Over 13 million individuals are arrested each year by local, state, and federal police agencies.<sup>2,3,28</sup> Media attention is generally given to crimes that are considered the most serious offenses (referred to as *Part I* or *index* crimes by the Federal Bureau of Investigation (FBI)), which include murder, rape, arson, robbery and property offenses such as larceny, theft, automobile theft, and burglary.<sup>28</sup> Despite the attention paid to these offenses, they accounted for only 16.4% of the total arrests in 2002. Less serious offenses, referred to as *Part II* by the FBI, and including a combination of felony and misdemeanor offenses, account for 83% of arrests.<sup>28</sup> The most prevalent arrest categories in Part II offenses are drunk driving (1.43 million), drug-related offenses (including use and distribution) (1.56 million), other minor assaults (1.3 million), and public nuisance offenses (1.2 million) for 2002, although they do not vary from one year to the next. These arrest numbers are actually small in comparison with the larger number of reported crimes for which no one is arrested due to the discretion exercised by the police as to whether to arrest an individual. (See Appendix.)

Though the majority of arrestees are Caucasian, variations occur in the types of offenses for which members of each racial group are likely to be arrested.<sup>2,3,28</sup> As shown in Figure 1, African Americans are arrested for 38% of violent personal crimes, 30% of property offenses, 33.5% of drug offenses, and 10% of drunk driving offenses. African Americans are more likely than Caucasians to be arrested for Part I offenses, drug charges, and simple assaults. While African Americans are more likely to be arrested on drug-related charges, this is not necessarily indicative of a greater prevalence of a substance abuse problem; rates of drug use for Whites and non-Whites are comparable.<sup>28</sup>

The decision to arrest sets the criminal justice process in motion. While police frequently make decisions to divert people from the criminal justice system, an arrest decision greatly increases the likelihood that a person will be incarcerated or under correctional control. Pretrial decisions (decisions, detention, and release options decided while awaiting trial) affect later decisions (such as sentencing).<sup>29,30,31</sup> For example, the percentage of people in jail who are awaiting trial has risen from 51% in 1990 to 60% in 2003, meaning that more offenders at the later time are unable to obtain a financial surety or some collateral condition(s) of release.<sup>2,3</sup> Local jails are likely to be populated with unconvicted people who are often detained until trial due to conditions unrelated to the constitutional allowances for detaining offenders (i.e., risk of absconding or public safety harm). Also, with the majority of arrestees being younger adults (under 34 years old), access to financial resources to make bail or to acquire the services of a bail bondsman is more limited than it is for older offenders, who may have greater financial resources.

Among arrests for major offenses in 75 of the largest counties in the country, 32% of defendants were released with financial conditions, 31% were released with non-financial conditions, and 38% were detained until trial. Of those who were detained until trial, only 7% were declared ineligible for release due to potential harm or absconding issues; that is, with appropriate means these offenders could have been released.<sup>32</sup> In a study in Baltimore City in 1996, researchers found that

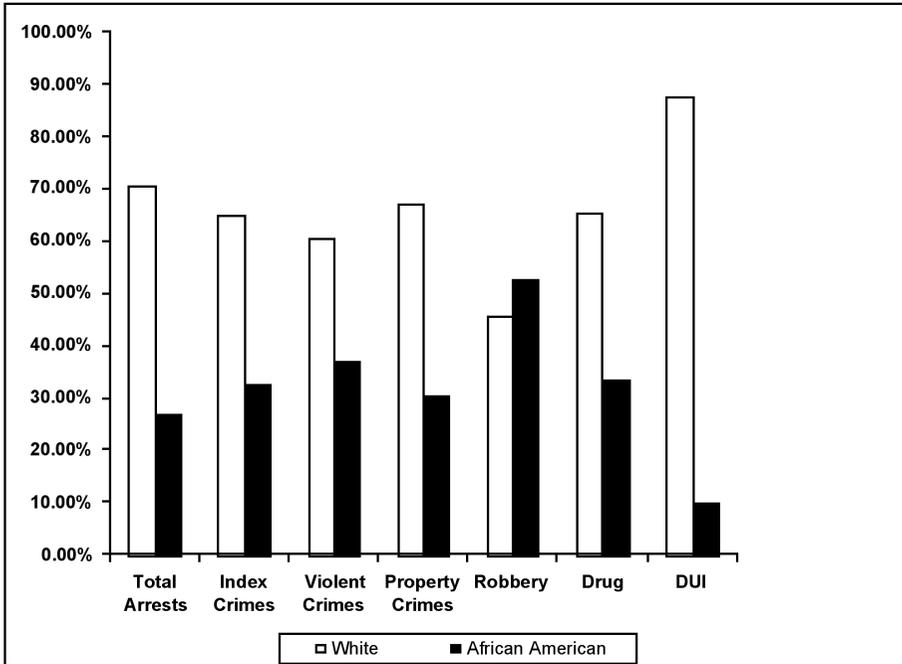


Figure 1. Percentage of arrests for the most prevalent offenses by race

Source: U.S. Department of Justice (DOJ), Federal Bureau of Investigation. *Crime in the U.S., 2002*. Washington DC: Government Printing Office, 2003, pp. 252-9.

many defendants could not get the \$500 required for release and were therefore detained until trial for an average of 120 days.<sup>33</sup> National statistics show that nearly half of the defendants detained until trial are African American. Being detained to trial also has been linked to an increased likelihood of conviction, where 79% of such defendants are convicted compared with 61% of defendants released during the pretrial period.<sup>2,3,32</sup> This major discrepancy in conviction rates between those detained and those released has a domino effect on the type of sentence that the offender is likely to receive. Offenders detained in jail during the pretrial phases are more likely to receive incarceration sentences than are those who are released.<sup>29,31,32</sup>

Over the last two decades, sentencing in the U.S. has undergone major changes. Sentencing guidelines often prescribe incarceration for certain types of offenses (mostly drug-related convictions). Together with legislatively prescribed mandatory minimums for certain types of drug offenses, these guidelines have increased both the types of convictions that require incarceration and the duration of incarceration. The average offender spends more time in prison today than fifteen years ago, serving 38% of a 60-month sentence in 1990 compared with 50% in 1999.<sup>34</sup> The average drug offender convicted of possession served 18 months in 1990; this increased to 25 months by 1999. Drug trafficking offenders served an average of 22 months of incarceration in 1990, an average that climbed to 29 months in 1999.<sup>34</sup>

Sixteen states have abolished parole and therefore require offenders to serve their sentences behind walls, while 20 others have mandatory parole release or end of

sentence release policies. The combined effect is that more offenders are incarcerated for longer periods of their sentence. Figure 2 illustrates how the correctional control populations have boomed in recent years, with the prison population rising from 319,598 in 1980 to 1,387,000 in 2003, a 334% increase. The number of adults under any form of correctional control has increased from 1.8 million to nearly 6.8 million adults. Overall, parole, probation, and prison/jail (convicted) populations increased during this period by over 260%. The greater rise in incarceration is due to prescribed incarceration sentences for a greater number of types of crime, longer duration of incarceration, and more revocations from community supervision (see below).

The radical increase in criminalization of offenses has disproportionately affected African American and Hispanic males, particularly those in the 18 to 35 years of age category. Figure 3 below illustrates the per capita rates of incarceration for different age groups. The rate of incarceration among African American males 20 to 34 years old is approximately 7,500 per 100,000; the rate of incarceration for Caucasians in the same age group is approximately 1,000 per 100,000. Based on this recent history of incarceration, it is estimated that for those born in 1991, 1 in 3 African American males, 1 in 6 Hispanic males and 1 in 17 non-Hispanic White males are likely to go to prison; the rate for those born in 1971 is 1 in 8 for African American males, 1 of 50 for non-Hispanic White males, and 1 of 25 for Hispanic males.<sup>2,3</sup>

The sharp increase in incarceration in the last two decades has also affected women who are members of racial and ethnic minority groups. The incarceration rate for females in racial/ethnic minority groups is 286 per 100,000 for those 20 to 24 years old, 406 for 25 to 29 years old, 456 for those 30 to 34 years old, and over 400 for those 35 to 44 years old. The rate from non-Hispanic White females is approximately 100 per 100,000 for any age group.<sup>34</sup> While women still account for around 20% of the incarcerated population, minority females are incarcerated at much higher rates than Caucasian females, and follow the same pattern discussed for men except that a wider range of age groups are affected.

Another major area of criminal justice practice concerns community supervision, particularly the increasing rate of failure to successfully complete probation and/or parole sentences in the community (these cases are known as *revocations*). Nearly 40% of new prison intakes (nearly 700,000 offenders) are failures from community supervision who are incarcerated for noncompliance with a condition(s) of release or as a result of a new rearrest while under supervision.<sup>35</sup> Just as sentences have increased in severity over the last twenty years, so too has the average number of conditions mandated for supervisees. Particularly pronounced are increases in financial conditions (e.g., fines, fees, and restitution), treatment and other related conditions (e.g., drug testing and treatment), and nondiscretionary conditions (e.g., restrictions on place of residence, curfews, reporting requirements to supervision staff, and prohibition of gun possession). Together, these new conditions place the offender at greater risk for failure to abide by the conditional release. In 2003, 7% of probationers returned to incarceration to serve their sentences (having had their probations revoked) and 26% of parolees returned to prison.<sup>36</sup>

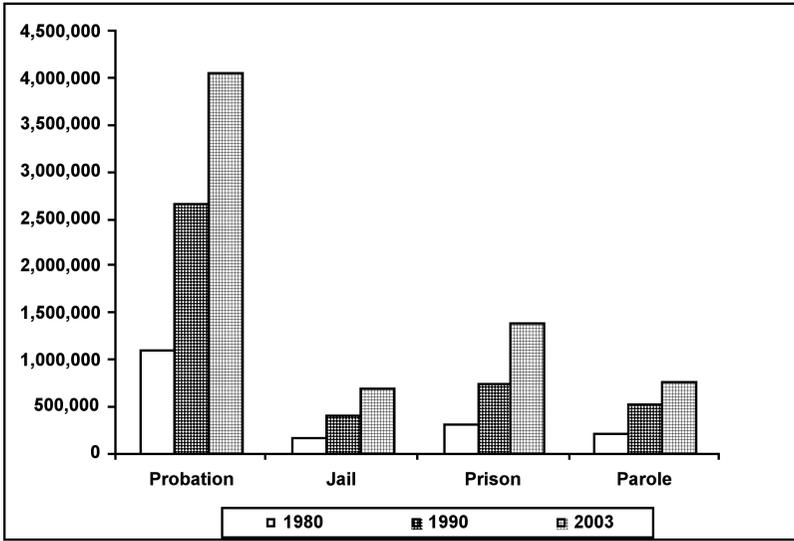


Figure 2. Number of adult offenders under different types of correctional control in 1980, 1990, 2003

Source: Harrison PM, Beck AJ. Prisoners in 2003. (Pub. NCJ 205335). Washington, DC: BJS, 2004. Bureau of Justice Statistics website, 2005.

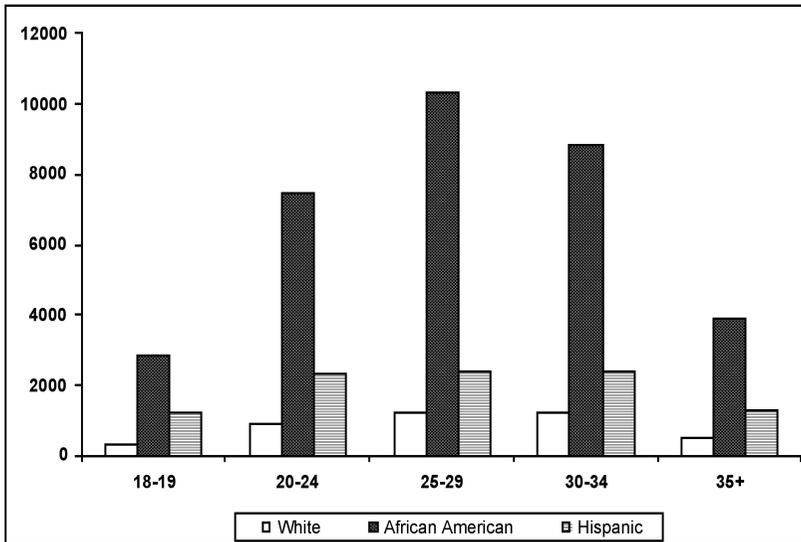


Figure 3. Rate per 100,000 U.S. resident population in each age group (in years) of sentenced prisoners under jurisdiction of state and federal correctional authorities

Source: Bureau of Justice Statistics. Sourcebook Criminal Justice Statistics, 2002. 30th Ed. (Pub NCJ 203301) Washington DC: BJS, 2004, Table 6.27. Available at [www.albany.edu/sourcebook](http://www.albany.edu/sourcebook).

## Criminal Justice Policies that Affect Churning of Offenders

In 2003, over half of the offenders on probation had a prior conviction, 52% of the parolees were on probation or parole at the time of the arrest leading to their current sentence, and the average inmate had multiple prior histories of involvement in the criminal justice system.<sup>36</sup> This churning of offenders in and out of the criminal justice system has certain public safety advantages in that it protects the public against those offenders who might be the greatest threat(s) to society due to their persistent involvement in criminal behavior. However, it also makes it more difficult for an individual to reintegrate into society after his or her first offense.<sup>37,38</sup> Recent changes in federal and state policies have entangled offenders in civil and collateral benefit restrictions (in areas of employment, housing, and education) that foster an inability on the part of the former offender to become productive in society.<sup>39,40</sup> Overall, the policy is based on deterrence, the assumption being that the loss of liberties and privileges consequent upon criminal conduct dissuades others from criminal behavior. At the individual level, the goal is to encourage the offender to correct his/her own conduct to avoid future negative consequences (*specific deterrence*).

This focus on the individual began in the late 1970s when scientists found that a small percentage of people account for the majority of criminal behavior (leading to the term *criminal career*). Alfred Blumstein and Jacqueline Cohen from Carnegie Mellon University found that a small percentage of individuals were persistent offenders and created the most havoc in the community.<sup>41</sup> This work contributed to a trend towards examining crime control policies, and toward developing new approaches to addressing disorder and persistent offenses. The idea of criminal careers suggested that there were societal advantages to removing high-offending individuals from the community for long periods of time (so-called *selective incapacitation*). In the 1970s, the emphasis was on personal and property offenders (i.e., Part I) who were thought to be the most harmful to society. A change occurred in the 1980s when the focus shifted to drug offenders as a result of the increased violence and disorder that surrounded the boom in open distribution of illicit substances.

The emphasis on selective incapacitation came during a period of disillusionment with rehabilitation-based sentencing goals, particularly those that included indeterminate sentences. Rehabilitation appeared not to be working, according to some influential scholars, a failure usually attributed to an inability on the part of offenders to change, inadequacy of the system to provide programs that changed offender behaviors, and scarcity of rehabilitation programs. Robert Martinson and colleagues, in meta-analyses of correctional interventions, reported that few programs achieved gains in changing offender behaviors and that most programs were not properly implemented.<sup>42</sup> Others depicted the difficult to insurmountable hurdles that former offenders had reintegrating back into society.<sup>37,38</sup> Disillusionment with rehabilitation goals, coupled with increasing pressures to ensure that high volume offenders were appropriately punished, generated dissatisfaction with the sentencing scheme of that period. The retributionist perspective, developed as part of a movement for so-called *just deserts*,<sup>43</sup> evolved as a new model to create more equity in the sentencing system and reduce disparities among sentences meted out by different judges.

The sentencing policies of the 1980s shifted towards more certain, less discretionary incarceration policies. The goal was to remove indeterminate sentencing (under which the offender did not know ahead of time the sentence that s/he would receive) in favor of a certain sentence where the offender could expect a given term of incarceration based on the nature of their crime and his or her prior offending behavior. Federal sentencing guidelines, which advanced some of the efforts undertaken by various states to alter sentencing practices, shifted the emphasis from offender change to policies focused on retribution or incapacitation. The ultimate goal was to increase the deterrent effect of the criminal law. Mandatory minimums, or legislative initiatives to stiffen penalty structures (by defining a floor or minimum penalty), increasingly took hold over the course of a decade, as public officials sought to reassure an uncertain public that they were targeting the part of the population that caused the most harm to society.

Changes in sentencing also affected policies surrounding parole and probation. In 20 states, parole was abolished or modified in favor of full-term incarceration. The discretionary release of the offender was abolished in favor of having the offender serve more time followed by a period of supervised release. These shifts increased the prison population markedly. Furthermore, there was an important conversion in the management of an offender's time in prison. A new generation of tough, conservative prison administrators redefined the day-to-day activities of offenders to be consistent with their own views of proper offender classification, movement, and control strategies. The use of so-called *supermax* prisons (highly restrictive maximum security facilities), the expansion of prison disciplinary units, and the exclusion of offenders from participation in prison programs (including treatment) for minor disciplinary infractions are obvious examples of the restrictiveness of many federal and state prison systems today.<sup>44</sup> Similarly punitive policies took shape in probation and parole, where the tendency was to stack on conditions to heighten the controls on offenders and to increase the possibility of catching those offenders in violation of supervision requirements.

### **Policies Affecting Particular Communities**

Criminologists during the late 1980s and early 1990s started to develop some problem-solving techniques that recognized that, just like the concentration of criminal behavior in certain individuals, there was also a concentration of criminal behavior in certain places. *Hot spots*, or locations where crime was concentrated, gave rise to the idea that public safety goals can be achieved by attending to the behavior of individuals in those areas.<sup>45</sup> Many of these hot spots (which tend to be defined by areas of law enforcement actions and requests by citizens for assistance through calls for service or policy initiatives) resulted in certain neighborhoods/communities being the target of law enforcement actions.<sup>46</sup> These communities are also where churning occurs because the residents are subject to heightened police efforts made in an attempt to reduce disorder and criminal activities. Many communities are plagued by a lack of support services, high levels of poverty, elevated high school dropout rates, and similar indicators of unhealthy communities, including higher rates of communicable disease and mortality.<sup>16-21,47</sup> Another factor that affects

disorder is police misconduct, which has been shown to contribute to violence in these communities.<sup>24,25</sup>

In the evolving literature on communities, three themes dominate: coercive mobility (the concentration of arrest from and reentry into certain neighborhoods), collective efficacy (the building of trust and cohesion to reinforce prosocial norms), and social capital (the social relations, norms, trust and obligations that define the resources available in the community). Rose and Clear note that the local areas are important to consider when we think about the impact of incarceration and reentry (and criminal justice actions), because these neighborhoods are the contexts for the lives of offenders and non-offenders alike.<sup>48</sup> Recent research confirms that offenders tend to be part of or return to communities that have high concentrations offenders.<sup>27</sup> The concentration of offenders in these neighborhoods affects the community negatively, mainly by increasing the stigma associate with the community and by saddling the community with additional problems without providing added resources to restore or maintain order. Much like coercive mobility, the ultimate consequence is that the criminal justice system destabilizes informal networks of social control and increases poor attitudes towards formal social controls, both of which have been shown to contribute to increases in crime and disorder in the communities.

Churning in disadvantaged communities places undue burden on these communities' law-abiding residents. Todd Clear and Dina Rose, in a number of articles, discuss how coercive mobility drains law-abiding citizens and families of offenders of financial resources, increases the stigma and negative identity of the residents, and gives rise to community dynamics that alienate community members from stabilizing norms.<sup>48</sup> In particular, the removal of men from the community (via incarceration) has the chilling effect of changing the socio-economic structure of the family. Families or support systems have the added burden of maintaining some level of contact with their loved ones who are in and out of prison. Financially, the family must tap into limited monetary resources to maintain contact (by means of making phone calls, trips, and visits to prisons that are often several hours away; providing incarcerated loved ones with some resources; providing for the family while the individual is incarcerated) and to provide psychological support. Released former offenders (as discussed above) suffer from the stigma of their status as convicts, which limits their ability to take up a position as a productive citizen in the community. Communities may also acquire a related stigma with residents becoming ashamed of the areas in which they reside due to the bad reputation of the neighborhood.<sup>16,19</sup>

### **Resource Gaps in Constitutional and Legally Mandated Services to Offenders**

While changes in policies since the 1970s have aimed at deterring people from engaging in criminal activities and drug use, it is unclear to what degree, if any, deterrence has been achieved. It might instead be the case that the new policies have engineered a sense of unfairness among the citizens who are involved in the criminal justice system. Perceived lack of fairness may contribute to the illegitimacy of social institutions in the minds of those who are most directly affected by these policies. A

backlash that erodes the deterrent effect may well be underway, in that the lifecycle for many people (especially men who are members of racial or ethnic minorities) may involve periods of correctional control (as suggested by the Bureau of Justice Statistics estimate that one in three African American males will experience some period of incarceration). In the following section, we explore legitimacy as it relates to four areas of criminal justice practices.

### **The Role of Police: Profiling or Public Safety?**

The actions of police departments to a large extent determine how citizens (offenders and non-offenders) perceive the criminal justice system. During the last several decades, the police have experimented with a number of initiatives to improve law enforcement in the community, ranging from foot patrols to selective enforcement to community policing, with attention to reducing drug-related and violent crime.

Studies on perceptions of the police in the community are becoming more common, with several recent studies documenting a growing concern that certain segments of society perceive police actions to be biased, specifically in the practice of racial profiling.<sup>9, 24, 49, 50</sup> In systemic observations of police-citizen encounters in three cities, researchers found that when officers were disrespectful towards citizens, citizens were less likely to comply with those officers' requests.<sup>11, 51</sup> A 2001 study conducted by the Bureau of Justice Statistics found that 63% of Whites surveyed expressed confidence in the police compared with 31% of African Americans.<sup>8</sup> In the same study, African Americans and Hispanics were found to be twice as likely as non-Hispanic Whites to feel that traffic stops requested by law enforcement were unjustified, and they were twice as likely as non-Hispanic Whites to be searched.<sup>34</sup> Research in this area tends to find that individual and community judgments about whether the police are profiling and whether the police actions are legitimate depend on how the police exercise their authority; furthermore, police misconduct tends to contribute to more deviance and disorder within communities.<sup>24, 25</sup>

The report on a recent poll in California on the criminal justice system summarizes some of the major attitudes of the citizens towards the police and the criminal justice system.

Another important finding of this poll reveals that the image of California's criminal justice system is in trouble. Surprisingly, in a country where the criminal justice system is supposed to be the strongest and the most dependable, majorities of the poll's 12 racial and ethnic groups think California's system favors the rich and powerful. Eighty-eight (88) percent of African Americans and 75 percent of American Indians agree with that concept. Moreover, the state's criminal justice system scored low on the most important criterion: its fairness. More than two out of three African Americans, Latinos and American Indians indicated that they have only "some" or "very little" confidence in the fairness of the criminal justice system of California.

The results of the poll reveal good news and bad news for California's police departments. On the positive side, all of the groups are satisfied with the job that their local police departments are doing in protecting their neighborhoods. More than half of all the groups and four out of five Arabs and Armenians rate their job performance as "good" or "excellent." On the negative side, a majority of California's racial and ethnic

groups believe that their local police tend to harass and detain people with darker skin or with foreign accents more than they harass and detain other Americans. Namely, three-quarters of African Americans and nearly half of all Latinos believe that their local police officers often abuse their power [p. 1].<sup>52</sup>

The front end of the criminal justice system is plagued with citizen concerns about the legitimacy of the police, and other agents of the criminal justice system, but little research is available on citizens' perceptions of judicial, correctional, and prosecutorial components of the system. Of concern is that individuals and communities may find themselves unfairly treated and therefore perceive that the agenda of the criminal justice system is a "lock 'em up" strategy, i.e., a strategy to increase the churning of minority group members through the criminal justice system. Ultimately, we must ask questions not only about the differential enforcement of specific laws (e.g., drug laws and street crime laws vs. white collar crime laws), but also about the criminal statutes enacted by legislatures across this country. As we observed over a decade ago:

Criminal statutes reflect society's view of both offense *seriousness* and offender *deservedness* for various form of punishment . . . Bias against certain groups (e.g. minorities, the lower class, women) is an inevitable consequence of such a review process; our laws reflect our values about both offenses and offenders . . . To the extent that race is related to an offender's conviction offense, it is certainly possible that *offense-driven* sentencing schemes "institutionalize" racial bias. For example, if blacks are more likely to commit, get charged, and get convicted for the types of crimes that result in prison or jail terms, they will be more likely to be found in prison or jail. But why do these crimes result in a period of incarceration, rather than other, equally serious forms of criminal misbehavior? Do these types of decisions reflect value judgment not only about offense seriousness but also about offender deservedness? Obviously, this type of racial bias is much more difficult to detect and rectify [pp. 2–3].<sup>53</sup>

### Legal Defense Counsel

In 1963, the United States Supreme Court ruled in *Gideon v. Wainwright* that a defendant had a right to legal representation, and that the state must provide legal representation to indigent offenders in felony prosecutions where incarceration is a potential sentence. The promise of the indigent defense system is expressly that "any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. (372 U.S. 335 (1963))."<sup>54</sup> The provision of legal counsel ensures that there is an effective administration of justice through the adversarial process. Such protections guarantee that an individual is not unjustly deprived of life or liberty by the government. For over 40 years, states have been struggling with the provision of legal representation services for indigent defenders. Within the last decade, most states formed commissions or working groups to examine the provision of legal services for indigent offenders being criminally prosecuted. Indigent legal services tend to be a low priority for the criminal justice system, and defenders have a limited role in criminal justice system processes (i.e., decision-

making points of the criminal justice system, ranging from charging decisions to revocation).<sup>32</sup> The emphasis of *Gideon* on decisions that affect the life and liberty of the accused has been narrowly defined by many states to be focused on the trial phase of the criminal justice process without attention to other key decision-making phases such as pretrial release or revocation. Since the criminal justice system lends itself to domino effects where each decision is affected by prior, related decisions, having legal counsel for offenders during all stages of the process affects outcomes; legal representation is a significant factor in reducing the restrictions on liberties that may occur as a result of involvement in the criminal justice system.<sup>54</sup>

Most germane to the churning issues raised above is whether the defender services provided adequately cope with the complex criminal justice system and protect the constitutional rights of the accused. Three main issues may directly affect whether the arrestee is deemed innocent until proven guilty: the availability of defender services, the processes in the criminal justice system for which defender services are available, and the ability of states to provide services that would ensure that the indigent have legal representation. How these services are provided may raise many questions in the eyes of the community about whether the government is committed to protecting their constitutional rights.

The first issue concerns the availability of defender services (adequacy of funding). Most state governments do not provide sufficient funding (e.g., funding at the same or similar levels as provided for prosecution) for indigent defenses. States have used a mixture of funding sources to offer the legal counsel that they do provide for to the indigent, generally of three types: some states/localities directly fund legal defense services, some states use assigned/appointed counsel systems, and some states use a contract counsel system in which attorneys are paid to handle cases (e.g., \$200 for defense counsel in a criminal case). Overall, it is estimated that spending for indigent defense is less than 2% of all national law enforcement expenditures and less than 10% of total spending on legal and judicial services.<sup>56</sup> Caseloads of public defenders have been documented to be outside of legal standards, leaving most defenders with little time to adequately prepare and defend the accused.<sup>56</sup>

Public defenders are part of the criminal justice system and their role as part of the system may affect their ability to be advocates for the offender in the adversarial process. The manner in which the state funds or provides defense counsel to the indigent affects the ability of that counsel to assume a truly independent role. The point in the process at which they are appointed also affects the defense attorney's independence. If the defendant is assigned counsel at the beginning of the trial phase, legal rights may be undermined during earlier criminal justice phases (such as bail hearings, charging decisions, and plea bargaining). In the all-too-swift world of criminal justice processing (where nearly 95% of the cases are disposed through plea bargaining instead of trial),<sup>57</sup> the independence of the legal defense counsel and the point at which defendants are provided services affect the ability of the legal counsel to be effective advocates in the courtroom.

Most states require the accused to furnish proof of indigence based on the state's own definition of eligibility for court-appointed counsel. The standard is generally a means test where the accused must document his or her liabilities, income, expenses,

medical bills, and number of dependents. A defendant who does not qualify for appointed counsel must pay the cost of representation. This places pressure on offenders to secure representation by attorneys who specialize in the rapid handling of cases for flat fees or to plead guilty and thereby waive the option of going to trial in order to avoid incurring significant legal costs,<sup>57</sup> and thus affects the likelihood of his/her being convicted and receiving an incarceration sentence.

### **Pretrial Release Services**

In 2002, the American Bar Association (ABA) issued the national standards on Pretrial Release in an attempt to further the provision of “due process to those accused of crime, maintaining the integrity of the judicial process by securing defendants for trial, and protecting victims, witnesses and the community from threat, danger or interference [p. 1].”<sup>58</sup> The standards bear on the fact that nearly 38% of offenders are detained in jail to trial when they could be released if they had sufficient financial resources and collateral. The ABA standard promotes the use of pretrial release agencies to ensure that indigent offenders can be released while awaiting trial unless they pose a risk to public safety or a risk of flight. Yet few jurisdictions offer pretrial services; a recent survey of pretrial organizations identified 322 agencies in 3,100 jurisdictions with pretrial operations. These operations range in size from one staff person to 300 staff members, with 40% of the programs having staffs of 2 to 5 people.<sup>59</sup> The services offered include pre-arraignment interviews, post-arraignment interviews, risk assessment, in-court presentations, supervision, in-court reviews and follow-up. Few pretrial agencies have sufficient resources to provide the full array of services.<sup>59</sup>

Pretrial services offer an opportunity to make the criminal justice system for indigent offenders more equal to what it is for others. They provide the safeguards to ensure that determination of risk and potential flight are based on criteria that are applied equally to all accused regardless of means. Formalized risk assessment criteria provide a formula to recommend release to the arraignment judge for the accused; however, 60% of the 322 agencies do not use a formal risk screening tool.<sup>59</sup> Unfortunately in most jurisdictions, pretrial agencies do not provide a full array of services to the defendant. The failure to provide such services may be interpreted in low-income communities as yet another instance of government agencies not adequately protecting the constitutional rights of the accused and reducing the likelihood of an equal chance for prosperity. Since being incarcerated prior to trial increases the likelihood that an individual will be incarcerated after sentencing, the availability of risk assessment tools to discern flight and public safety risk during the pretrial phase can reduce the rate of unnecessary pretrial incarceration.

### **Treatment Services for Offenders in the Criminal Justice System and Revocation**

One of the largest contributors to parole revocations is continued drug use while under supervision (as determined by positive urine results) and failure to engage in treatment services. Of the 2.6 million adults on probation supervision, nearly half

have orders for drug treatment services, while less than 17% actually receive such services.<sup>60</sup> National studies have also documented the unavailability of treatment services to meet the demands of the community, with estimates as high as 83% of those in need of treatment not having access to services.<sup>61</sup> This is particularly the case with court-ordered treatment, where over 1.3 million adults under correctional supervision have been ordered to get treatment, though treatment services are not available for anywhere near this number of offenders.<sup>12,61,62</sup> National studies on availability of drug treatment services consistently demonstrate significant gaps for those in need, regardless of whether they are addicts or offenders under the control of the criminal justice system.<sup>1,63</sup> Recent studies have shown that providers tend to use treatment services that are insufficient to fully benefit addicts and that the services tend to be eclectic.<sup>65,66</sup>

It is apparent that the criminal justice system places demands on offenders to obtain services that are scarce or unavailable, and subsequently holds the offender accountable for the failure to obtain them.<sup>12,62</sup> Since judges and the parole board require treatment conditions for nearly half of the orders for release, the offender must obtain treatment to meet the legally mandated release conditions or risk being in violation of the requirements. Few correctional programs offer treatment in prison or community supervision programs and, with the gap in available services, the offender is largely responsible for meeting the conditions of release. Self-help groups (such as Alcoholics Anonymous and Narcotics Anonymous) are routinely used as treatment when, in fact, they do not meet criteria for direct clinical services. The court orders may be considered illegitimate since the criminal justice system demands the offender to be drug-free and to obtain recovery services when said services are often not available in the community.

## Conclusions and Implications

This paper has provided an overview of how the policies and practices of the criminal justice system may affect the disproportionate distribution of minority offenders in different segments of the criminal justice system (e.g., arrests, pretrial detention, convictions, incarceration, and probation). This review is intended to underscore the contextual and extralegal factors that may affect the churning of offenders and, by extension, select communities through the criminal justice system time and time again. Most importantly, it lays a framework for developing theoretically-based research questions and hypotheses to examine how the experience of offenders and select communities affects deterrence or crime control based policies and practices.

Procedural justice, collective efficacy, and subcultural adaptation provide a theoretical framework to examine both the perceptions of offenders and differential experiences affecting individual behavior. With the inadequate allocation of resources in the criminal justice system, the existing literature is insufficient to show what parts of procedural matters (e.g., representativeness, consistency, impartiality, quality, ethicality, distributiveness) might contribute to offenders and citizens perceiving that they are being treated in a fair and equitable manner (or the reverse), how different procedures and processes affect people's perceptions of whether they are

shown respect and their assessments of their own chances of becoming productive citizens, what procedures or processes affect people's belief that they have access to the same constitutional rights and protections as others, and what values and norms shape people's adaptation to criminal justice system processes and procedures. These are just a few of the questions that emerge from a theoretical approach to understanding how the policies and practices of the criminal justice system affect the former offender's own self-efficacy and his/her commitment to becoming a productive member of the community. The answers to these questions can help to explain the perceived legitimacy (or illegitimacy) of the criminal justice system from the standpoint of those who are most involved in it, and how different types of participation can alter an individual's behavior.

In this paper we have posited that providing justice for all requires resources, particularly in three key areas: legal counsel, pretrial services, and drug treatment (and other court mandated programs). We have tried to demonstrate how inadequate resources in each of these areas affect the experiences with, and therefore the perception of, the criminal justice system by offenders and other members of communities with high crime rates. The underlying question is whether changed experiences in any of these areas could reduce churning (and, ultimately, reduce recidivism). From the substance abuse treatment literature, it is clear that good quality treatment services reduces recidivism;<sup>12,61,63</sup> thus, providing adequate services in the criminal justice system would likely improve offender outcomes. More research is needed to support this thesis, in particular to examine different mechanisms to improve collective efficacy in the communities where many offenders reside, as well as the mechanisms to reduce subcultural adaptations leading to criminal behavior.

The premise that actions of the criminal justice system may contribute to disorder and criminal conduct is an area that has not received much attention. We do not know if improvements in the way in which offenders are treated (e.g., with respect, dignity, and consistency) would reduce recidivism, although this is worth investigating in order to develop alternative deterrence mechanisms. Within the last decade, a number of well-designed studies have examined the impact of police conduct and the legitimacy of the police in the eyes of the community.<sup>24</sup> The work has led to a better understanding of how police conduct affects order in a community. Similar research is needed on agents of the courts (e.g., prosecutors, defenders, and judiciary) and correctional institutions (e.g., prisons, probation, and parole) to bring about a better understanding of how offenders and their communities perceive the conduct of these agencies, with an emphasis on increasing the deterrence capability of formal social controls.

Another related issue is the force of situational factors that may affect offender behaviors. Homicide is the leading cause of death for Black men ages 15–24 years, and the second leading cause for those 5–14 and 25–44 years old; it is the fourth cause of death for non-Hispanic White men 5–14 years old and the third for non-Hispanic White men 15–24 years old.<sup>66</sup> Furthermore, offenders are likely to have higher rates of infectious diseases, asthma, mental illness, and substance abuse than the general population; the prevalence is generally 4 to 10 times greater than in the general population.<sup>67</sup> The increase in likelihood of death by homicide and

other victimization (e.g., during property offenses) for minority group members affects not only life expectancy but also quality of life. As discussed by Bouffard and colleagues, emotions associated with life expectancies may affect the choices people make.<sup>68</sup> When offenders have higher rates of early death or exposure to infectious diseases and are not provided with resources to address these health-related issues, we must inquire into the impact of life expectancy on criminal behavior and overall conduct.

Improving formal and informal social controls can shape individual behavior and improve conformity in important ways, yet research is needed to further examine how best to use a wide array of control mechanisms to reduce churning of individuals through the criminal justice system. The current literature only scratches the surface of how actions by social institutions and communities affect individual behavior. A number of compelling themes remain to be explored.

## Appendix

### Clearance (resolution) rates for selected Part I and Part II crimes by race and offense category, YEAR(S)

- Murder: 13,561 offenses known – 64% cleared by arrest  
9,127 Arrestees (47.9% White; 50% Black; 2.2% other)
- Rape: 80,515 offenses known – 44.5% cleared by arrest  
16,772 arrestees (63.7% White; 33.7% Black; 2.6% other)
- Robbery: 343,023 offenses known – 25.7% cleared by arrest  
59,402 arrestees (45.8% White; 52.7% Black; 1.5% other)
- Aggravated Assault: 747,354 offenses known – 56.5% cleared by arrest  
294,665 arrests (63.8% White; 33.8% Black; 2.4% other)
- Burglary: 1,842,930 offenses known – 13% cleared by arrest  
144,119 arrestees (69.6% White; 28.5% Black; 1.9% other)
- Drug Abuse: 968,053 arrestees (65.2% White; 33.5% Black; 1.3% other)
- Embezzlement: 12,375 arrestees (68.3% White; 29.7% Black; 2% other)
- DUI: 1,002,349 arrestees (87.7% White; 9.9% Black; 2.4% other)

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Source: Bureau of Justice Statistics. Sourcebook Criminal Justice Statistics, 2002. 30<sup>th</sup> Ed. (Pub NCJ 203301) Washington DC: BJS, 2004. Available at [www.albany.edu/sourcebook](http://www.albany.edu/sourcebook).

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