

Faith in Violence: Race and the Punitive Paradigm

John-Paul Hammond Anderson

A dissertation submitted in partial satisfaction

of the requirements for the degree of

Doctor of Philosophy

University of Washington

2021

Reading Committee:

Rebecca Thorpe, Chair

Michael McCann

Jack Turner III

Program Authorized to Offer Degree:

Political Science

©Copyright 2021

John-Paul Hammond Anderson

University of Washington

Abstract

Faith in Violence: Race and the Punitive Paradigm

John-Paul Hammond Anderson

Chair of the Supervisory Committee:

Rebecca Thorpe

Political Science

The United States is in the midst of a “racial reckoning”, a confrontation with racial inequality brought to the forefront of politics by recurring acts of police brutality. In the wake of George Floyd’s murder, massive uprisings in support of racial justice swept over the United States and then the world. Although George Floyd’s murder was the catalyst of international demonstrations, the protests were not only a response to the worst cases of police brutality. Protesters also sought to confront the day-to-day activities of criminal-legal institutions, that even in the absence of overt brutality and harassment, disproportionately impact stereotyped and socioeconomically isolated communities. Thus, racial disproportion in prisons has come to signify the routine racial injustice of the United States.

What remains less known, however, is that the world’s prison are similarly characterized by conspicuous ethnic, racial, and indigenous disproportion, comparable to that of the United

States. Indeed, no country can match US incarceration-rates; however, in terms of demographic divergence between the incarcerated and non-incarcerated population, the United States is far from exceptional. Disparate groups such as the Roma of Europe, Indigenous Australians, and Black Americans share a similar carceral experience in that they are far more likely than other groups in their respective countries to be incarcerated. Despite a clear global pattern of disproportionality in prisons, there have been few specific theorizations to clarify this occurrence. This dissertation offers a general theory of ethnoracial and indigenous prison disproportionality and relates this theory to the future of criminal justice in the United States.

I first demonstrate the extent of disproportion in world prisons by analyzing 19 countries across 6 continents. The findings show that no country for which data is available has anything close to a proportional prison system, including the low-incarcerating and wealthy democracies of Europe, which otherwise appear progressive in their penal regimes. Addressing existing theories for prison disproportion and finding them insufficient to explain a global pattern stretching across considerable national variation, I develop a novel general theory to clarify why and how legal violence becomes focused on a country's perceived "outgroups".

Criminal-legal systems, despite their respective variation and the variation of the political regimes in which they are embedded, are shown to be legitimated and motivated by a shared set of ideas and assumptions, what some call the "criminal justice paradigm". I deconstruct the criminal justice paradigm to reveal an implicitly exclusionary logic I articulate as "nationalistic". I explain how this exclusionary logic predisposes police and other criminal-legal actors to focus on groups perceived outside the bounds of an idealized national identity, therein constituting a "selection bias" at the institutional level. Thus, while criminal justice reformers remain preoccupied with rooting out bias at the individual level, they overlook the bias inherent to the

very idea of criminal justice itself. While “institutional racism” is a long-established concept, this dissertation articulates a specific reason, apart from any single country’s history or culture, for why criminal-legal systems are predisposed to identarian discrimination.

I relate this theory back to the racial reckoning of the United States the future of American criminal justice. I conclude with normative recommendations for how the American approach to crime can be made compatible with a commitment to racial justice.

## Table of Contents

1.	Introduction.....	1
2.	A Third Front? Reform, Abolition, And Cross-National Awareness...19	
3.	Prison Disproportionality: Liberal and Conflict Theory Lenses.....66	
4.	A General Theory of Prison Disproportionalities.....101	
5.	Reducing Harm and Redefining ‘Crime’ .....164	
6.	Conclusion: Confronting Faith in Violence.....198	
	Bibliography.....	202
	Appendix.....	232

# 1

## INTRODUCTION

---

We live amid significant State violence—though, depending on our relative advantage in society, it may seem to be otherwise. The State signals its willingness to harm us through symbols of authority: firearms, uniforms, badges, marked vehicles, robes, gavels, and the dire silhouettes of prisons looming on the horizon. This capacity for violence most often manifests as investigatory stops, arrests, and incarceration—these violent acts are woven into the routine of modern life. For some, these experiences are distant threats, hardly worth any preoccupation. For others, the prospect of a violent encounter with the State composes the rhythm of daily life.

Tolerance for the violence of the State depends on perceptions and lived experience; when State violence is perceived as discriminatory or excessive it risks instigating resistance (Tankebe 2013). This is why ethnic, racial, and indigenous overrepresentation in prisons—otherwise known as prison disproportion—is so troubling; overrepresentation of particular groups, especially if they have been historically discriminated against, suggests the justice system is biased and thus no longer trustworthy. For example, racial disproportion has been a persistent feature of American prisons and the backdrop to high-profile incidents of police brutality; a disproportionately black and brown prison population in conjunction with reoccurring spectacles of racial violence by police have led to a significant crisis of legitimacy for American criminal justice (Kaba 2020). This crisis has motivated reforms—as similar crises have done in the past—and also increased public interest in alternatives to the criminal justice status quo, including the abolition of police and prisons altogether.

Thus, there is a sense that the United States is at a crossroads. One path leads down essentially the same direction the country has been travelling for decades—incremental reform to optimize the conventional criminal justice approach. The other path—a departure from the criminal justice status quo—is less clear. How to begin upon this path is one question; to what extent should we abandon the familiar punitive approach to crime and be willing to experiment with new ideas? This has become a salient question in light of recent uprisings in response to police brutality and mass-incarceration (Maynard 2020). However, this dissertation focuses on why a path leading away from a conventional punitive approach to crime should be traversed in the first place.

The answer to this question provided here is, admittedly, a sweeping claim: criminal-legal systems, in general—not just in the United States but everywhere they are currently implemented—are ideologically predisposed to ethnic, racial, and indigenous discrimination. I show that “criminal justice” —as a basic set of theory, practice, and discourse—is paradigmatically nationalistic and exclusionary of identities held at the margins of national identity. Among other consequences is that excluded identities are disproportionately the object of police investigation. I argue this bias permeates criminal-legal systems globally, despite the institutional, historical, and cultural variation in which they are embedded. Accordingly, I argue that criminal-legal systems cannot be reformed to accord with an authentic commitment to equality under law. Thus, the well-worn path of incremental reform, which more or less preserves existing criminal justice institutions, will always arrive short of the full promise social justice and legal equality. The stakes are both urgent and unequivocal: if we are to take a commitment to racial equality and inclusive democracy seriously, we must abandon the familiar path of reformism and explore other avenues.

## **Methods**

This dissertation is inter-disciplinary, synthesizing empirical research of contemporary prison demographics with political theory, critical criminology, Critical Race and Critical Indigenous scholarship, sociolegal studies, and the history of ideas as proposed by Mark Bevir (2000). The empirical portion of the dissertation uses publicly available prison and population census data that is analyzed through a modification of the Ortona index (Chessa and Fragnelli 2005) to show demographic difference between incarceration and total populations in the countries examined. The dissertation's empirics demonstrate one of the foundational claims to broader theoretical argument: penal systems the world over are associated with significant ethnoracial and indigenous disproportionality under varied historical, economic, and cultural conditions. The balance of the dissertation theorizes these findings to clarify the global pattern of prison disproportion that is observed empirically. Sociolegal, critical criminological, Critical Race, and Critical indigenous scholarship serves as the conceptual and theoretical basis of this thesis, providing the primary inflection points from which I develop a novel theory of prison disproportionalities. Political theory and a History of Ideas allow me to extend my analysis beyond extant explanations for global prison disproportionalities. This argument, as any other, is guided by contestable assumptions and conceptualizations I intend to make as transparent and explicit as possible so that the reader is prepared to evaluate the broader claims.

### **“Criminal-Legal Systems”**

A criminal-legal system is generally a tripartite system of government organizations responsible for direct enforcement of the law, composed of police, courts, and prisons—otherwise known as a “criminal justice system”. This dissertation refers to criminal-legal systems as a single “metatype” of public institution. That is, although there important cross-

national and sub-national variation exist among these systems, they are nonetheless based on essentially the same institutional “blueprint” which stipulates a division of bureaucratic labor in service of an overarching mission to defend society from crime. Given the literature distinguishing cultural approaches to policing, adjudication, and punishment, gathering these various systems under a single umbrella category could be construed as overgeneralizing (Manning 2005). However, the general comparability among the world’s criminal-legal systems is indicative of a shared ideological foundation and social function (Reichel 1999; Nelken 2011; Dammer and Albanese 2013; Pakes 2019). I do not dispute that criminal-legal systems differ in important ways; however, the differences are primarily in terms of their intrusiveness and severity of sanctions that are administered. The institutions themselves are each intended to perform the same social function—“crime control”—and are collectively guided by a shared set of ideas that I critically interrogate throughout this project.

## **Ideology**

From a History of Ideas perspective, one purpose of identifying and analyzing ideological frameworks is to better understand institutional design and corresponding institutionalized practices—particular institutions are premised on specific ideas and in turn condition behavior and cognition (Roucek 1944). Thus, an examination of why criminal-legal systems “do what they do” includes consideration of the ideas which informed their institutional design and how these ideas developed over time. In keeping with a History of Ideas approach, my critique is premised on a deconstruction of a distinct ideology—composed of theory, practice, and discourse—motivating and legitimating criminal-legal systems in general: the “criminal justice paradigm” (Hulsman 1986; Mathiesen 2014; Coyle and Schept 2017). I attribute much importance to this “ideology” as a conditioning mechanism impacting policing and criminal

proceedings. However, ideology is a term that one scholar explains as encompassing considerable “semantic promiscuity” (Gerring 1997, 957). The meaning of ideology ranges from overt, self-conscious political articulations made by recognized elites to subtle, dispersed, and mostly implied ideas about the nature of social life, otherwise known as “sociosymbolic formations” (Zizek 1994). To clarify, this dissertation treats ideology as follows: a broadly accepted fiction which “regulates the relationship between visible and non-visible, between imaginable and non-imaginable”, and does so to justify either a prevailing authority and their asserted abstractions or challengers and their asserted abstractions (Zizek 1994, 1; Lukes 1986; Thompson 2015; Arendt 2007). In the words of Arendt (2007), ideology stems from “an axiomatically accepted premise, deducing everything else from it. . . . Ideological argumentation [is] always a kind of logical deduction”, which “proceeds with a consistency that exists nowhere in the realm of reality” (71, 90). Ideology need not be explicitly declared and may be at its most influential when encountered as seemingly non-ideological truths (Kennedy 1982). The law, in particular, represents a quietly powerful ideology in this way (McCann 1994; McCann & March 1996). While I do not dispute the relevance of either individual agency or socioeconomic structure to this analysis of criminal justice, I suggest that both the individuals and the structures they inhabit have a constitutive relationship with hegemonic belief systems in which they operate.

### **The Criminal Justice Paradigm and the Concept of ‘Crime’**

It could be assumed that the ideology of criminal justice is simply political liberalism, or that criminal-legal systems adopt whatever ideology dominates their respective political regimes. On the contrary, I argue that the criminal justice paradigm is its own distinct ideology, motivating and legitimating criminal-legal systems and coexisting alongside “host ideologies”.

For example, the criminal justice theory, practice, and discourse of the United States, Saudi Arabia, and China—three different regime types and cultures—bare remarkable similarity; in each country, police seek to defend all of society from individual criminals and courts exist to impose punishment on the guilty to reimpose the law when it has been violated. This is not to say the criminal-legal systems of each country are entirely equivalent, only that criminal-legal systems are implemented and maintained for essentially the same reasons regardless of sociopolitical and cultural differences of each country. Thus, the reason for the existence of police, courts, and prisons is generally equivalent among modern states and rooted in a norm of governance that was established through a centuries-long process of Eurocentric “colonial modernization” (Foucault 2003; Shahidullah 2012, 293).

The end result of this process was a globally hegemonic criminal justice paradigm, which can be summed as follows: 1) ‘Crime’ is defined as an act violating the law; 2) ‘Crime’ is morally offensive because violating law injures of all society; 3) government, as the representative of society, is authorized to use violence to deter lawbreaking and punish lawbreakers. This may read as so banal and obvious that characterizing it as an “ideology” is viewed as frivolous or pedantic. However, these ideas are consummately ideological. The criminal justice paradigm is a set of ideas regulating “the relationship between visible and non-visible”, specifically the relationship between ‘crime’—acts of lawbreaking that include evidence and witnesses— and ‘society’—which is an abstraction that can neither be directly observed nor communicated with. Nonetheless, policing, criminal proceedings, and incarceration are legitimated as defense of ‘society’, which is asserted to be injured by acts of lawbreaking—the extent of abstraction in this logic can only be described as “ideological”.

The ideology of criminal justice comes into particularly sharp focus when considering alternative logics regarding ‘crime’. ‘Crime’, as a socially constructed concept of the forbidden, can be defined and understood in various ways—‘crime’ always structures a socio-behavioral boundary, yet the *what* and the *why* of ‘crime’ has no ontological basis and is a product of human imagination and discourse (Durkheim 1972; Hulsman 1986). Importantly, the concept of ‘crime’ has considerable political significance in that theories of why ‘crime’ represents a wrongful act legitimate particular power arrangements and authorize certain agents, and not others, to intervene when a criminal act occurs. The power to punish represents an apex of political power; defining the ‘crime’ concept—determining its moral and social significance—is key to that power (Garland and Young 1983). Thus, this dissertation discusses ‘crime’ as socially constructed, consummately political, and historically contingent.

## **CHAPTER OVERVIEW**

To indict the criminal justice paradigm as inherently predisposed to indentarian discrimination by virtue of its ideological basis requires empirically demonstrating that criminal-legal systems are uniformly associated with ethnic, racial, and indigenous disparities despite considerable cross-national variation. In Chapter 1, I examine ethnoracial prison disproportionalities in a cross-national, global context. To do so, I develop and original dataset and construct an novel index of ethnoracial disproportionalities in national incarceration rates across 19 countries and 6 continents, drawn from internet-searchable publicly available prison and population statistics. I demonstrate that prisons are characterized by significant ethno-racial and indigenous disproportion across every country for which data are available, despite social, cultural, and economic variation.

The results contrast with a strong tendency within the criminal justice literature to treat the United States as “exceptional” in all aspects of its penal regime. Of course, in some respects the United States is exceptional: the highest incarceration-rate in the world, inexcusably brutal prison conditions, and a dogged commitment to the death penalty distinguish the United States from other wealthy democracies, especially those of Western Europe (Whitman 2003). However, in one respect American prisons bear remarkable resemblance to their European and other counterparts elsewhere—the extent of ethnic, racial, and indigenous disproportion. The assumption that the United States stands alone with respect to its ethnoracially disproportionate prison population is empirically false; a clear global pattern of prison disproportion is evident from the findings.

I develop a novel method for cross-national comparison through which the cases can be ranked in terms of their prison disproportion and find that the United States by no means has the most racially disproportionate prison population. This is surprising considering the socioeconomic and cultural conditions of the contemporary United States and the stark history of American racial repression. I interpret this finding as an indication of the enormity of the problem—racial disproportionality in incarceration rates—on the world stage. The United States is notorious for racial disparities in criminal justice; yet many low-incarcerating and wealthy countries of Europe have far more racially disproportionate prison populations, including countries that American reformers suggest the United States should attempt emulate in terms of penal policy, such as Norway. I suggest the findings of the first chapter reflect poorly on the prospects of the United States merely reforming its way out racially disparate punishment.

The second chapter serves as a waypoint between the findings of the first chapter and a general theory of prison disproportionalities. I consider extant theories of prison disproportion

and the extent to which they generalize cross-nationally. The dominant perspectives on prison disproportion are rooted in political liberalism and conflict theory. Political liberalism is focused on the individual, whereas conflict theory is primarily focused on social and economic structures; as starting points for an analysis of prison disproportion, they cover the micro and macro level of analysis, respectively.

Theories of prison disproportion drawing from political liberalism discuss two processes which contribute to the overrepresentation of certain groups in an incarcerated population: “differential criminal involvement”—some groups violate law more often than others due to relative socioeconomic deprivation—and “differential selection”—some groups attract the negative attention of law enforcement more than others due to implicit and explicit bias (Blumstein 1988; Sampson and Lauritsen 1997; Smith and Alpert 2007). Neither of these processes can be dismissed as factors in prison disproportion; however, they produce a methodological and conceptual impasse; it remains practically impossible to determine which process—differential offending or differential selection—is the primary driver of ethnoracial and indigenous overrepresentation. In tending toward the micro-level of analysis, theories of prison disproportion based in political liberalism are limited in their capacity to explain a global pattern of prison disproportion and are mired in a cyclical disagreement about whether the issue is individual choice to violate law or police bias (Piquero 2008).

Conflict theory perspectives on prison disproportion examine the social and economic structures which would produce both differential offending among disadvantaged groups and systemic bias such groups encounter—this constitutes a “macro” level analysis (Reiman 1987; Wacquant 2009; Beckett and Francis 2020). Structural disadvantage, racist culture, and the reoccurring crises of a capitalism cannot be dismissed as conditions under which it would be

expected that groups locked at the bottom of a social hierarchy would be disproportionately punished compared to more advantaged groups. However, conflict theory explanations of prison disproportion tend to rely heavily on historical analysis of single countries and are thus unprepared to theorize a global pattern of prison disproportion beyond a vague gesture to the ravages of global capitalism. I do not dismiss the exigencies of capital as an important factor in this global pattern; however, a theory of prison disproportion that would apply to the diversity of countries analyzed in the first chapter needs to explain why criminal-legal systems—under varied historical, social, political, and economic conditions—all respond so similarly to social inequality without being coordinated to do so. Conflict theory remains vague as to why criminal-legal systems in general “do what they do”. Hence, conflict theory falls back on historical analysis—such as American criminal justice’s roots in slavery (Brucato 2014)—that do not generalize well to other countries, despite an evident cross-national pattern of prison disproportion that bares similarity to the pattern of disproportion in the United States. In other words, some conflict theory accounts of prison disproportion reproduce an assumption of “American exceptionalism”.

Overall, I find that liberal and conflict theory to be valuable starting points; however, they do not engender a satisfying analysis of the meso—institutional—aspect of prison disproportionality—that is, criminal-legal systems themselves. The following chapter thus focuses on determining the incentives, motives, and exigencies that would explain why diverse criminal-legal systems so consistently and reliably associate with ethnoracial and indigenous prison disproportionality.

Given the limitations of liberal and conflict theory accounts of prison disproportionalities, especially their lack of attention to the institutional level of analysis, the third chapter sets out to

establish a novel general theory which can help explain the global pattern observed in the first chapter. Criminal-legal systems vary from country to country, yet they are each founded upon the same set of ideas and intentions. Thus, I focus my analysis on these commonalities, which constitute a broadly accepted and implemented “criminal justice paradigm”. Superficially and in the abstract, the criminal justice paradigm seems innocuous, little more than basic principles intended to guide State intervention in the prevention and resolution of crime. However, I argue that a closer look reveals an inherently exclusionary logic, which I characterize as “nationalistic”—that is, intended to defend a single national identity and preserve their cultural hegemony within a national border.

Before laying out the implicit nationalism of the criminal justice paradigm and the way it prejudices the criminal justice mission to defend society, I first establish that police work is itself inherently discriminatory. Police, especially on patrol, must discern threats in a target-rich environment while being heavily outnumbered; the patrol is defined by profiling some and ignoring others. The process of profiling/ignoring in patrol is not necessarily based on cues of ethnic or racial difference; however, police are invariably placed under conditions which invite such “short cuts”. Through a phenomenological thought experiment, I demonstrate that even an abstract officer, absent identity or any other intention but to defend society from crime, must discriminate using their senses or find themselves paralyzed in terms of determining the effective use of discretion. The centrality of profiling in police work will have important implications when later considering that the guiding paradigm of police work, and criminal-legal activity more broadly, bares a nationalistic predisposition.

I next detail the theory, practices, and discourse of the criminal justice paradigm with the intention of demonstrating that criminal-legal systems cannot significantly deviate from the

paradigm's tenets without transforming into something other than a criminal-legal system. Relying on Critical Race (Nunn 1997; Delgado and Stefancic 2017) and Critical Indigenous scholarship (Cunneen 2006; Tauri 2005), I explain how the fundamental theory, practices, and discourses of the criminal justice paradigm perpetuate a "colonial dynamic" in settler societies which fragments indigenous communities and sustains settler dominance over land and labor. This process clarifies why prisons in settler societies are disproportionate: the criminal-legal systems of settler societies have never fully moved beyond their original implementation as colonialist institutions and the criminal justice paradigm's theory, practice, and discourse make such an evolution away from its colonialist roots all but impossible. However, a similarly "colonial" dynamic can also be observed in places without a clear settler society history. For example, the carceral experience of the Roma in the Baltic region and the experience of Aboriginal Australians and Black Americans are overwhelmingly similar despite these groups bearing little relation to each other beyond their historical marginalization.

Thus, I further interrogate the premises of criminal justice paradigm to examine why and how it would contribute to prison disproportionalities in both settler and non-settler societies. I consider the most central idea within the criminal justice paradigm: that State violence to abate 'crime'—violations of law—constitutes a *defense of society*. Hence, criminal cases explicitly position the State as the plaintiff charging a specific, individual defendant with a criminal violation. "Society" is positioned as the injured party in a crime, and as the representative of society, the State speaks for and acts on society's behalf. Though this is a seemingly simplistic idea, it relies upon complex abstractions with implied relationships which represent a logic about the nature of social life. Deeper analysis of this logic reveals an identarian and exclusionary implication of 'society'. The defense of 'society' is the *raison d'être* of any criminal-legal

system; thus, an identarian connotation to ‘society’ places a prejudice at the very core of the criminal justice mission.

As the injured party to any crime, ‘society’—and its various synonyms such as “the people” —is positioned as inherently innocent by default; that is, society is cast as morally superior in contrast to the criminal. However, society is also situated as perpetually vulnerable to criminal predation and must be perennially defended by the State. Thus, ‘society’ in the criminal justice paradigm is paradoxically both morally superior and innately vulnerable. A review of overt nationalist rhetoric shows the same logic: the “nation” is paradoxically superior to its enemies yet existentially threatened by them at the same time (Marx 2005). The criminal justice paradigm figures society in much the same way that overt nationalist movements figure the nation; indeed, both the criminal justice paradigm and overt nationalism depend on the same narrative to legitimate coercive State authority—that an idealized identity needs and deserves the State’s violent protection from an existential threat.

Thus, I argue that the criminal justice paradigm is essentially a “nationalistic” worldview in which whatever group has successfully dominated the conception of national identity is prioritized in its defense. In other words, the criminal justice paradigm imbues the concept of ‘society’ with identarian connotation. Countries are built around a national identity, which is expected to define a country’s culture and dominate its politics—this is the base-line nationalism of the contemporary nation-state and typically a site of considerable contestation between groups vying for recognition of legitimate “peoplehood” (Gillis 1994). Criminal-legal systems are essential to the dominant group’s cultural hegemony—rival groups seen as outside the bounds of fully belonging to ‘society’ are more likely to be perceived as threatening by State actors, and

thus disproportionately likely to face arrest and incarceration. To clarify this process, I return to the topic of police work and its reliance on discrimination.

The “patrol” has been a mainstay of policing from the earliest inception of centrally organized and uniformed police organizations under late European monarchies (Riley 1983). As discussed earlier, the patrol requires that officers sensorily discern threats within a target-rich environment, therein inviting discrimination based on cues of visual and behavioral difference. Already inviting of ethnic and racial discrimination, the criminal justice paradigm further prejudices the police worldview by suggesting that ‘society’ is roughly equivalent to the idealized or dominant—and thus less threatening—national identity. Police are therefore prone to systematically ignore individuals who emit cues of belonging to the national identity and focus their attention on perceived outsiders. This contributes to a condition under which some groups will experience disproportionate unwanted contact with police and related consequences. In conjunction with criminogenic socioeconomic conditions afflicting marginalized ethnic, racial, and indigenous groups, the nationalistic predisposition of criminal-legal system contributes to prison disproportionality. This constitutes a cross-nationally applicable theory of prison disproportion that need not rely on single-country historical or cultural analysis.

The final substantive chapter considers what the United States should do to address racially disproportionate incarceration. The obvious implication—if a commitment to racial equality is taken seriously—is abolition of the existing penal regime. If the guiding paradigm of criminal justice is motivated by an exclusionary logic, then incremental liberal reforms cannot disabuse American criminal-legal systems of their prejudicial inclinations. However, I suggest a different approach.

A significant number of Americans, especially but not exclusively white Americans, find the notion of abolition frightening or unnecessary (McDowell and Fernandez 2018). This is understandable given that criminal-legal systems focus State violence on perceived outgroups—for most white middle-class and affluent Americans, police violence and incarceration are not familiar experiences (Carter et al 2016). The dominant national identity of the United States is “white” and white attitudes toward criminal-legal systems, though not without variation, tend to be more positive than those of other racial groups (Wu 2014).

Rather than confront these fears and attitudes directly by advocating for immediate abolition of the penal regime, I suggest a more strategic approach of working to expand the “restorative justice” institutions already scattered throughout the country. I argue that restorative justice, although first instituted with little awareness of racial justice in mind (Gavrielides 2014), can achieve abolitionist goals of reducing racialized State violence without instigating public fear that may result in backlash and reprisal. I do not present restorative justice as utopian, and I detail its many shortcomings as a theory and practice. However, on the whole, I argue restorative justice may offer a crucial path toward a more racially just America.

Restorative justice has no single agreed upon definition; however, many restorative justice theorists base the idea on defining ‘crime’ primarily as harm to persons and relationship rather than strictly as lawbreaking (Zehr 1994; McCold 1999; Marshall 1999; Elliott 2002; Braithwaite 2002). This redefinition of crime has significant social and political implications when construed as meaning that the direct “stakeholders” in a crime—victim and offender—are authorized to directly address the harm done through a deliberative process aimed at repair and emphasizing the self-articulated needs of victims.

The role of the citizen and the State in a restorative process differs significantly from their respective roles in a conventional criminal proceeding. Whereas the State dominates the criminal proceeding, sidelining direct victims so that ‘society’ and State authority are the primary focus, the restorative justice process confers authority to the victim and offender to arrive at a mutually agreed upon and substantive resolution. The State is a facilitator in this process, supporting self-governance, rather than the sole dominant authority. These roles of State and citizens are legitimated by defining ‘crime’ as harm to persons and relationships rather than strictly as lawbreaking.

Furthermore, and importantly, when ‘crime’ is defined as harm, there is less reason to reimpose the law through punishment—incarceration does little to substantively address specific harms experienced by victims. Also, when ‘crime’ is defined as harm, the State is no longer figured as defending ‘society’ or as an injured party following violations of the law. Thus, restorative justice is an alternative to both State dominance over criminal proceedings and State dominance as expressed through the violence of incarceration. Restorative justice is currently being implemented to address violent crime in criminalized communities with considerable success; however, it remains geographically limited and underutilized (Sered 2019).

There are two implications I draw from the prospect of expanding restorative justice in the United States. First, restorative justice can be thought of as “harm reduction” applied to State violence. The United States relies heavily on punishment, and much of American society displays a classic “dependence” on a punitive outlook toward crime (Tonry 2012); restorative processes are a “replacement behavior” that can address this overreliance on incarceration. Using criteria of dependence developed within Addiction Medicine (McLellan 1992), I explain how restorative justice can reduce the frequency, duration, and intensity of State violence while still

meeting the social need for an intervention in crime. As American punishment falls disproportionately on black and brown Americans, the benefits of this harm reduction approach to State violence accrue within those communities most directly impacted by the current punitive approach. Thus, although restorative justice has only recently been recognized as within a racial justice agenda, that propensity has been there from its inception (Davis 2019). In the shorter term, restorative justice represents one way to reduce the harms now routinely inflicted upon marginalized communities by the State while still addressing the harms that occur within those communities themselves.

In the longer term, restorative justice may change the way Americans think about crime and national belonging. Every time it can be demonstrated that the moral implication of ‘crime’ is the harm experienced by the victim, and every time it can be demonstrated that State violence is unnecessary to address that harm, the nationalistic logic of the criminal justice paradigm is undermined. However, every instance of criminal-legal activity—from arrests to parole—pushes in the opposite direction, reinforcing the State’s primacy of defending ‘society’ and perpetuating the base-line nationalism of the American State. However, it is possible that if restorative justice is expanded then the criminal justice paradigm itself could fade into irrelevance. Thus, restorative justice can be thought of not only as “harm reduction” but also as a potentially radical form of social change.

Overall, the dissertation seeks to challenge what I term a “faith in violence” to secure a free and fair society. Thinking specifically of the United States and its current crisis around police brutality and racially disproportionate incarceration, I use the word “faith” to mean the continued belief that a violent and punitive approach to crime control can be made compatible with inclusive democracy and racial equality, despite ample evidence to the contrary. This faith

is perhaps based on the notion that some place, somewhere, relies on a conventional punitive approach to crime without incurring the identarian exclusion for which the United States is now notoriously associated with. If this were true, then it would be arguably reasonable to continuing believing that the United States can one day achieve a racially just society while continuing to rely on State violence as a primary response to crime. However, the following chapter challenges this belief by demonstrating that criminal-legal systems the world over can be unambiguously associated with conspicuous ethnic, racial, and indigenous disparities comparable to those in the United States. These findings challenge any faith that criminal justice is identity-neutral by default and can be made so once again in the United States through reform.

“The law is meant to be my servant and not my master, still less my torturer and my murderer.”

-James Baldwin, *A Report from Occupied Territory*

---

## INTRODUCTION

In the wake of George Floyd’s murder, massive uprisings in support of racial justice swept over the United States and then the world. Although George Floyd’s murder was the catalyst of international demonstrations, the protests were not only a response to the worst cases of police brutality. Protesters also sought to confront the routine activities of criminal-legal institutions, that even in the absence of brutality and harassment, disproportionately impact negatively stereotyped and socioeconomically isolated communities (Taylor 2016). Racial disproportion in prisons has come to signify this routine racial injustice. For example, Black Americans are 5 times as likely to be incarcerated compared to white Americans (Nellis 2016). Nonetheless, Black Americans remain at a disproportionately high risk of criminal victimization, accounting at times for nearly half of all homicides while only comprising 13% of the total US population (Harrell 2011). Hence, the murder of George Floyd was a tipping point for “large swaths of American society [who] see themselves as anomic, subject only to the brute force of the state while excluded from its protection” (Bell 2017, 2057).

In the aftermath of the 2020 uprising, at least 17 American city governments began to consider proposals to “defund” their police departments and reallocate public-safety dollars toward police and prison alternatives such as social-work and harm-reduction based services (Holder 2020). At the same time, the idea of abolishing criminal-legal systems altogether became a subject of serious discussion (Alexander 2020). The rationale was not only to prevent the most acute failures of American criminal justice, such as those exemplified by the murder of George Floyd and numerous others, but also to address the ongoing norm of criminalizing black and brown communities that contributes to ethnic and racial disproportion in incarceration while failing to adequately ensure safety (Jefferson-Bullock and Exum 2020). In response, a reinvigorated state and federal effort to “repair, reform, and [re]legitimate” existing criminal-legal institutions emerged as a counterpoint (Akbar 2020, 1802).

The future of American criminal justice remains uncertain, however proponents of defunding and/or penal abolition<sup>1</sup> face considerable political, and indeed, ideological, obstacles rarely encountered by those who advocate for more limited and incremental reform (Ben-Moshe 2018). Among these obstacles is the “colorblind lens” routinely employed to present criminal-legal systems in the abstract as fundamentally race-neutral tools of crime control (Murakawa and Beckett 2010; Van Cleve and Mayes 2015). From this perspective, American criminal justice can overcome racist elements by purging bad actors, purifying the institutional subcultures in which they operate, and clarifying acceptable criminal-legal conduct (Butler 2015). However, for proponents of more radical measures who employ a race-conscious analysis, this reform agenda

---

<sup>1</sup> “Penal abolition” used here to refer to abolition of police, criminal courts, and prisons in tandem. See Coyle and Scott, (Eds.). (2021).

may be regarded as merely co-opting racial grievance and repacking institutionalized racism (Maynard 2020).

How can we evaluate the prospects of successful racial-justice oriented reforms to existing criminal-legal systems? One way is to look to history (Delgado and Farber 1998; Faegin 2013). The relatively few, and often limited, instances of racial progress in American punishment offer little reassurance that maintaining and reforming the existing penal regime is compatible with a genuine commitment to racial justice (Alexander 2012). However, a promising, and often overlooked approach, is to look outside the United States, to identify criminal-legal systems in other countries which most approximate the kind that racial justice-minded reformers may wish to see implemented here. Identifying such examples would do two things: first, it would strengthen the view that a criminal-legal approach to crime and a racially just society are indeed compatible, which would undermine the cases for defunding and abolition. Second, it would identify role models on which to base reforms and clarify criterion and goals for that effort.

### **Current Study**

Given the potential utility of a cross-national analyses to a reform/abolition debate, this study seeks to systematically address several important and understudied inquiries: what is the extent of ethnic and racial disproportionality in the world's prisons and how do they compare to each other? Do prison disproportionalities always involve historically marginalized "race-class subjugated" (RCS) communities (Soss & Weaver 2017), as they do in the United States? Finally, under what national conditions, as defined by socioeconomic and criminal justice factors, do criminal-legal systems achieve ethnoracially equitable (and proportional) outcomes?

These inquiries are addressed using a novel dataset covering 19 countries across six continents,<sup>2</sup> compiled from publicly available and internet searchable prison and national census data targeting the year 2016.<sup>3</sup> My method utilizes a modification of the Ortona Index, used by economists to analyze disproportionality in proportional representation systems (Chessa and Fragnelli 2005). Based on the racial justice principle that ascriptive identity ought not to impact a person's or group's life chances,<sup>4</sup> I measure the level at which ethnoracial identity is associated with incarceration for each case. This is achieved by identifying the difference in ethnoracial representation between each country's total and incarcerated populations, in terms of the categories used by each case's respective census. The overall extent of disproportion found is represented by a "disproportionality index", by which countries are then ranked and compared. I also provide a "range of representation" between the least and most incarcerated census categories in each country, which provides a cross-reference for the disproportionality indices and further context. Case selection was determined by the availability of public internet-searchable data for the year 2016 or approximate year within a range from 2010 to 2020. Incarcerated population is defined as the sum of adult persons held in jails and prisons due to the routine merging of both forms of custody in prison censuses.<sup>5</sup>

The findings demonstrate that conspicuous levels of ethnoracial disproportion is typical, and possibly even ubiquitous, in the world's prisons. The extent of disproportion found in each

---

<sup>2</sup> Countries included are Ireland, Switzerland, Australia, Greece, Finland, Norway, Latvia, Canada, Italy, France, England and Wales, New Zealand, The United States, Spain, South Africa, Brazil, Germany, India, and Saudi Arabia.

<sup>3</sup> 2016 is the midpoint of several national censuses; if 2016 data was not available, I used data for the closest year available. The data search covered a range from 2010 to 2020.

<sup>4</sup> There is no single definition of "racial justice; however, few proponents of this concept accept violating this principle. For an articulation see Bell (2008).

<sup>5</sup> "Jails" typically hold person awaiting trial or serving short sentences for more minor offenses. "Prisons" typically hold persons convicted of serious crimes who are serving longer sentences.

case is significant: even in countries with the most comparatively proportional prison populations, the most overrepresented census categories in prisons are shown to bear at least twice the risk of incarceration compared to their counterpart groups. In some cases, the risk of incarceration for the most overrepresented census categories was found to be more than 30 times that of their most under-represented counterparts. Moreover, socioeconomically marginalized ethnic and racial groups are overrepresented in the prisons of every case for which data was available.

In terms of socioeconomic and criminal justice factors, the findings show that even under the most favorable national conditions, the extent of disproportion in the imprisoned population is conspicuous. Countries with more desirable ratings on the Human Development Index, World Happiness Report, and Democracy Index tended to have more ethnoracially disproportionate prison populations. Further, more economically equal countries with smaller prison populations, lower incarceration rates, and fewer homicides are shown to have only marginally more proportionate prison populations. For example, nations of north-western Europe are found to have some of the most ethnoracially disproportionate prisons populations in the world.

Overall, the evidence suggests that despite considerable variation in cultural and national conditions, reliance on conventional criminal-legal approaches to crime coincide with significantly disproportionate burdens of punishment upon a country's least advantaged communities. Drawing on current understandings that disproportion in incarceration involves both criminal-justice-specific bias and differential criminal involvement related to socioeconomic marginality, this global pattern may be most accurately interpreted as a consequence of the constitutive relationship between illiberal social and economic exclusion

(Mauer 2011; Soss and Weaver 2016). While this process is typically studied through single-country analyses, the findings demonstrate this is global phenomenon.

The findings are highly relevant to current debates over the future of American criminal justice in the post-Ferguson era. Alexander (2020) writes that “we must face our racial history and our racial present” to clarify the best way forward (2). Additionally, a cross-national perspective can offer a tangible, data-driven evaluation of the prospects of maintaining and reforming American criminal-legal institutions on behalf of racial justice goals.

For example, rationales for maintaining and reforming existing punitive institutions in the US may be based on an assumption that other countries rely on incarceration without significant ethnic and racial disparities, thereby suggesting the US could as well. This assumption fits the “colorblind lens” often employed to analyze criminal-legal systems in the abstract. To counter this assumption, proponents of defunding and abolition can refer to evidence that no country with a punitive carceral paradigm has been found to produce anything approximating racially equitable (or proportional) outcomes, including countries that may otherwise be potential role models for US reforms. This supports an argument that alternatives to a conventional reliance on criminal-legal approach to crime may be the most reliable pathway toward a more racially just society.

The chapter is organized as follows: First, in the literature review, I further discuss the reform/abolition debate and how it relates to the concept of normative legitimacy, before reviewing previous cross-national studies of ethnic and racial disproportion in prisons. Next, I detail my method and discuss how it overcomes previous limitations impeding broad cross-national comparisons across large numbers of countries with distinct ethnic and racial populations. My findings demonstrate that ethnic and racial disproportion in prisons is a global issue which

afflicts not only high-incarcerating countries with conspicuous histories of ethno-racial oppression but also countries with low incarceration-rates and comparatively progressive penal regimes. This is followed by a discussion of how cross-national analyses of ethnoracial disproportion in prisons may contribute to debates regarding criminal justice reform and abolition in the United States.

## **LITRATURE REVIEW**

### **Legitimacy and the Abolition/Reform Debate**

In the context of the racial justice<sup>6</sup> principle that ascriptive identity ought not to impact life chances, the question of whether to abolish or reform existing criminal-legal institutions often comes down to an appraisal of their legitimacy, in the normative, Rawlsian (2020) sense.<sup>7</sup> A position to rehabilitate criminal-legal institutions concurs most logically with a view that existing institutions are - at their core - race-neutral by virtue of principled institutional design but have become, for various reasons, temporary distortions of their true form. Conversely, a position to “divest and dismantle” existing institutions logically stems from a view that they are either inherently unfair or distorted beyond repair, and thus incapable of delivering just punishment (Akbar 2020, 1844; Davis 2011). It is unsurprising then, that the widely studied and publicized ethnic and racial disproportion of American prisons has coincided with attacks on, and defenses of, the normative legitimacy of American criminal justice.

For example, several scholars have sought to debunk the “myth” of a racist criminal justice system by studying the role of socioeconomic inequality in contributing to criminal

---

<sup>6</sup> There is not a single, agreed upon definition of “racial justice”. However, few proponents of the concept would dispute this principle. For an articulation, see Bell (2008).

<sup>7</sup> However, it should be noted that Rawls himself circumvented the issue of race when theorizing justice. See Mills (2013).

involvement among groups overrepresented in prisons. According to Blumstein (2009) and Tonry (2011), ethnic and racial disproportion in US prisons is primarily a reflection of how the social and economic rewards of American life are jealousy hoarded by the wealthy and the white, leaving few licit opportunities for marginalized groups (186; 31). In this framing, the normative legitimacy of criminal justice is defended; criminal-legal institutions are found to be race-neutral constructs that are unfortunately situated in a highly racialized society. In this view, the real problem is the racial gap in just about every measure of quality of life in the United States and the way these gaps manifest as criminal behavior. Address the gap, it is argued, and whatever extent of criminal-justice specific bias at play would cease to be a meaningful factor in determining prison demographics (Blumstein 2009, 186). Though these arguments do not claim that bias in law enforcement is entirely imagined, the “crisis of legitimacy” currently afflicting American criminal justice is seen as distracting from more urgent social inequities beyond the scope of criminal-legal institutions themselves.

The racial disparities in American life are indisputable, yet the fact that American criminal justice unfolds under such evident conditions of racial inequality does not mean that criminal-legal institutions should be presumed racially neutral - and therefore legitimate - by default. An expanding list of scholars conclude that criminal-legal systems do not merely respond to broader social inequalities but actively perpetuate such inequalities (Wacquant 2001; Garland 2012; Simon 2012). For example, Bell (2017) contends that criminal-legal systems serve an “insidious function” to control and exclude “disfavored groups” (2059). Bell argues that “incremental interventions” will never be sufficient to address systems which are inherently predisposed to target the marginalized (2131). Likewise, Cleve and Mays (2015) see the criminal legal system as “the most oppressive tool that creates racial inequality in America” (407). This

claim is based on observations that no other social institution features such stark racial disparities as those found in criminal justice. If society-wide inequalities explain most of the ethnic and racial disproportion in prisons, as some contend, one would expect to see other social institutions impacted in similar ways. Nevertheless, criminal justice stands out as particularly disparate, thereby suggesting it is even less fair than the inequitable society in which it is embedded (Western 2014). Overall, a critical view of American criminal justice's legitimacy has ascended in the last decade (Brown and Schept 2017, 441). The status quo of the mass-incarceration era is increasingly difficult to defend, and the national conversation seems to favor significant reforms at the very least, if not more radical measures such as defunding or abolition to make way for novel non-punitive approaches to crime.

Yet ambiguity remains for those attempting to determine the appropriate degree of intervention in America's criminal justice future. Is the issue that a racist American culture has distorted an essentially neutral tool of crime control into a racial weapon? This is the implication in some accounts of the rise of mass incarceration, that criminal-legal systems are more or less neutral tools of behavioral regulation that have been captured by forces intent on preserving white-supremacy and used in place of delegitimized racist policies (Feeley and Simon 1992; Weaver 2007). If this is the case, it is conceivable that we may rescue this tool, and criminal law more broadly, from the clutches of America's racist exigencies through race-conscious reforms. Or, alternatively, was American criminal justice intended from its inception to reinforce white, capitalist domination and shaped over time by this original intention? If so, existing criminal-legal institutions would arguably need to be abandoned in favor of entirely new approaches that work to counter the American penchant for what Soss and Weaver (2017) describe as "race-class subjugation".

Recurring patterns of racially differential impact in criminal justice suggest that the current system in America, and American law more totally, is indeed predisposed to racism. Contrary to assumptions that the era of mass-incarceration racialized the American prison population, there has never been a time in US history in which the US prison population has been anything close to proportional to the US total population. Prison statistics going as far back as 1850 show “the combined percentage of foreign-born persons, Black [Americans] and other minority groups incarcerated by the criminal justice system has ranged between 40 and 50 percent of all inmates present” (Calahan 1979). As early as 1910, US prison statistics show that Black Americans, who comprised 11% of the total population, made up 31% of the incarcerated population, which is comparable to the degree of disproportion in black imprisonment seen today despite a massive growth in the overall incarcerated population (Rosich 2007, 2).

Patterns like this have led Critical Race scholars such as Richard Delgado (1998) to argue that American punitive systems have not only been shaped by the imperatives of a racist society but are, indeed, built upon a racist “social DNA” (374). Delgado defines a system as “inherently racist if it is recurrently so - that is, it keeps coming back to the behavior time and again and for each of the different minority groups” and “does so for reasons seemingly imbedded in its very structure and makeup” (364). For Delgado, recurring patterns of racially differential impact in punishment point to a racist “DNA” within American law despite occasional, and often limited, racial progress in the law (382). However, a specific exposition of the law’s racist “DNA” has so far not emerged and arguments in this direction tend to rely on historical observations that remain vulnerable to counterarguments that American criminal-legal systems are merely responding to broader social inequalities or have been (temporarily) corrupted into a racial weapon.

As Van Cleve and Mayes (2015) argue, there is a tendency among scholars, officials, and much of the public to view criminal justice through a “colorblind” lens which views criminal-legal systems in the abstract as inherently neutral tools, thereby morally legitimate by default even if subject to illegitimate episodes of politicization. Thus, abolitionist arguments, although more mainstream today than ever before, face an uphill battle against perspectives which locate the problem of racial inequality in criminal justice outside of criminal-legal systems themselves.

## **LOOKING OUTSIDE THE UNITED STATES**

This study does not intend to decisively resolve whether American criminal justice is inherently race-neutral or otherwise. However, the ongoing debate between those who seek to maintain and reform existing criminal-legal institutions and those that favor a ground-up restructuring of the American approach to crime can be furthered by considering the extent to which punitive systems outside of the United States are characterized by ethnic and racial disparities. For example, identifying examples of roughly ethno-racially proportionate incarcerated populations outside of the United States may illuminate pathways of race-conscious reform, both of criminal-legal systems and institutions more broadly, which do not involve disestablishing police and prisons. This endeavor is facilitated by understanding the fundamental similarities of criminal-legal systems that underly their variation.

### **The “Criminal-Legal Approach”**

Throughout this study I use the term “criminal-legal approach” to refer to a fundamentally related set of practices which stem from “a dominant discourse that collectively is understood as the paradigm of ‘criminal justice’” (Coyle and Schept 2018, 319). The criminal justice paradigm is a specific, hegemonic yet contested point of view that individuated and

regulated punishment is necessary for the defense of society from criminality. Criminal-legal institutions such as police, criminal courts, and prisons constitute the superstructure of this paradigm (Mathiesen 2014).

While the notion of a “criminal justice paradigm” is useful in certain contexts, I opt here for the more behaviorally specific term of the “criminal-legal approach”. This term is based on a view that although criminal-legal systems vary in important ways, they are nonetheless comparable as variations on a single metatype of public institution defined by similar punitive goals and institutionalized behaviors (Dammer 2013). Criminal-legal systems across the globe can be thought of as premised on a single “blueprint”: uniformed police patrol, respond, and investigate; courts adjudicate; the condemned are typically incarcerated; and each process is regulated according to procedure, various rights recognitions, and a division of labor within the system. Hence, this is an “approach” to certain kinds of social problems that produces similar official behaviors. This is not to overlook the variation of punitiveness between countries (Cavadino and Dignam 2006), but rather point out that cross-national comparison of criminal-legal systems tend to be of degree and not kind (Maguire and Duffee 2015).

The criminal-legal approach (and paradigm) emerged from the European Enlightenment and achieved global hegemony through a process of Eurocentric “colonial modernization”, thereby displacing a variety of indigenous disputing methods over the span of several centuries (Foucault 2007; Shahidullah 2012, 293). Even explicitly illiberal regimes performatively base their social control on this tripartite model out of adherence to the global norm (Bramstedt 1998). Consequently, the criminal-legal approach can be thought of as unfolding within a quasi-natural experiment: the same basic blueprint, and related set of behaviors, has been adapted to fit various

national conditions. This allows for cross-national evaluations of the criminal-legal approach on various levels, including the phenomenon of ethnoracial disproportion in prisons.

## **PREVIOUS CROSS-NATIONAL STUDIES**

Previous cross-national comparisons of ethno-racial disproportion in prisons have been insightful yet limited, primarily due to the methodological challenge of standardizing ethnic and racial categories across cases. Although it has been demonstrated that ethnic and racial disproportion in prisons is not unique to the United States and far more globally pervasive than may be typically assumed, these observations have had little impact on the debates regarding the criminal justice trajectory of the United States, perhaps due to their limited scope. Still, these early studies arguably remain important first steps in an evaluation of the potential to repair and re-legitimate American criminal justice in the post-Ferguson era.

Cross-national comparison is typically premised on standardizing across cases, and the heterogeneity of ethnic and racial categories among countries poses a significant challenge to researchers examining prison disproportionalities. A prominent issue is the inadvertent production of false equivalencies between groups in various countries.

Although groups which experience comparable risks of incarceration within their respective countries may overlap in some respects, they may also experience importantly different opportunities otherwise. To provide a concrete example, both Black Americans and Black Britons experience a much higher likelihood of incarceration compared to any other group within their countries – in fact, Black Britons have at times experienced a greater likelihood of incarceration than Black Americans (Glynn 2013, 5). However, these two groups have been shown to statistically differ when it comes to social factors such as marriage and residential

segregation, both of which are theorized to contribute to offending patterns (Crutchfield 1982). For example, Black Britons are far more likely to marry someone of a non-African origin than Black Americans and much less likely to experience residential segregation (Loury et al 2005, 178). In other words, Black Britons experience more “integration” compared to Black Americans, yet incarceration-rates for both are comparable. This is counterintuitive to theories that posit integration as lowering contact with criminal justice systems (Wilson 2012; Massey and Denton 2018). The larger point, however, is that arbitrarily matching different groups in different countries based on a perceived similarity risks producing unsustainable equivalencies. Furthermore, as my method will demonstrate, drawing equivalencies between groups in different countries is unnecessary.

Another standardizing challenge is that governments not only recognize differing ethnic and racial categories but also recognize differing *numbers* of ethnic and racial categories. For instance, the United States recognizes four ethnic and racial categories in its current prison census and Australia recognizes only two. Comparing the United States and Australia in terms of their respective ethnic and racial incarceration-rates would involve selecting which groups on the US side to exclude and which groups to match, thereby not only risking false equivalencies but also arbitrarily excluding some groups from the analysis altogether.

Despite such challenges, scholars have had some success implementing cross-national analyses of ethnic and racial incarceration-rates; the work of Michael Tonry is notable in this regard. To test the assumption that the US is indeed exceptional in terms of its ethnoracially disproportionate criminal justice system, Tonry (1994) examines ethnic and racial incarceration-rates in 5 English-speaking countries. Instead of trying to match groups cross-nationally, Tonry organizes respective countries’ ethnic and racial groups into white/other binaries. For example,

Tonry compares the incarceration-rates of “Whites and Natives” for Canada and “White and Blacks” for England and determines the ratio of most to least incarcerated group for each country. These ratios are then compared against each other. This achieves a cross-national comparison of ethnic and racial incarceration-rates that somewhat overcomes the heterogeneity of racial identity categories in national censuses. In each of the 5 cases, Tonry finds that “disadvantaged visible minority groups are seven to 16 times likelier” to be incarcerated compared to their white counterparts (97).

Tonry concludes that racial disproportion in US prisons is not exceptional, but rather fits a pattern that stretches across the English-speaking world. Tonry interprets these findings as suggesting that the causes of racial disproportion in US prisons have less to do with criminal-justice-specific discrimination and more to do with racialized economic marginality. Comparing Australia, Canada, England and Wales, and the United States “exposes the failure of social policies aimed at assuring full participation by members of minority groups in the rewards and satisfactions of life in industrialized democratic countries” (97).

Although uncovering important findings, Tonry’s method has limitations. The method limits the number of countries which can be included in the analysis by relying on cultural similarity to construct the data set. Furthermore, although pairing the least and most incarcerated group in each case provides a picture of disproportionality in each country, we are left wondering about the many groups in-between the extremes and if their carceral experience fits the national pattern. Moreover, Tonry’s method excludes groups which are minorities in both the total population and prison population but nonetheless may be significantly overrepresented in prisons such as indigenous communities in Canada and the United States (Ramos 2016). This approach

reinforces the invisibility of groups typically overlooked in debates regarding punishment and racial justice.

Subsequent studies by Tonry (1997) observe that “members of some disadvantaged minority groups in every Western country are disproportionately likely to be arrested, convicted, and imprisoned for violent, property, and drug crimes” (1). Further, the overrepresentation of ethnic and racial minority groups in prisons has been acknowledged as globally extensive by the United Nations (2021). However, systematic comparisons have remained elusive, primarily because of the heterogeneity of identity categories in national censuses. Without a systematic basis of comparison, the issue remains difficult to grasp and the opportunity for transferable lessons remains limited. Tonry (1997) advocates for the “development of a comprehensive research agenda” that “move[s] beyond single-country analyses” to clarify this global pattern (36). With this in mind, I use a method for comparing ethnic and racial proportions between incarcerated and total populations which accommodates broad cross-national analysis and includes all groups within national censuses.

## **A DIFFERENT APPROACH**

### **Summary of Method**

To overcome the challenge of standardizing identity categories across countries, I use a modified version of the Ortona Index, which was originally developed to analyze proportional electoral systems “based on the difference between seats assigned by a given electoral system and seats assigned by a perfect proportional system” (Chessa and Fragnelli 2005, 1655). I have adapted this method to analyze population data that is offered as percentages rather than full counts, since prison demographics data is typically in percent. This method is used to compare

individual cases against an “ideal scenario” in which an incarcerated population and total population have the same ethnic, racial, and indigenous proportions. Ethnoracial congruence between incarcerated and total populations is ideal in that it would strongly suggest that ethnoracial identity is not associated with risk of incarceration. Cases are compared against each other in terms of how close or far they are from this ideal.

To facilitate cross-national comparison, I construct two interrelated metrics for each case. The first is a “disproportionality index” ( $d_c$ ) which represent the mean level of disproportionality in incarceration across all census categories used in a given country’s census. The second metric is the “range of representation” ( $r_c$ ), which shows the disparity in incarceration between a country’s most underrepresented and most overrepresented category.

### **Disproportionality Index**

The formula for the disproportionality index is:

$$d_c = \frac{\sum_{i \in N} \left| 1 - \left( \frac{P_i^I}{P_i^T} \right) \right|}{n_c}$$

The calculation has two steps and is used to analyze each country separately. First, I measure the ratio of representation between the incarcerated population and total population for each category within the census; this is the “representation ratio”  $\left( \frac{P_i^I}{P_i^T} \right)$ . A representation ratio of “1” would indicate perfect proportionality – a 1 to 1 ratio – between the incarcerated and total population for a particular category (Chessa and Fragnelli 2005, 544). A representation ratio below 1 indicates underrepresentation and a representation ratio over 1 indicates overrepresentation.

Australia provides a simple case with which to demonstrate representation ratios because the Australian census only counts two categories. Furthermore, single-country analysis confirms the disproportionality of Australian prisons (Walker and McDonald 1995, 2; Cunneen 2019). The representation ratios for Australia support this previous research.

In 2016, the total Australian population ( $P_i^T$ ) was counted as 97% “White and Other” and 2.8% “Aboriginal Australian and Torres Islander”. During the same year, Australia’s incarcerated population ( $P_i^I$ ) was counted as 72% “White and Other” and 27% “Aboriginal and Torres Islander”. The representation ratio of 0.7 for “White and Other” indicates that category is underrepresented in prisons at 0.7 times their representation in the total population. Whereas the representation ratio of 9.7 for “Aboriginal and Torres Islander” indicates that category is represented in prisons at 9.7 times their representation in the total population.

Census Category	(PT)	(PI)	$\left(\frac{P_i^I}{P_i^T}\right)$
White and Other	97%	72%	0.75
Aboriginal/Torres Islander	2.8%	27%	9.7

**Table 1. Census Category Representation and Disproportion Ratios for Australia, 2016** *Source:* 4517.0 - Prisoners in Australia, 2016, Australian Bureau of Statistics and 2016 census, <https://www.abs.gov.au/websitedbs/censushome.nsf/home/2016>

To calculate the disproportion index ( $d_c$ ) for Australia, the absolute difference is measured between the disproportion ratio for each group and perfect proportion, i.e., 1. Then the results for each category are summed and divided by the total number of census categories analyzed. This produces a Disproportion Index ( $d_c$ ) for Australia of 4.5, one of the highest among all cases. A disproportion Index of “0” would indicate that there is no ethnoracial demographic difference between a country’s incarcerated and total population.

Census Category	$\left 1 - \left(\frac{P_i^j}{P_i^t}\right)\right $
White and Other	.25
Aboriginal/Torres Isldr.	8.7
$(d_c)$	4.5

**Table 2. Disproportion Ratios and Disproportionality Index** for Australia, 2016

Findings of no difference (i.e., “0”) were not expected. The United States, which is well known for a disproportionate prison population, can be used as comparison to contextualize the variation in disproportion indices. In the context of evaluating the prospects of successful race-conscious reform to the existing penal regime of the United States, if a criminal justice system can be identified which displays very low levels of disproportion, it may be possible to infer transferable lessons about how that system, and the society that surrounds it, achieves this outcome. Likewise, comparing disproportion indices allows evaluation of countries which have been put forward as normative examples of best practices in criminal justice.

### **$(d_c)$ Right-Side Bias**

The measure of disproportionality indices takes advantage of the “right-side bias” which stems from analyzing percentages via a modified Ortona index. Both underrepresentation and overrepresentation in prisons are forms of disproportionality and because this method is based on absolute difference, both contribute to a country’s disproportionality index. However, this method does not treat both manifestations of disproportionality as normative equivalents. Ethnic and racial overrepresentation in prisons is associated with collateral negative impacts on marginalized communities and various ethnic and racial disparities more broadly, whereas underrepresentation is typically viewed as a group advantage (Gottschalk 2011). Because a census category cannot be underrepresented below 0%, underrepresentation will contribute a maximum value toward disproportionality indices of 1, whereas there is no upper limit to how

much overrepresentation will drive indices upward. Hence, the method has a justifiable right-side bias.

### **Range of Representation**

To further clarify and contextualize the disproportion index, I provide a range of representation ( $r_c$ ) between the most *underrepresented*  $\left(\frac{P_u^I}{P_u^T}\right)$  and most *overrepresented*  $\left(\frac{P_o^I}{P_o^T}\right)$  categories for each case. The use of mean to calculate the disproportion index can potentially “soften” results for countries with more census categories; means are typically paired with ranges for this reason. Cross referencing a given disproportion index with the range reveals the disparity between the least and most incarcerated groups in terms of the extent to which ethnic and racial categorization associates with risk of incarceration. For example, a given country’s range may show that the least incarcerated category is only incarcerated at 0.25 times their representation in the total population whereas the most incarcerated group is incarcerated at 8 times their representation in the total population. This clarifies if disproportionality indices are driven primarily by underrepresentation or overrepresentation, and to what extent. To find the range of representation, I rank order the representation ratios from lowest to highest, identify the most underrepresented and most overrepresented categories, and present the data as such:

$$r_c = \left[ \left( \frac{P_u^I}{P_u^T} \right), \left( \frac{P_o^I}{P_o^T} \right) \right]$$

The range of representation can also clarify unexpected results. For instance, while Australia’s disproportion index is 4.5, the US index is lower at 0.73. This may be surprising based on the notoriety of American racial disparities in punishment. However, the range of representation for Australia is [.75, 9.7] and for the US it is [.49, 2.5]. The range of

representation is indeed greater in Australia than the United States, thus it makes sense that Australia's prison population is more disproportionate overall compared to that of the US.

## **Data and Collection**

This study uses a novel data set to analyze 19 countries across 6 continents. Inclusion of cases was based on the availability of publicly searchable on-line data targeting the year 2016, for which break downs of prison and total population by ethnicity, race, and indigenous identity categories were included. This process involved accessing official websites of bureaus of statistics to determine if the needed prison data was made available. If officially furnished data was unavailable, a second round of searches looked for usable data from non-governmental organizations, research organizations, and previous research. The list of potential countries was drawn from World Prison Brief.<sup>8</sup>

In some cases, proxies were used in place of ethnic and racial census data if evidence could be found that such proxies could arguably substitute for categories of ethnic and racial difference in terms of differentials in social, economic, and political opportunities. For example, India was included using categories of caste and several European countries were included using distinctions of citizen/foreigner. In the context of these places, these categories arguably overlap with ethnic and racial distinctions used elsewhere. In one case, Germany, I was also able to include religious self-identification, which overlaps with ethnic difference. This is discussed further in the single-country analyses following the findings.

---

<sup>8</sup> Full list available from: [https://www.prisonstudies.org/highest-to-lowest/prison-population-total?field\\_region\\_taxonomy\\_tid=All](https://www.prisonstudies.org/highest-to-lowest/prison-population-total?field_region_taxonomy_tid=All)

2016 was chosen as the target year for data collection. If 2016 data was unavailable for a country which provides demographic prison data otherwise, then data was collected for the closest year, ranging from 2010 to 2020. Prison populations are subject to fluctuations year to year. However, evidence suggests that prison demographics generally shift over the course of a decade or more, even after implementation of new policy and practices (Kang-Brown et al 2018, 6). Thus, data collection targeted approximately the year 2016 as a middle ground among decennial national censuses to provide a snapshot of contemporary prison demographics. Moreover, 2016, in comparison to a year such as 2020, was a relatively stable year absent global difficulties such as a pandemic that may have created unusual criminal justice and economic conditions. Data tables and links to data sources are provided in the appendix.

### **Data Issues and Underestimation**

Many countries use different methods, and even differing categories, to count their respective incarcerated and total populations. This is likely due to incarcerated and total populations being counted by differing government agencies. Furthermore, totals for some cases do not add up to 100% due to assumed collection errors. Available public data on ethnoracial proportions of incarcerated populations is of varying quality, thus the findings should be regarded as estimates. In general, census practices in most countries lead to an underestimation of prison disproportion through the counting of ambiguous categories such as “other” which include variously represented groups in prisons. This problem is most acute in countries that analyze their prison and total populations using a category of “Citizen”, which likely includes an underrepresented majority and possibly several overrepresented minorities. Despite these data challenges, a significant extent of disproportion is demonstrated for all cases.

## **FINDINGS**

To reiterate, the goal of this study is to clarify the extent of ethnoracial disproportion in the world’s prisons in order to help evaluate the prospects of effective reform to existing criminal-legal institutions in the United States. The context of this inquiry is the acute crisis of legitimacy now facing American criminal justice in the post-Ferguson era – if the American criminal-legal approach is to be reformed to achieve more racially equitable outcomes, it would be useful to identify a model which the United States can look toward to help guide that process.

Taken as a whole, these findings demonstrate that ethnoracial disproportion in prisons is globally extensive, even in countries that are safer and more socioeconomically egalitarian than the United States. The extent of prison disproportion among all cases is significant; even in the most proportional countries, overrepresented ethnic and racial groups are imprisoned *at least* twice as much as the least incarcerated group.

The findings are analyzed as a line-up of cases according to their disproportionality index and range of representation. The two lowest and highest scoring countries, as well as countries which exhibit unexpected results, receive single-country analyses – this exemplifies how the method is intended to be used as a guide for further research rather than as a conclusive framework.

Country	data year	$(d_c)$	$(r_c)$	$\left(\frac{P_u^I}{P_u^T}\right), \left(\frac{P_o^I}{P_o^T}\right)$
Ireland	2017	6.4	[0.73, 19]	Irish/Traveller
Switzerland	2017	5.3	[0.56, 14]	Swiss/Asylum Seekers
Australia	2016	4.5	[0.75, 9.7]	White/Aboriginal Australians
Greece*	2011	3.7	[0.39, 7]	Greek/Foreigners
Finland	2017	3.3	[0.87, 8.5]	Fins/Iraqis
Norway*	2012	2.5	[0.75, 5.83]	Citizen/Foreigners
Latvia	2012	2.4	[0.71, 13.9]	Latvian/Roma
Canada	2016	1.9	[0.33, 5.7]	Caucasian/Multi- Racial

Italy*	2014	1.6	[0.73, 4]	Citizen/Foreigners
France*	2013	1.4	[0.82, 3.6]	Citizen/Foreigner
England and Wales	2018	.82	[0.85, 3.75]	White/Black
New Zealand	2013	1	[0.45, 3.38]	Asian/Maori
United States	2016	.73	[0.49, 2.5]	White/Black
Spain*	2018	.68	[0.82, 2.18]	Citizen/Foreigner
South Africa	2016	.69	[0.19, 2]	White/Colored <sup>9</sup>
Brazil	2016	.33	[0.64, 1.3]	OBC/Scheduled Tribes
Germany	2017	.3 (1.1)	[0.9, 1.5] ([.86, 3.1])	White/Black
Saudi Arabia*	2017	.26	[0.8, 1.32]	Citizen/Foreigner (Secular-Christian Muslim)
India	2015	.25	[0.75, 1.64]	Citizen/Foreigners

**Table 3. Disproportionality Indices and Range of Representation.** \*Citizenship or national origin status used as proxy for race/ethnicity.

### SINGLE-COUNTRY ANALYSIS: LOWEST INDICES

India and Saudi Arabia were found to have the most proportional prison populations. Considering their differences in national conditions (one a socially restrictive kingdom, the other a liberal democracy), they make for an interesting pairing in this study. Although they both compare favorably against the other cases, they nonetheless demonstrate that even the most proportional justice systems yet identified are characterized by significant ethnoracial disparity. Further investigation reveals supporting evidence.

#### India

India was analyzed according to caste, which overlaps with notions of ethnic and racial difference elsewhere. This is not to say that race and caste are equivalent, but rather that both are recognized as social statuses within hierarchical societies that associate with access to

<sup>9</sup> “Colored” is a pejorative term in the United States and elsewhere. Currently in South Africa the term “Colored” is officially used in the census to denote a person of who identifies as having origins in Africa, Europe, and Asia.

opportunity and discrimination and thus can be theoretically related to risk of incarceration (Berreman 1960).

In India, the diverse caste of “Scheduled Tribes”, also known contentiously as “Adivasis”, or “original settlers” in Hindi, are the most over-represented census category in Indian prisons. The Scheduled Tribes category faces twice the risk of incarceration compared to the least imprisoned caste and were overrepresented in prisons at 161% of their share of the total population during 2015. To place this disproportion in perspective, India’s Scheduled Tribes face similar risks of incarceration compared to some estimates of Black American risk in the early 20th century United States during the height of Jim Crow (Perkinson 2010).

India’s Scheduled Tribes are known to experience both overt and implicit discrimination alongside a significant inequality of opportunity, all of which are theorized to contribute to overrepresentation in prisons (Harriss-White and Prakash 2010). Caste discrimination continues to be an ongoing issue in India despite significant efforts to curtail exclusion (Jaffrelot 2010). Given this, the comparative proportionality of India’s prison population was a somewhat surprising finding. One possible explanation is that post-colonial reliance on incarceration in India has remained limited due to budgetary constraints (Nagda 2016). Other, less costly processes of social control may currently substitute for incarceration in India in a similar way to how racial segregation is theorized to have done so during the Jim Crow era of the United States (Alexander 2012). Thus, India’s comparatively proportional prison population may be a consequence of limited “legal capacity”, that is, capacity to enforce law and order (incarcerate), rather than a successful balancing of caste-justice and crime control. The prison disproportion of contemporary India, and the comparable disparities in the United States prior to mass-

incarceration, suggest that criminal-legal approaches may coincide with ethnoracial (and caste) disparities even when they are not heavily relied upon.

### **Saudi Arabia**

In Saudi Arabia, the census category of “foreigners” is overrepresented in prisons and is three times more likely to be incarceration compared to the “citizen” category. To put this disproportion into perspective, “foreigners” in Saudi Arabia were more overrepresented in prisons during 2016 than the “Hispanic” category was in the United States. Considering that the “Hispanic” category in the US is incarcerated at more than twice the rate of American whites (Bales and Piquero 2012, 743), “foreigners” in Saudi Arabia face a significantly disproportionate risk of incarceration. Foreign born, often non-Arab, workers are crucial to the Saudi economy, yet they experience a distinctly subordinated status and predominate in low-wage sectors of the economy (Showail and Parks 2013). Give this, it may be unsurprising that they are overrepresented in the prison population due to fewer licit and worthwhile economic opportunities and the potential to be targets of police discrimination. A closer look at the Saudi justice system is warranted to further understand its comparatively low disproportion index.

Saudi Arabian criminal justice incorporates elements of Sharia law and can be understood as a hybrid justice system that displays European (criminal-legal) influence in combination with an effort to traditionalize punishment (Al-Shazly 2016). Traditional punishment can be extremely harsh for more serious crimes, yet some of the more common offenses are treated with surprising lenience. For example, sentences for drug possession intended for personal use are typically limited to a maximum of two years (174). Thus, the explicitly illiberal and socially restrictive kingdom may be more lenient than many liberal democracies when it comes to minor drug offenses. More research is needed to understand how

incarceration and alternatives are distributed among citizens and foreigners in Saudi Arabia for the most common offenses. However, it is reasonable to assume that given the subordinated status of foreigners, alternatives to incarceration such as mandatory drug treatment may be imposed more regularly upon Saudi citizens who are seen as more deserving of the State's investment. This would drive disproportion upward in Saudi prisons. Yet, it is also reasonable to consider that Saudi Arabia may avoid establishing a large carceral regime that would significantly curtail its crucial foreign work force; this may limit disproportion in Saudi prisons. Again, this suggests that even limited reliance on a criminal-legal approach may coincide with significant ethnoracial disparities.

What can be drawn from the analysis of the lowest disproportionality indices is that although each of these countries could boast having the most proportional prison populations, they are nonetheless places where a criminal-legal approach clearly coincides with arguably unjust ethnoracial outcomes, even under such differing socio-political and economic conditions. It is unclear what the examples of Saudi Arabia and India offer in terms of guidance for US reforms.

### **SINGLE-COUNTRY ANALYSIS: HIGHEST INDICES**

The most disproportionate prison populations found were those of Ireland and Switzerland. As neither are often mentioned in the context of prison disproportion, their arrival of at the top of the list was unexpected. Both demonstrate that even a small prison population can be extremely disproportionate.

#### **Ireland**

The extreme disproportion of Ireland's prisons is driven primarily by the overrepresentation of Irish Travellers, who are 1 in every 10 prisoners despite being just 0.6% of the total population (Stanton 2017). Irish Travellers have long been considered culturally distinct from "settled" Irish and succeeded in having their ethnic identity recognized by the Irish government in 2017 after many decades of advocacy. This recognition is vital considering that Travellers experience significantly more poverty and discrimination compared to the settled population (O'Connell 1997). In this regard, Irish Travellers face similar challenges to the Romani peoples of continental Europe, which includes "increased surveillance by police due to their status as deviant or 'other'" (Drummond 2015, 22).

The case of Ireland demonstrates that even relatively small prison populations, in this case just 7484 persons, are capable of extreme disproportion. However, the index for Ireland is still likely an underestimate. Foreign nationals are overrepresented in Irish prisons at 195% of their proportion of the total population, which suggests that immigrant communities, which include Irish citizens, experience disproportionate contact with police. For example, the killing of George Nkencho in 2021 marked the first death of an African-Irish community member in connection to Irish police and sparked weeks of protest against the disparate treatment of the African-Irish community by authorities (Murphy 2021). Thus, Ireland's distinction between "Citizen" and "Foreigner" in prison statistics likely obscures overrepresented groups within the Citizen category.

## **Switzerland**

Switzerland's disproportionality index is the second highest in the study. However, Switzerland's index may have partly to do with how the Swiss government counts its prison population. Rather than split the prison population into a binary of "Swiss" and "foreign", as its

European neighbors tend to do, the Swiss break down the “foreign population” into three separate categories: “foreign residents”, “asylum seekers”, and catchall category of “status unknown”, which comprises “foreigners with no fixed residence in Switzerland, cross-border workers with a G permit, [and] undocumented migrants and tourists” (Islas 2019). Foreign residents, like Swiss nationals, are under-represented in Swiss prisons, though not nearly to the same degree. Swiss nationals only comprise 32% of the prison population while being 73% of the total population, whereas foreign nationals make up 22% of the prison population and 26% of the total population. The remaining half of all prisoners in Switzerland are drawn from the categories of “asylum seekers” and “status unknown”, which together were only 4.5% of the total population in 2017. Granted, the Swiss maintain a relatively small prison population of just under 7000 persons in a country of over 8 million. Nonetheless the disproportion is extreme. The category of “asylum seeker” is 12% of the prison population while only accounting for 0.8% of the total population. Persons categorized as “status unknown” made up 34% of the prison population but only 3.75% of the total population. The Swiss case demonstrates that there is important diversity within the category of “foreign” that should be considered, further reinforcing that the binary of citizen/foreigner employed by most European countries likely minimizes the observable degree of ethno-racial disproportion in European prisons.

## **OTHER CASES OF INTEREST**

### **The United States**

The United States is well known for racial disparities in criminal justice. However, contrary to expectations, The US prison population does not rank even among the top 10 most ethno-racially disproportionate. Expectations that the US would have an exceptionally disproportionate prison population may be reasonably drawn from America’s well-documented

history of systemic racism (Faegin 2013). Yet comparatively speaking, the American prison and total populations are shown to be more similar than those found in Western European and similarly wealthy countries.

However, disparities in American criminal justice are not overstated. First of all, it can be seen from the range of representation in the US ([0.49, 2.5]) that the disparity between the most underrepresented category, “White not-Hispanic”, and the most overrepresented category, “Black”, is significant; 5 Black Americans are incarcerated for every 1 white American. A vast literature on racial disparities in American criminal justice provides overwhelming evidence that such disparities are persistent, pervasive, and strongly associated with devastating consequences for socially marginalized and economically isolated communities (Murakawa 2014; Hinton 2017; Crump 2019). Thus, the index for the United States is best interpreted as suggesting the enormity of ethnoracial prison disproportion as a global problem.

Of the 19 included cases, 12 rate more disproportional than the United States. Of these 12, all have substantially lower incarceration-rates than the United States and many are characterized by progressive penal regimes and comparatively egalitarian socioeconomic conditions. As will be discussed, this can be interpreted as reflecting poorly on the prospects of successfully reforming American criminal justice to compensate for reoccurring patterns of racial injustice in American society.

Moreover, it should be noted that the index for the United States is likely an underestimation of prison disproportion due to the way statistics of race and ethnicity are collected by the American Bureau of Justice Statistics (BJS). Because many individual American states do not collect prison data on the census categories of “Asian”, “American Indian and Native Alaskan” (AIAN), and “Hawaiian Native and Pacific Islander” (HNPI), the BJS

aggregates these groups into an “Other” category. This obfuscates the disproportion in American prisons. For example, 22,744 Native women and men were incarcerated during 2016 (Daniel 2020). That amounts to 11% of the total “Other” category in BJS statistics when the AIAN category only comprised 1.3% of the US total population. The Prison Policy Initiative concludes that “until criminal justice agencies overcome the limitations on data collection — and until the offices that publish the data are willing to list Native Americans as a distinct demographic group, rather than a member of an “Other” category — informational gaps will continue to make it difficult to understand how overcriminalization has impacted Native populations” (Daniel 2020).

## **Norway**

Norway has been suggested as a model for US reforms (Pratt and Eriksson 2008; Labutta 2016). Indeed, the Norwegian system is arguably worthy of emulation in several respects, including comparatively humane prison conditions, rational and evidence-based sentencing practices, and comparatively low incarceration-rates. Recidivism rates are also low, which indicates successful interventions.

However, several scholars challenge the notion of “Nordic Exceptionalism”, which is often used to explain the seemingly benign character of criminal-legal systems in Northern Europe. For example, Barker (2013) terms the Nordic penal regimes as “Janus Faced”, in part on account of the high proportion of foreign nationals in Nordic prisons. On the one hand, these regimes are progressive in their approach to punishment, and “often put forward on normative grounds as best practices for penal moderation” (20). On the other hand, Nordic countries have “come to rely on the criminal law and penal sanctioning to sort, classify, contain, or expel unwanted or undeserving ‘others’” (21).

Foreign nationals in Norway are ethnically and racially diverse, thus this citizenship status serves as a proxy for ethnic and racial difference (Skardhamar et al 2014). The comparatively high disproportion index for Norway (2.5) is driven by a 580% overrepresentation of the “Foreign” category in its prisons, who, during 2012, were 29% of the incarcerated population and only 5% of the total population. This finding supports Barker’s argument that the Norwegian system is indeed “Janus Faced”. Moreover, in distinguishing its prisoners as either “Norwegian citizen” or “Foreigner”, Norway obfuscates the true extent of disproportionality in its prisons. There are likely ethnic and racial groups within the “Norwegian” category that are overrepresented in prisons, and this cannot be clarified until Norway chooses to count its prisoners beyond a citizen/foreigner dichotomy. One such group may be the Saami, the indigenous peoples of the Sápmi region, who have experienced discrimination and repression for centuries in Norway and other Scandinavian countries (Toivanen 2017). Furthermore, Norway’s regional neighbor Finland, which is similarly progressive in its criminal justice approach, uses several categories of national origin in its prison census and is shown to have a more disproportionate prison population compared to Norway. Similar results may emerge for Norway if prison data was more complex.

Norway’s disproportionality index is 2.5, well above that of the United States. That said, its incarcerated population is comparatively tiny, and its prison conditions are arguably the best in the world (Johnsen and Granheim 2011). Yet neither the Norwegian criminal justice system nor Norwegian society preside over anything approximating an ethnoracially equal opportunity to avoid incarceration. Whether this is due to ethnic differentials in offending, criminal-justice-specific bias, or some combination thereof, Norwegian criminal justice, despite its admirable

qualities, cannot be discounted as an element within a larger process of ethnic exclusion currently pervading Norwegian society.

The findings suggest that the United States is unlikely to develop a more racially just approach to crime by attempting to emulate the contested notion of “Scandinavian Exceptionalism” (Ugelvik and Dullum 2011). This is not to say that the United States would not improve some aspects of its criminal justice by emulating the Nordic example, especially in terms of prison conditions and reentry. Rather, these findings suggest that the conventional criminal-legal approach, even under comparatively favorable conditions, nonetheless coincides with significant ethnic and racial disparities.

### **Germany**

Like Norway, Germany has a progressive penal regime, low recidivism rate, low incarceration-rate, and humane prison conditions; thus, Germany seems a reasonable model on which to base reform in the United States (Frase and Weigend 1995). However, the disproportion in German prisons is often overlooked: “foreigners” – which encompass a diversity of ethnic and racial difference - are shown to be overrepresented in German prisons at 150% of their share of the total population, which is a greater extent of overrepresentation than can be shown for the “Hispanic” category of the United States, which was overrepresented in 2016 at approximately 125%. A further analysis using religious self-identification may reveal even more disproportion than the official statistics based on citizenship status.

Foner (2015) argues that “the strong religious divide between Muslims and the secular/Christian majority in much of Western Europe operates...“in some ways like the stark social cleavages involving people and groups of visible African ancestry in the United States”

(897). The Turkish and Arab communities of Germany report a high religious affiliation, thus religious self-identification serves as a proxy of ethnic difference (Brettfeld and Wetzels 2007). In a second analysis using this proxy, self-identified Muslims, which comprised about 6% of Germany's total population, were estimated by some sources to be 19% of the prison population, or 311% of their representation within the total population (Pew Research Center 2017; Klaiber 2018). However, official German prison statistics do not track prisoners according to religious self-identification and this remains an estimate, which due to Islamophobia, may be overstated (Cherribi 2011). If accurate, recalculating Germany's disproportionality index based on these disparities places it well above the United States, at 1.1. Based on research that religious minorities within the Citizen category in Germany are subject to disproportionate "police-initiated contact", it is reasonable to suspect that German prisons are more disproportionate than official statistics make clear (De Maillard et al 2018; Bierbrauer 1994).

## **SOCIOECONOMIC AND CRIMINAL JUSTICE FACTORS**

The 19 cases in this study vary considerably in terms of their socioeconomic and criminal justice characteristics, thus providing an opportunity to examine the correlation between these factors and ethnoracial disproportion in prisons. One hypothesis is that disproportionality indices would be higher under relatively inegalitarian social conditions, such as greater extents of economic inequality and more authoritarian governments. This finding would potentially strengthen positions to maintain and reform existing American penal systems by highlighting a significant role of factors adjacent to the criminal-legal approach itself. This would suggest that national conditions could be improved to the point where ethnic and racial identity did not significantly associate with incarceration. The findings suggest otherwise.

### **HDI, WHR, and Democracy Index**

Very weak correlations were identified between disproportionality indices and several national benchmarks in counterintuitive directions. Countries with more desirable ratings on the Human Development Index, World Happiness Report, and Democracy Index tended to have *more* ethnoracially disproportionate prison populations.

As previously mentioned, ethnoracial disproportion in prisons is theorized to emerge from several intersecting factors, many of which involve some form of social or economic exclusion that is conceivably reinforced by reliance on incarceration (Sampson and Lauritsen 1997). Given that theories of innate group criminality are refuted (Pate 2014), the extent of demographic disproportion in a country's prisons may thus be seen as a bellwether of inclusiveness within its polity. Thus, it is surprising to see that countries which rate higher on national indices associated with social inclusivity and openness of government have more disproportionate prisons populations. Although "higher degrees of political repression or autocracy are hypothesized to be significantly associated with the use of punishment", these hypotheses have primarily applied to analyses of overall national incarceration-rates and not ethnoracial disproportion in prison specifically (Ruddell and Urbina 2004, 917-918). The correlation observed here, though hardly conclusive, question assumptions that illiberal outcomes in incarceration are confined to more conspicuously illiberal places.

## **GINI**

If group differentials in criminal involvement are contributing to disproportion in prisons, then more equal economic conditions may lessen pressures to engage in illicit behavior. However, countries which rated lower on the GINI index (more economically equal) were shown to have only marginally lower disproportionality indices overall, which was an unexpectedly weak association. Countries such as Australia, Norway, and Finland have some of the most

desirable GINI coefficients in the world and some of the most disproportionate prison populations, nonetheless. The full benefits of residing in these comparatively egalitarian countries are known to be unevenly distributed across ethnic, racial, and indigenous divides (Fritzell et al 2012). However, it remains surprising that overall economic equality matters so little with respect to prison demographics.

### **Criminal Justice Factors**

In terms of criminal-justice specific benchmarks, the correlations were more intuitive, though still very weak. Countries with smaller prison populations, lower incarceration rates, and fewer homicides tended to have more proportional prison populations. However, even among such countries, the disproportion of the imprisoned population was conspicuous and troubling. The findings presented little evidence that ethnic and racial disproportion in prisons is simply a consequence of higher crime rates or a larger prison population.

	<b>Homicide</b>	<b>Incar. Rate</b>	<b>Prison Pop.</b>	<b>GINI</b>	<b>HDI</b>	<b>WHR</b>	<b>Democracy</b>
<b>(<math>d_c</math>)</b>	-0.1416	-0.1837	-0.1476	-0.1696	0.2393	0.2846	0.1978

**Table 4. Correlation of disproportionality Indices** with homicide rate, incarceration rate, incarcerated population (for most countries, sentenced prisoners, excluding remand prisoners), GINI, Human Development Index, World Happiness Rating, and the Democracy Index.

### **Socioeconomic/Criminal Justice Factors and Race-Class Subjugation**

Analysis of prison disproportion and national socioeconomic and justice conditions yield very weak correlations. This suggests that the association between the criminal-legal approach and ethnic and racial disproportionality in prison may be independent of national conditions – the association is observed under a variety of national conditions. One useful concept to guide interpretation of this finding is “race-class subjugation.”

Soss and Weaver (2016) use the term “race-class subjugation” (RCS) to theorize the intersections of ethnoracial and economic marginalization. RCS in a criminal-legal context recognizes that “policed communities are coproduced by race and class” and not merely one or the other. An RCS lens therefore avoids the “tendency to reduce race and class to discrete sets of labels”, when in actuality these aspects of human experience typically have a constitutive relationship (Soss and Weaver 2017, 567).

The scope of this study precludes a detailed analysis of the potential relationship between RCS and prison disproportionalities as I am not endeavoring to theorize the causes of prison disproportion beyond what has already been suggested elsewhere: group differentials in offending and criminal-just-specific bias (Garland et al 2008). However, abolition/reform debates focusing on racial justice may become bogged down in disagreement about which of the theorized causes of disproportion should take precedent. The concept of race-class subjugation can move these debates beyond whether race or class matters more when it comes to overrepresentation in prison. Both group differentials in offending and criminal-justice-specific bias can be theorized as sub-processes of race-class subjugation, that is, elements of a larger process of social exclusion based on intersecting ethnoracial and class distinction. This has already been suggested by Soss and Weaver (2016) themselves, though not in criminological terms.

My contribution here is to suggest that the concept of RCS, or a similar conjunction of identity and economic status, is applicable in cross-national comparisons of criminal-legal systems, even amid the heterogeneity of ethnic and racial identities. The most incarcerated census categories in each and every case are also among the poorest within their respective countries. Many, if not all, overrepresented groups arguably experience something akin to race-

class subjugation, even if they are not understood within their respective cultures specifically in terms of “race”. Thus, the considerable extent of ethnoracial disproportion in the world’s prisons, and the economic isolation of the world’s most incarcerated groups, suggests that race-class subjugated group status is an important factor – perhaps more important than national socioeconomic and criminal justice factors - in determining prison demographics. The criminal-legal approach may indeed be an approach of race-class subjugation, not just in the US, as Soss and Weaver argue, but the world over. As will be discussed, this is one way in which cross-national analysis of prison disproportionalities can be used to contest the prospects of successful race-conscious reform to the existing US penal regime.

### **DISCUSSION: BACKWARD, INWARD, OUTWARD**

Demands to defund or abolish conventional criminal-legal approaches to crime have gained considerable national attention since the summer of 2020 uprising. In the year since George Floyd’s murder, more than 30 states enacted new reforms and oversight provisions in response to considerable public pressure (Abel 2021). However, arguments endure that few if any of the proposed and implemented reforms address the routine, every-day racial disparities of American criminal justice, which constitute the volatile background to high-profile police brutality (McDowell and Fernandez 2018). While banning the use of chokeholds and “no-knock” warrants will hopefully save lives, criminalized black, brown, indigenous and immigrant communities will still experience the brunt of disproportionate police-initiated contact and incarceration. Likewise, if individual officers are held to greater account for acts of brutality, the bulk of the criminal-legal system remains intact. Thus, even after a wave of reforms, the question of whether to continue along the well-worn path of the criminal-legal approach remains. The following discussion argues that an outward looking, cross-nationally aware evaluation of

ethnoracial disproportion in criminal-legal systems may further the debate about the prospects of effective, racial-justice oriented reform.

Advocates for defunding and/or abolishing US criminal-legal institutions often base their arguments on evaluations of America's social past and present, neither of which offer much reassurance that reliance on a conventional punitive approach can be made compatible with a commitment to racial justice. Writing at the height of the summer 2020 uprising, abolition activist Mariame Kaba (2020) commented in the *New York Times* that “efforts to solve police violence through liberal reforms...have failed for nearly a century” and that “there is not a single era in United States history in which the police were not a force of violence against black people”. Indeed, the origins of American policing have been traced to slave patrols and the continuity of white supremacy after the Civil War (Hadden 2003; Brucato 2013). Reoccurring legal violence in support of white supremacy is theorized as “path dependent”, that is, a process in which past decisions continue to shape future behavior (Francis 2018). Criminal-legal systems, alongside state-abetted vigilantism, have played a crucial role in repressing racial justice movements since the end of Reconstruction (Bell 2008). Further, evidence continues to accrue that “extensive patterns of racial profiling are not episodic but historical” aspects of American policing (Spruill 2016, 62). This stark confrontation with “American history necessitates that we ask difficult questions about the ability of our storied political and legal institutions to rectify past wrongs” (Francis 2018, 130). Thus, advocates for defunding and/or abolishing existing punitive institutions may reject reforms as perpetuating institutions which have historically failed to overcome racist foundations.

However, American history can be, and is, routinely dismissed. Farber (1998), disputing the argument that history reveals the inherent racism of American law, points out watershed moments of racial progress in the law:

“We get only a skewed and incomplete picture if we focus only on one side of the picture: if we ignore the Thirteenth, Fourteenth, and Fifteenth Amendments; if we ignore *Brown v. Board of Education* and the work of the Warren Court; if we ignore the Civil Rights Acts of 1964, 1965, and 1990; and if we ignore or minimize the commitment to affirmative action that many American institutions, especially educational institutions, have had for the past two decades” (375).

To what extent do historical exceptions herald the end of reoccurring patterns? Perhaps punctuated equilibrium eventually transforms into a new equilibrium. Or perhaps, as Delgado (1998) contends in response to Farber, “discrimination is a recurring theme [in American law], like a soundtrack in a movie or a leitmotif in a musical composition, silent at times perhaps but always there, always returning” (382). Given the limits of human forecasting, even an acknowledged history of institutionalized racism cannot easily displace a faith that established and familiar institutions may be rescued from their troubled past. Thus, those demanding radical change may instead point to America’s tumultuous racial present as justification for a new direction.

Contemporary statistical evidence of the racially disproportionate negative impact of American criminal justice is difficult to dispute (Western 2014). Notwithstanding, narrow legal conceptions of discrimination based on the concept of intent, rather than impact, legally marginalize such evidence (McCann 2020, 384). Moreover, whites, especially poor whites,

remain close to half of the incarcerated population, which can make American punishment seem like an equal opportunity endeavor (Alexander 2012, 254). Even still, many have come to accept that American criminal justice, statistically speaking, tends to contradict the racial justice principle “that one’s life chances not hinge on entirely arbitrary and irrational features like race” (LeBron 2018, 144).

Statistics, however grim, pale in comparison to the visceral impact of witnessing a police officer slowly murder an unarmed, prone, and handcuffed man with apparent disregard as a crowd fruitlessly pleads for mercy. The footage of George Floyd’s murder was probably the most potent *prima facie* evidence of racism in American criminal justice in a generation. Yet such overt acts of callousness by police remain vulnerable to a “bad apples” narrative which focuses blame on individuals while implicitly defending the legitimacy of systems. For example, President Biden (2021), following the conviction of Derek Chauvin for George Floyd’s murder, initially acknowledged the day-to-day systemic racism of American justice systems, only to revert to a reassuring trope of individual responsibility:

“Systemic racism...is a stain on our nation’s soul; the knee on the neck of justice for Black Americans; the profound fear and trauma, the pain, the exhaustion that Black and brown Americans experience *every single day*...Most men and women who wear the badge serve their communities honorably. But those *few* who fail to meet that standard must be held accountable...today’s verdict sends that message” [Italics Added].

The honor of individuals is of questionable relevance within an institutional analysis. As many officers who have challenged racial prejudice from within their own departments can attest, institutional exigencies and subculture are rarely subordinated to individual moral preference (Bolton and Feagin 2004, v – vi). Moreover, institutions subtly but powerfully shape

individual worldviews and behaviors (Skolnick 2010). In particular, academy trainees and officers are taught to accept “binary opposites—black/white, us/them, good/evil, law-abiding, citizens/criminals”, or risk facing escalating formal and informal sanctions (Radebe 2021, 235). A binary worldview can blunt moral reasoning and mask the ethnical quandaries of legal violence, not to mention be quite accommodating to one’s own sense of honor (Herbert 1996). Thus, participation in systemic racism is not necessarily repugnant to individual moral awareness. Deftly sidestepping a deeper analysis, the rhetoric of bad apples/honorable officers is employed routinely to focus public attention on individual responsibility and distract from broader questions. Consequently, holding individuals accountable can supplant holding systems accountable, even when our present, in addition to our history, is replete with evidence of systemic failure to address racial justice.

Movements to defund or abolish existing American criminal-legal institutions may look backward, to history, or inward, to the American present, to justify their positions. Both remain difficult pathways toward overcoming their opposition. However, a third dimension is available to this analysis. Advocates for radical, systemic change may also look *outward* to the criminal-legal systems of other countries, just as advocates for liberal reforms have done for decades. Though likely to be just as embattled as other dimensions of this debate, a cross-national analysis adds a third front of contestation to a maintain-and-reform agenda.

As the findings demonstrate, no country with available data could be identified as having anything close to a proportional prison population. Thus, I have argued that ethnoracial disproportion in the world’s prisons is extensive and significant. Furthermore, disproportion was shown to characterize the incarcerated populations of countries with progressive penal regimes, robust social welfare systems, comparatively low incarceration rates, statistically safer

communities, and humane prison conditions. Criminal-legal approaches to crime appear difficult, if not impossible, to implement in a way that does not coincide with ethn racially disparate risks of incarceration. Disparate risks of incarceration are the backdrop to mistrust of justice systems and police brutality against race-class subjugated groups. Thus, the legitimacy of criminal-legal systems is imperiled, not just in the United States, but around the world. This helps clarify why the American Black Lives Matter movement was able to inspire global protests (Weine et al 2020).

In looking to American history, there is scarce evidence to suggest that more reforms to existing punitive institutions is a reliable pathway toward genuine racial justice. Likewise, the contemporary circumstances of the United States are taken by many as offering little reassurance. However, examples of criminal-legal systems elsewhere, especially in Europe, have offered hope that American punishment may be redeemed. The uniqueness of American mass-incarceration was revealed in large part through cross-national analysis which confirmed that US incarceration-rates are significantly out of line compared to a global norm (Hartney 2006). This was important in exposing the American punitive turn, its socio-cultural and political origins, and the disconnect between rates of incarceration and rates of offending (Tonry 1999; Raphael 2009). It thus became increasingly possible to imagine a more morally acceptable American penal regime, one which was guided by science rather than politics (Whitman 2003). The key to addressing the punitive morass of the United States, it seemed, was to embrace the more rational penal approaches of Western Europe. Thus, while an inward facing analysis of American criminal justice did little to clarify the prospects of reform, looking outward offered an opportunity to identify potential role models on which to base a future US criminal justice

system. The implication has been that although American criminal justice is failing in the eyes of many Americans, other countries are successfully using incarceration in a just and fair manner.

However, a cross-national emphasis on incarceration-rates, sentencing practices, and prison conditions, though important, has often overlooked ethnoracial disproportion in prisons. Many countries do successfully maintain lower incarceration-rates, and this is arguably worthy of emulation. Yet given that criminal-legal systems across the world are associated with significant levels of ethnoracial disparity, advocates for defunding and/or abolishing American criminal-legal institutions can now argue that American history, the American present, *and* the global present offer little reassuring evidence that maintaining and reforming existing approaches to crime is indeed compatible with a commitment to racial justice.

Others have pointed out that criminal-legal systems are variations on a common institutional blueprint that achieved global hegemony through a process of colonial modernization and influence. Again, criminal-legal systems are not monolithic, but they are variations on a common theme. If it is shown that fundamentally similar approaches to crime coincide with similar disparities under a wide variety of national conditions, it is questionable to believe that the United States can be an exception to this global pattern while continuing to base its approach to crime on the same global blueprint.

## **CONCLUSION**

This study has sought to clarify the extent of ethnoracial disproportion in the world's prisons and situate the findings in an American debate regarding defunding, abolishing and reforming existing criminal-legal institutions. The findings demonstrate that ethnoracial disproportion in prisons is both extensive and significant in every case for which data is

available. The most incarcerated groups identified in each case were all suitable candidates for a “race-class subjugation” categorization. This pattern holds across a wide variety of national conditions and is even identified in countries with low incarceration-rates, comparatively robust social welfare provisions, humane prison conditions, and overall lower crime rates. Furthermore, many of the most disproportionate prison populations were found in countries with more desirable rating on several cross-national benchmarks of civilization.

Advocates of limited, incremental reform in the United States will have significant difficulty in identifying either a historical American or contemporary international example of a criminal-legal system which does not coincide with plainly obvious ethnic and racial disparities. These findings support views that reforming existing criminal-legal institutions in the United States will not usher in a racially just future for American criminal justice. Thus, that future may lie in proposals to defund criminal-legal institutions and reallocate public safety dollars toward non-punitive interventions or entirely dismantle the American punitive approach altogether.

The idea of “racial justice” is inseparably contained within the commitment to moral equality that undergirds contemporary democratic society, thus its feeble condition or absence altogether signals a catastrophic failure to confront hypocrisy (Mills 2014). With an increasingly clearer view of the association between criminal-legal approaches and ethnoracial disproportion in prisons - at both the national and international level - it becomes increasingly incumbent upon those that support maintaining existing criminal-legal systems to demonstrate the prospects of successful reform on behalf of racial justice.

### **Epilogue: Race, Faith, and the Criminal Justice Paradigm**

So far, I have discussed three dimensions of analysis which may be used to contest an agenda to maintain and reform the American criminal-legal approach: American history, the American present, and now, a cross-national awareness. Yet, as the next chapters will argue, fidelity to existing punitive institutions is not so much a matter of evidence and rationality but rather myth and belief – statistics, patterns, and even incontrovertible images of human suffering, do little to challenge the *faith* that so many place in the criminal-legal approach. Thus, the dissertation’s subsequent chapters will focus on a fourth dimension of analysis, one that seeks to understand the fundamental convictions and commitments, i.e., faith, underlying what some call the “criminal justice paradigm”.

Critical criminologists and penal abolitionists often refer to the “criminal justice paradigm” and its inherent toxicity to authentic “justice”. Too little of this work focuses on the toxicity of the criminal justice paradigm to *racial* justice and the connection of racial justice to every other kind of justice. The next chapter examines the criminal justice paradigm through the lenses of Critical Race and Critical Indigenous theory to understand how this distinct and contested worldview interacts with notions of ethnoracial and indigenous difference. The analysis helps explain the findings of this chapter, specifically, why criminal-legal approaches around the world exhibit similar patterns of ethnoracial and indigenous disproportion in punishment under such a wide variety of national conditions. Further, the analysis is a crucial first step toward confronting the relationship between race, faith, and violence—which, I argue, motivates legal and procedural as well as extralegal and brutal manifestations of contemporary criminal justice behavior.



### 3

#### PRISON DISPROPORTIONALITY: LIBERAL AND CONFLICT THEORY LENSES

---

“The colonial world is a world cut in two. The dividing line, the frontiers are shown by barracks and police stations. In the colonies it is the policeman and the soldier who are the official, instituted go-betweens, the spokesmen of the settler and his rule of oppression.”

- Frantz Fanon, *The Wretched of The Earth*

“The problem with the police is not that they are fascist pigs but that our country is ruled by majoritarian pigs.”

- Ta-Nehisi Coates, *Between the World and Me*

---

#### **INTRODUCTION**

Why do we see persistent ethnoracial disproportionalities in incarceration on a global scale, despite differing histories, cultures, welfare states, economies, and variation in criminal-legal systems? This chapter provides overview of prevailing theoretical frameworks for understanding these disparities, specifically those with standpoints in political liberalism and conflict theory. Though they provide valuable insights, I argue that these frameworks are unable to furnish a satisfying explanation for the global pattern of prison disproportion observed in the preceding chapter. I attribute this failure to underlying theoretical assumptions in each framework which preclude deeper analysis of the motivations and incentives driving criminal-legal systems. While liberal and conflict theory standpoints help us understand the issue of

prison disproportion at the micro (individual) and macro (structural) levels (respectively), the meso level of analysis—which considers the institutional “connective tissue” between individual behavior and overarching socioeconomic conditions—remains underutilized. Given this limitation, I offer a new theory of prison disproportion that clarifies why criminal-legal systems produce ethnoracial disproportion in prisons without explicit coordination and despite prevailing taboos against discrimination. This chapter thus serves as a waypoint between the findings of the first chapter highlighting ubiquitous ethnoracial disproportionalities and the theoretical explanation for this finding that I introduce and elaborate in Chapter 3: Specifically, I posit that criminal-legal systems worldwide are motivated and legitimized by a shared paradigm—the “criminal justice paradigm” —which contains an implicitly exclusionary, nationalist logic. The nationalist reasoning within the criminal justice paradigm conditions police discretion and contributes to disproportionate police-initiated contact between law enforcement and groups perceived outside the bounds of an idealized national identity—a nationalist abstraction that the criminal justice paradigm implicitly equates with the concept of ‘society’. Thus, as I detail in Chapter 3, the criminal justice mission to defend ‘society’ takes on an exclusionary predisposition.

### **Global Prison Disproportion and American Exceptionalism**

Prisons around that world feature ethnoracial disproportionalities on a scale comparable to that for which US prisons are now infamous; these disparities exist despite a range of national/cultural conditions. However, the racial disparities of the United States have often been construed as “exceptional” and rooted in a unique history of colonialism and enslavement (Brucato 2014; Goldfield 1997). I do not intend to dispute the centrality of enslavement, colonialism, and genocide in American cultural and political development (Wolfe 2006; Smith

2012; Glenn 2015). Still, the ubiquity of ethnoracial disproportion in prisons across the world presents a puzzle considering notions of “American exceptionalism” in punishment. For example, comparative sociolegal scholarship suggests that European and American criminal-legal development originates in differing socio-cultural contexts of the 18<sup>th</sup> century—the former class-focused and latter race-focused—which have resulted in divergent path dependencies and a particularly racist American criminal-legal system (Brucato 2014; Vila and Morris 1999; Walker and Katz 2010). So, why do so many differing places present an outcome—ethnoracial prison disproportion—that, according to the American exceptionalism thesis, would be expected in the United States yet occurs under divergent cultural and historical conditions?

One possible response may be that a history of enslavement, colonialism, and genocide are broadly shared by settler societies, producing similar trajectories of State development across the world that are shaped by ongoing ethnoracial, indigenous, and economic conflict (Tuhiwai-Smith 2021). This is a view of criminal justice through the lens of conflict theory. The quotes that begin this chapter point to the role of settlers and majorities as a kind of “invisible hand,” deftly working the strings of mannequin-like criminal-legal systems to sustain colonial appropriation of land and labor. In this framing, police, courts, and prisons exist to reinforce inequality; the consequence is that prison demographics more closely resemble the base of society rather than its apex.

Indeed, settlers, majorities, and ethnocrats of various stripes in various places tolerate or even encourage the targeting of socioeconomically subordinate groups by police (Downes 2016). However, evidence suggesting incarceration is disproportionately reserved for subaltern populations does not clarify how this process unfolds or why it is a ubiquitous feature across different national contexts. That is, historical observations of the differential impact of criminal-

legal activity on subaltern groups does not automatically explain how and why criminal-legal systems are apparently controlled and coordinated by dominant groups.

In order to account for the global pattern of prison disproportion observed in the preceding chapter, this chapter reviews prevailing explanations for ethnoracial and indigenous overrepresentation in prisons and evaluates their cross-national applicability. The most broadly accepted explanations for prison disproportion reflect a continuing dominance of political liberalism and conflict theory in criminological analyses. I find that explanations rooted in political liberalism and conflict theory provide valuable insights—neither viewpoint can be wholly dismissed. However, I argue that established liberal and conflict theory framings of prison disproportion do not provide satisfying explanations for why every country included in this study display such conspicuously disproportionate prison populations. This invites new explanations of prison disproportionalities, and ethnoracial disparities in criminal justice more broadly, that diverge from conventional liberal and conflict theory interpretations.

## **EXTANT THEORIES OF PRISON DISPROPORTION**

### **Liberal Criminology: The “Mainstream”**

The previous chapter touched on the two hypotheses of prison disproportion that fit within a conventional liberal worldview: group differentials in criminal involvement and criminal-justice-specific ethnic and racial discrimination, otherwise known as “differential involvement” and “differential selection” (Piquero 2008). The differential involvement hypothesis explains ethnoracial prison disproportion as a consequence of some groups being more involved in crime than others. A range of factors may explain the differential. The differential selection hypothesis proposes that ethnoracial prison disproportion is the result of discriminatory enforcement stemming from bias in police and judicial discretion. Differential

involvement may be a problem from a liberal point of view in that it suggests socio-environmental criminogenic conditions that threaten to undermine the rule of law. Differential selection is a problem because it is counter to the rule of law entirely in that it is incompatible with the principles of legal equality and non-discrimination. Typically, in single-country analyses, ethnoracial prison disproportion is theorized as involving some combination of differential involvement and differential selection (Blumstein 1988).

Both hypotheses are likely also aspects of a global pattern of prison disproportion. However, explanations that rely on these concepts are prone to theoretical impasse. Specifically, it is difficult to discern which of these processes—differential involvement or differential selection—should be the primary concern that guides policy. Furthermore, explanations attempting to adjudicate between the primacy of differential involvement and selection tend to be superficial and lack a clear accounting for why these processes would occur under various national conditions and produce comparable outcomes. Before the notions of differential involvement and selection are discussed further, it is useful to first consider the relationship between “mainstream” criminology and political liberalism to illuminate their shared assumptions. These assumptions are responsible for the theoretical impasse in mainstream criminology that prevents further theorization of prison disproportion beyond the irresolvable antagonism between the differential involvement and selection hypotheses.

### **Political Liberalism as the Foundation of Mainstream Criminology**

Criminology was built upon the foundations of European liberal political theory through the arguments of social contractarians such as Locke, Rousseau, and Kant which focused on questions specific to the concepts of crime and punishment (Amatrudo 2009, 13). The earliest

criminologists—such as Beccaria and Filangieri—were liberal philosophers in their own right, seeking to conceive of an approach to crime based on social contract principles and secular rationales for authority. This was a radical proposition at the time. The Church, most prominently Catholicism, claimed jurisdiction over criminal matters as part of its general administration of morality. Religious authorities relied upon the medieval “canon law” to guide criminal proceedings and this distinctive legal-religious code “influenced and controlled the lay world” to a significant degree (Brundage 2014, 2).

The Church’s authority was first challenged by the forerunners of liberalism, such as Machiavelli and Hobbes, who argued that the “civil sovereign” should not be beholden to “superstition” and thus hamstrung in its domestic and foreign affairs (Martinich 2003). These “statist” thinkers laid the groundwork for criminology by theorizing novel, secular justifications for punishment and criminal law which undermined the Church and empowered the State (Pihlajamäki 2020). For example, Hobbes’s formulation of the social contract authorizes the State to deter individual violence through state violence and obligates citizens to embrace rationality and personal responsibility. These two interrelated ideas are the philosophical kernels of the modern utilitarian and deontological theories of punishment and the basic rationale for legal violence—arrests, proceedings, and incarceration—employed today. Later liberal philosophers adapted the Hobbesian rationales for state power to regimes of limited government by introducing notions of procedure and individual right; yet, they retained the “reason-based” moral justifications for the state’s violence—the emphasis on personal responsibility and necessity of state dominance in criminal disputes (Hanna 2009). Thus, liberal political theory is the arguable genesis of “state-centered” criminology.

State-centered or “mainstream” criminology is a continuation of this liberal philosophical tradition. It emphasizes individual moral agency within what Dilts (2012) terms a “natural moral universe”, i.e., a framework of rights which limit government interference in individual liberty while maintaining a dependable rule of law (62). A liberal focus on individual rights and responsibility leads to what Platt (1974) contends “is a rejection of macroscopic theory and historical analysis, in favor of an emphasis on behaviorism, pragmatism and social engineering” (3). In other words, liberal criminology seeks to understand the causes and prevention of offending at the individual level; broader sociological and/or environmental factors are often marginalized or eclipsed. Indeed, three of the four primary “philosophies of punishment” in the liberal tradition – deterrence, rehabilitation, and incapacitation – all directly relate to the regulation of individual behavior, thereby exemplifying the liberal criminological focus on individual responsibility.

However, the fourth liberal rationale for punishment – retribution – speaks to liberalism’s often overlooked “communitarian” aspect (see Caney 1992). Retribution is typically conceived of as a collectively imposed “balancing of the scales” between an individual offender and society via the justice system. In retribution, society as a whole is theorized to demand that offenders pay for their crimes by surrendering their share of liberty, as liberty is understood as a collective good derived from communal observance of the rule of law (Tamanaha 2004, 33). Take for instance the following affirmation of retribution provided by John Locke (2015):

“a criminal, who having renounced reason, the common rule and measure God hath given to mankind, hath, by the unjust violence and slaughter he hath committed upon one, declared war against all mankind, and therefore may be destroyed as a lion or a tyger, one of those wild savage beasts, with whom men can have no society nor security: and upon this is grounded that great law of nature, Whoso sheddeth man's blood, by man shall his blood be shed” (36).

Locke establishes that individual crimes victimize the collective, not just individual victims, and that the criminal is morally distinct from society. In point of fact, “society” figures as the primary victim of harm or injury in all liberal rationales for punishment – whether deterrence, rehabilitation, incapacitation, or retribution. Punishment is rationalized as a utility to society—regardless of whether individual victims desire it to be done—that reinforces the social conditions necessary to sustain liberty. So, in liberal criminal law, criminality is conceived of in individual terms while victimization is viewed in collective terms; individual victims of crime are merely direct witnesses of lawbreaking rather than the injured party (or prosecutor) in criminal court proceedings (McCold 2004, 28).

Thus, the “philosophies of punishment”, which originate in European antiquity and were further articulated by liberal thinkers, reveal that Liberalism is not solely an individualistic worldview (Lorca 2016). A collective field of relations— “society” — is a core concept within liberal philosophy which motivates and rationalizes legal violence (Canton 2017). As Locke (2015) proposes, “liberty” is distinct from “license” —individuals can expect non-interference (liberty) so long as they confine their behavior within the limits prescribed by the law (33). Liberty, so conceived, faces two primary threats, an overreaching government and irascible lawbreakers.

As shown in the next section, “mainstream” criminological explanations for ethnoracial and indigenous disproportion tend to justify the prevailing criminal-legal status quo by uncritically accepting liberal assumptions. In emphasizing individual decision-making, the differential involvement and selection hypotheses imply that the “system”—including both economic and institutional arrangements—are not relevant to criminogenic outcomes. However, as I will discuss, a liberal standpoint may still elicit more radical criticisms which indict a

discriminatory or unequal social structure for group differentials in criminal involvement. This critique suggests that many purportedly liberal societies tolerate illiberal social and economic conditions, such as extremes in wealth inequality and indentarian exclusion.

### **Liberal Criminology and Prison Disproportion**

The differential criminal involvement hypothesis posits that groups – distinguished by categories of ethnicity, race, religion, age, etc. – experience differing criminogenic pressures, including subculture norms, differential access to opportunity and resources, pathological social networks, and collective traumas (Cloward and Ohlin 1960; Wolfgang and Ferracuti 1967; Quinney 1970; Ehlers et al 2013). The concept of differential criminal involvement is closely related to sociological theories of Anomie, in which normative constraints on individual behavior become unclear or otherwise undermined, leading to a contradiction of action and goals (Bernburg 2002). One classically criminogenic anomic scenario is an individual who on the one hand believes in the “American dream” yet, on the other hand, is prevented from the opportunity to achieve it by structural and institutional barriers – in response, they may become criminally involved to approximate the material rewards of the American dream they have been denied otherwise (Rosenfeld and Messner 2020).

The “criminal justice system selection bias hypothesis”, by contrast, finds that the discretion afforded to criminal-legal actors – police, prosecutors, and judges – opens the door to discrimination, resulting in violations of due process and equal protection guarantees (Chambliss and Seidman 1971; Hindelang 1978; Sampson and Lauritsen 1997). This bias can manifest as racial profiling by police and racially disproportionate police-initiated contact (Epp et al 2014);

prejudice in courts of law and racially disparate sentencing (Sommers and Ellsworth 2000); and discriminatory sanctioning in corrections which lengthen sentences (Kupers 2017).

The differential involvement and selection hypotheses have traditionally been thought of as competing explanations for prison disproportionality—whereas the former focuses on non-state actors, the latter focuses exclusively on state actors. However, far from oppositional, these two hypotheses in fact reflect the classic threats to liberty conceived of in canonical political liberalism: lawbreakers (differential involvement) and arbitrary government (differential selection). Just as political liberalism posits a single antidote to both threats to liberty—the rule of law—mainstream criminology does the same: it seeks to resolve differential involvement and differential selection, simultaneously, by reinforcing the rule of law. However, rather than truly resolving the issues, this process instead reestablishes state dominance by redefining problems in ways that compel authoritarian solutions. As example of this can be discerned from the history of US criminal justice modernizations in the 20<sup>th</sup> century. This effort addressed two issues, higher crimes rates in poorer minority communities and overt racism among police, and arrived at a single solution to both: “law and order”.

### **(Re)Arriving and a State-Centered Solution**

As contemporary discourses, the differential involvement and differential selection hypotheses have distinct genealogies despite a common theoretical root in political liberalism. The former is rooted in anthropological notions of innate group criminality and the latter is a more modern construction related to 20<sup>th</sup> century crises of criminal justice legitimacy. Yet, despite their differing discursive origins, these hypotheses were conceptually cojoined under the auspices of a project to modernize policing in America, which would eventually be “exported” as

best practices to other countries (McLeod 2008). This history exemplifies the state-centeredness of mainstream criminology.

The effort to overhaul American criminal justice emerged shortly after the second world war in the United States, eventually establishing what Murakawa (2014) terms, “prison America.” The goal was to “build a better carceral state, one strong enough to control racial violence in the streets and regimented enough to control racial bias in criminal justice administration” (3). The impetus was “revelations” (from the standpoint of privilege) of police-abetted, and police-involved, racial terrorism—which, although a stable feature of American society since its inception, came under renewed scrutiny in light of the Black American contribution to defeating fascism. These revelations amounted to the first of many crises of legitimacy that would engulf American criminal justice during the 20<sup>th</sup> century and beyond.

The response to this crisis was, much like today, focused on maintaining and reforming criminal-legal institutions to reinforce the “rule of law” (39). The Truman administration established a new Committee on Civil Rights, charged with ensuring a fundamental right to security as the basis of civil rights more broadly. According to Murakawa, the ensuing reports of Truman’s committee had a two-pronged agenda: controlling elevated levels of crime within Black communities and establishing “race-neutral” procedural regulation over the criminal process to curtail “arbitrary arrest and punishment” (44).

This was a crucial discursive juncture which cemented the concepts of differential involvement and differential selection in the liberal criminological imagination. The Truman era reform project subtly reframed and merged two previously competing explanations for racial disparities in criminal justice—innate racial criminality and racism—into a single “law and order” problem. In actuality, the Truman era reforms simply invoked the specters of liberalism’s

ancient foes: animalistic criminals and intrusive government (Dilts 2012, 59). The proposed solution was both more law and more order.

Racism among police was at once individualized and semi-contextualized: arbitrary arrest and punishment, though deemed an individual moral failure of police, was explained as related to poor training and unclear procedure, thereby inviting federal intervention i.e., *law*. Likewise, the long-entrenched notion of innate Black criminality<sup>10</sup> was further explained—in barely concealed racist terms—as a communal pathology of “laziness, carelessness, unreliability, petty stealing and lying”, thereby justifying continuing police focus on Black communities i.e., *order* (71). These conclusions were informed by the latest criminological science of the times, which, in line with a liberal worldview, focused on individual responsibility and the role of legal violence in securing liberty (Jeffery 1959).

Mainstream, liberal criminology has more or less continued along this trajectory ever since, focusing on differential offending and the most effective procedure to reduce discriminatory discretion (e.g., Hindelang 1978; Blumstein 1984; Sorensen et al 2003; Solum 2004; Beck and Blumstein 2018). As the issue of prison disproportion emerged as a topic of debate in the late 1970’s, mainstream criminology was already well prepared to counter the “myth” of a racist criminal justice system: overrepresented groups in prison were simply “disproportionately involved in criminal activity” (Blumstein 1984). Criminal-justice-specific bias, while undeniable, was explained as aberrational to the system, a consequence of bad actors and poorly implemented rules (Blumstein 2009). The two proposed causal factors of prison disproportion were further theoretically intertwined; members of groups more heavily involved in

---

<sup>10</sup> “The racial stereotyping of criminals has been an enduring and unfortunate feature of American culture” (Welch 2007). Moral implications were fundamental to the social construction of racial difference and rationales for enslavement. The African-descended enslaved were conceived of as both inferior and threatening to the European-descended settler—an inherent “criminal” incapable of respecting the social contract (Muhammad 2019).

crime were deemed more likely to experience discriminatory treatment by authorities due to negative stereotypes (Smith and Alpert 2007). Yet the relative ease of uncovering empirical evidence of differential criminal involvement —it is furnished by the State —versus the difficulty of defining and proving criminal justice bias has kept the criminological focus on group differentials in offending.

Consequently, the primary challenge of criminal justice in this view is not differential negative impact on marginalized groups but the “legitimacy” of criminal-legal systems, in the Weberian sense of the word (Tyler 2007). Since skewed prison demographics suggested bias in the system, liberal criminologists have sought to develop more effective ways of building trust between police and the communities in which they are most active. Throughout this process, the policy implications of liberal criminology remained on the path cleared by the Truman administration: a “fortified” and procedurally “race-neutral” criminal justice system to defend society against the twin evils of crime and racism, both of which were conceived at once to be the product of individual moral failure and a lack of effective State dominance (Murakawa 2014, 71).

Liberal criminology has, at various times, been used to justify the reassertion of state dominance as a solution to problems the State is unwilling or unable to sufficiently address. Thus, many critics see liberal criminology as merely justifying a state-centered and authoritarian status quo (Young 1999). However, some criminologists working within the liberal frame take issue with a shallow treatment of prison disproportionality and use liberal principles to criticize scholarly and public complacency with what is arguably a pattern of unjustifiably *illiberal* outcomes in criminal justice.

## Liberal Critique of Prison Disproportion

In the essay *The Liberal Idea*, Stephen Holmes (2000) seeks to clarify the guiding principles of the liberal tradition, many of which are reflected in liberal criminological critiques of the criminal justice status quo. Finding most criticisms of liberalism as misconceived, Holmes contends that “common liberalism -- for we might as well call it that -- has nothing whatsoever to do (as their critics say) with ‘atomistic’ individualism or a hostility to the common good”. Rather, Holmes argues, core liberal tenets of individual moral and political equality, fair distribution of resources and opportunity, and accountable authority—if taken seriously—greatly impede many of the injustices to which contemporary society has grown accustomed.

Surveying canonical liberal thinkers, Holmes argues that the liberal emphasis on the “common good”, though tolerant of some degree of economic inequality and fiercely defensive of individual property-rights, cannot “justify the vastly unequal distribution of inherited resources” which characterizes so many liberal democracies. Neither can liberalism, according to Holmes, justifiably coexist with patently illiberal social orders such as autocracy, aristocracy, theocracy, and most importantly for the context of prison disproportion, *ethnocracy*. “Ethnocracy” means “government or rule by a particular ethnic group...sometimes contrasted with democracy, rule by the demos or the people in general” (Anderson 2016). Ethnocracy, along with other illiberal regime types, run counter to universal rights, equality of opportunity, equality under law, and accountable governance. Thus, there is no rationale within canonical liberal political thought for societal outcomes which resemble a pattern of wealth and authority distributed along racial lines – these are patently, irrefutably *illiberal* conditions expected of an ethnocratic oligarchy (Howard 2012).

Hence, liberalism itself can be the source of critique for liberal criminology. Even though an individualistic, behaviorist lens dominates liberal criminology, liberal criminologists understand that behavior is not fully autonomous from the contexts in which it occurs. This simple acknowledgement has produced a wealth of mainstream criminology that considers the environmental and social contexts of crime (Buonanno 2003; Cahill and Mulligan 2003; Agnew 2007). The differential criminal involvement hypothesis can therefore be situated within a larger critique of purportedly liberal societies failing to adhere to liberal principles and contributing to criminogenic socio-environmental conditions which disproportionately impact socioeconomically marginalized groups.

This is essentially the argument of Michael Tonry, a leading voice within the criminological mainstream. Tonry (2011) argues that racial disparities in American criminal justice are the consequences of a continuing illiberal “southern strategy” in the United States to secure political authority through discourses which aggravate racial anxiety and justify illiberal uses of criminal-justice systems to sustain otherwise delegitimated social relations, such as de facto racial segregation. Tonry’s argument connects well with Rogers Smith’s (1997) multiple traditions thesis. Smith argues that “ascriptive hierarchy” persistently reemerges in American life alongside the nation’s more routinely acknowledged liberal and civic republican traditions. The “southern strategy” may be a recent manifestation of ascriptive hierarchy and the prison an instrument for maintain racialized hierarchies and enforcing social control. Thus liberal criminologists do acknowledge that ethnic, racial, and indigenous prison disproportionality does not belong in liberal societies. Given the findings of Chapter 1—which show that every purportedly liberal society on earth currently maintains a significantly disproportionate prison population—this is a potentially devastating admission for liberal proponents.

## **Generalizing the Liberal Critique**

This critique of American prison disproportion can be applied cross-nationally: the global pattern of prison disproportion suggests a global failure of liberal societies to approximate anything close to full socioeconomic inclusion. However, the underlying cause driving this global failure remains highly disputed. Given the historical and political heterogeneity of liberal societies, researchers must identify common policies or cultural themes among liberal societies that may connect to prison disproportionality. This task typically amounts to debating the differential involvement and differential selection hypotheses all over again, with just as little meaningful headway.

For example, an earlier sociological literature points to a “culture of poverty” inculcated by liberal welfare policies, which undermines incentives for the poor—who are typically ethnic and racial minorities—to participate in the licit economy, therein contributing to a confusion of values, e.g., anomie, and consequent social disorder (Banfield 1968; Murray 1984). In this scenario, welfarism was adopted cross-nationally as a best-practice to address inequality (Dobbin et al 2007); welfare state proponents, hoping to equalize their societies, instead inadvertently imported criminogenic policies, producing the global pattern of ethnoracial criminal involvement seen today. Murray (1984) does not dismiss differential selection altogether; rather, he suggests that expansive welfare policy further stigmatized the poor and reinforced negative stereotypes, which also influence police discretion (177).

In a potent counterpoint, Crutchfield and Pettinicchio (2009) contend that “cultures of inequality” pervade the Western world, driven by attitudes or traditions—echoing Smith’s multiple traditions thesis—that tolerate socioeconomic exclusion. The authors examine a dataset

of 15 countries, all situated in the West, and correlate survey data with GINI ratings and the proportion of ethnic “Others” in prison. They find that when public tolerance of inequality intersects with a looming sense of “minority threat” and economic polarization, Western liberal democracies have more racial and ethnic disproportionality in prisons. The implication is that cultural and economic conditions may increase the incidence of criminal-justice-specific bias alongside group differentials in offending, which are driven primarily by economic disparities.

These two theories essentially reflect the differential involvement versus the differential selection debate and run headlong into the same impasse. Both theories acknowledge differential involvement and differential selection; they differ in terms of which hypothesis they emphasize. However, neither theory can clarify which factor is the most influential and thus there is no clear policy implication other than the sort constructed by the Truman administration: more law and more order; that is, reformism.

### **Liberal Criminology’s Cross-National Shortcomings**

The primary analytical tools of liberal criminology to explain prison disproportion, differential involvement and differential selection, lead to a methodological and conceptual impasse. Furthermore, they leave many questions unanswered, especially in the context of a global pattern of prison disproportion: Why would the criminal-legal systems of such varied countries all respond so similarly to a “culture of poverty” or “cultures of inequality”? Why would differential criminal involvement and criminal-justice specific bias play out in such similar ways across the world, under differing anomic forces, differing cultures, different political battles? There is little space within a liberal framework to address the aforementioned questions, for they suggest not just a failure of liberal societies to adhere to liberal principles but

indeed a failure of liberalism *itself* to produce an inclusive, rights-based citizenship. Thus, the following section turns to Conflict Theory—the traditional counterpoint to liberal theory—to consider the global pattern of prison disproportionality.

## **CONFLICT THEORY AND PRISON DISPROPORTIONALITY**

“Conflict Theory” is used here as an umbrella category for political theories premised on a view of society as defined by social conflict and structured—economically, legally, and socially—according to the interests of dominant groups (Sanderson 2007). Conflict theorists typically dispute the assumption in political liberalism that society is the product of rational consensus around universal needs and values (Therborn 2018). Conflict theorists criticize the social and economic hierarchies which characterize modern liberal cultures, often focusing on inequalities produced through capitalist accumulation.

As perspectives on political economy, liberal and conflict theory perspective can have much in common; both may seek to understand how economic conditions drive political outcomes and how political development conditions economies. They differ in terms of where to focus the analysis; whereas liberalism tends toward an individualistic—or “microscopic”—analysis, conflict theory tends toward a sociological—or “macroscopic”—analysis. Consequently, critiques of criminal justice rooted in conflict theory—with its focus on macro-processes—tends to indict socio-economic structures rather than individual offenders or political actors. For example, Reiman (1987) summarizes a Marxist critique of criminal justice rooted in conflict theory:

“Capitalist criminal justice wrongly punishes people because their acts are caused by socially conditioned antagonism to their fellows in conjunction with limited and unstable opportunities to satisfy their needs and desires. Second, these people do not deserve

punishment because their apparent crimes are reactions against conditions which are, morally speaking, criminal”.

Although liberal criminologists may acknowledge that illiberal socioeconomic conditions contribute to offending patterns, conflict theory-oriented criminologists take the critique further by contending that such patterns are the consequence of preventable, unjustifiable deprivation incurred by a capitalist mode of production (Wallace 1981; Norrie 1982; Platt 1982; Vogel 1983). Thus, the story is not simply a failure of a society to adhere to liberal principles but rather the failure of liberal principles to equitably secure wants and needs. Racial disproportion in prison enters the picture primarily as a byproduct of this broader failure. For example, Vogel (1983) argues that,

“The increasing concentration of blacks in the prisons and the ever-increasing sensitivity of the prison system to the demands of monopoly capitalism ensures that the prison problem in America can only get worse. In the face of this problem, liberals have abandoned efforts at prison reform, while conservatives are faced with trying to accommodate huge prison populations while trying to hold down government spending on prisons and social services. At a minimum, only an effective job-creation program would help to break the pattern.”

Hence, for Vogel and an earlier generation of critical criminologists, prison disproportion is rooted in economic deprivation, which itself is an unavoidable consequence of a capitalist mode of production, which requires economic deprivation to accrue capital. The source of criminal justice pathologies—such as prison disproportionality—is seen as located in the ways criminal-legal systems are utilized to reinforce capitalist exploitation and consequent economic deprivations.

For example, as incarceration-rates exploded in the United States, and were poised to escalate cross-nationally, critical literature attributed the increasing primacy of the carceral state in liberal-democracies to exigencies of “late-stage capitalism”, such as the management of

surplus labor and a declining middle-class (Beckett and Francis 2020). The story goes: as the mounting contradictions of capitalism/modernity were no longer contained by state intervention in the economy, liberal-capitalist societies turned toward increasing reliance on police and prisons to mitigate increasingly conspicuous externalities such as rising unemployment and a burgeoning unemployable underclass. Criminal law, practice, and policy was constructed to justify the increasing reliance on police and prisons through both neo-liberal and neo-conservative logics which sought to reinforce notions of individual responsibility amid increasing social instability. Groups situated at the lowest rungs of the capitalist social order—the surplus and the disfavored—increasingly became the target of police and the unfortunate inhabitants of a sprawling carceral state (Santos 1980; Western and Beckett 1999; Butler 2004; Reiner 2007; Wacquant 2009; Greenberg 2010; Bell 2011).

A more recent critical criminological emphasis on culture posits that late capitalism/modernity was bound to produce novel discursive developments, and corresponding policy innovation, in reaction to capitalist decline (Cohen 1985). For instance, Simon's (2007) *Governing Through Crime* and Garland's (2002) *Culture of Control* both detail how “crime control” was elevated to a top political priority instead of meaningfully addressing economic inequality. The consequence was increasing authoritarianism and an expansion of the carceral state in response to economic dislocation (Gottschalk 2016).

A cultural analysis also produced a more nuanced understanding of the process by which reliance on incarceration escalates by introducing the role of discourse in the construction and legitimation of punitive policy. However, the explanation for prison disproportionality remained largely unchanged from the standard conflict theory narrative: marginalized ethnic, racial, and indigenous groups—already poor and excluded—were among the first to be “caught up” in the

carceral expansion instigated by late-modernity's socioeconomic instability, and thus became overrepresented in the growing prison population (Young 1999; Western 2004; Fleury-Steiner 2009).

Conflict theory perspectives are more apt to analyze a global pattern of prison disproportionality compared to their liberal counterparts because they begin from a standpoint that sees the modern capitalist global order as inherently conflictual. That is, they arrive to the analysis of ethnoracial prison disproportion with a cross-nationally applicable theory in-hand—socioeconomic conflict as a structuring force of liberal-capitalist societies that is evident in the distribution of rewards and punishments in a given country. However, the conflict theory frame still suffers from limitations—some of which are akin to those faced by liberal criminology.

### **Limits of the Late Capitalism Thesis**

The concept of Late Capitalism (sometimes euphemistically termed as “Late Modernity”) was first popularized by German economist Werner Sombart (1932) in *Die Zukunft des Kapitalismus* (“The Future of Capitalism”). Sombart sought to anticipate and describe the economic conditions of capitalism's forthcoming disintegration by building on Marx's concept of “immiseration” —the point at which capital becomes cannibalistic and begins to consume its own consumers, leading to progressively lower wages and quality of life. In turn, many conflict theory critiques of criminal justice theorize the associated socio-cultural conditions of capitalism's immiseration – deepening social insecurity and an increasingly authoritarian state clinging to a fading social order. A reliance on a Late Capitalism thesis tends to limit explanations of global prison disproportion in at least two ways.

First, the Late Capitalism lens targets the analytical focus upon societies which best fit a late-capitalism categorization, like the United States. “Mainstream” criminology is already critiqued for centering the United States—and liberal political configurations—in its analysis (Michalowski 2009). In point of fact, scholars emphasizing Late Capitalism tends to focus critical criminology on the United States at least as much as their more mainstream counterparts, reinforcing notions of “American exceptionalism” that eclipse cross-national analysis. Second, prison disproportion is observed in countries with various economic characteristics, and with varying degrees of the types of State intervention that theorized to forestall immiseration (Horkheimer and Adorno 2002). For example, while welfarism has declined in the United States, it has remained entrenched in Northern Europe. As predicted by a Late-Stage Capitalism thesis, incarceration-rates have skyrocketed in the United States and remained more stable in countries with stronger welfare systems (Downes and Garland 2001). Nonetheless, European prisons are particularly ethnoracially disproportionate, more so even than those of the United States. Thus, a Late-Stage Capitalism thesis seems more well suited to explaining national reliance on incarceration rather than explaining patterns of ethnoracial disproportion across countries with such varied socio-economic conditions. Furthermore, an emphasis underlying economic conflict seems less useful in explaining the significant prison disproportion of European social democracies, where welfarist policies remain relatively strong.

### **An Identity Versus Economy Impasse**

Another limitation in conflict theory-oriented accounts of criminal justice is that identity disparities are situated as byproducts of larger macro-economic and cultural trends. The emphasis on class conflict often marginalizes racial identity-differentiation in these analyses.

That is, while there are particularly stark ethnic and racial consequences of late-modernity's punitive turn, the punitive turn itself is presented as a more or less identity-blind reaction to overall social instability. For example, Gottshalk (2015) warns the reader not to view "the carceral state primarily through the narrow lens of racial disparities" and thereby overlook the underlying economic causes of carceral expansion (120). Gottshalk means to caution against seeing criminal justice as merely driven by bigotry so that we may appreciate the carceral state for what it truly is: a device of economic control in a progressively destabilizing society.

Gottshalk's view reflects a conventional-left conception of race as superstructural to class-based conflict, part of capital's long-theorized divide and conquer strategy. This emphasis on class has become increasingly disputed with the emergence of intersectionality as a way to further understand criminal-legal outcomes (Potter 2013). However, intersectionalism tends to be geared toward single-country analysis and is most typically employed to consider the American case. The consequence is that macro-level, cross-national theorization of prison disproportion is still left to adjudicate between the primacy of class and other identities when considering broad patterns (Ugwudike 2015, 153). This tends toward conceptual and methodological impasse.

Similarly to how liberal criminology faces an impasse in the differential involvement versus differential selection debate, critical criminology tends to produce an impasse when attempting to determine if identity differentiation or economic status matters more in capitalist punishment regimes (Russell 2002; Lynch 2019). Indeed, these two impasses are conceptually related: liberal criminology's differential involvement hypothesis is often related to economic deprivation and the differential selection hypothesis is an issue of racial repression. The primary difference is the level of analysis—micro or macro—and the extent to which these problems are understood as structural; liberal criminology tends to reject structural analysis.

As touched on in the first chapter, Soss and Weaver (2016) push past this impasse by cojoining the two forms of repression into the concept of “Race-Class Subjugation”, which contends that analyses of class are coterminously analyses of race. However, Soss and Weaver’s framework is intended for analyses of American politics and has yet to be applied in a cross-national context. The concept of Racial Capitalism, which will be discussed later in this chapter, thus serves as the most generalizable framework for analyzing global prison disproportionality that does not get mired in an identity versus economy impasse. However, before Racial Capitalism is addressed, another limitation in conventional conflict theory needs to be discussed: the tendency of inattention to meso-level, institutional analysis.

### **Inattention to the Intermediate**

Conflict theory critiques of criminal justice tend to not only sideline the issue of racial disparities as a mere byproduct of macro-processes but also do the same to the *institutions* prominently characterized by racial disparities: criminal-legal systems. Criminal-legal systems are typically figured within a conflict theory frame as inherently disinterested constructs subject to the torrents of conflict which surround them. Rarely are criminal-legal systems portrayed as representing the collective interests of institutional actors within their respective political systems. However, a parallel literature observes criminal-legal systems to be effective players in political regimes, capable of extracting concessions from elites and the public alike (Lipsky 1980; Stuntz 2011; Paoline and Terrill 2014; Bowling 2019). When overlooking the institutional level of analysis, conventional conflict theory seems to uncritically accept the European Enlightenment’s claim to have discovered truly socially-neutral institutions—*tools*—with which to shape an ideal society (Norrie 1982). Hence, there is a pattern within conflict theory critiques

of criminal justice which imply that the punitive mechanisms of the state, such as police, may be appropriated through revolution to work on behalf of the proletariat. That is, the problems of police and prisons in liberal societies—excess violence and discrimination— are located in liberal ideology and capitalist exigencies and not necessarily attributed to some inherent quality of the institutions themselves (Davis 2011).

Before problematizing the inattention to meso-level, institutional analysis, in consideration of criminal justice, it is useful to consider the origins of this potential blind spot. This position is arguably traceable to Marx, who saw the prison and the secular rationales for its use—both of which were relatively novel ideas at the time—as *potentially* useful tools for an emerging socialist global order (Murphey 1973, 15; Russell 2002).

Prominent Soviet era legal theorists, Evgeny Pashukanis, further developed Marx’s cautious acceptance of modern punishment in *The General Theory of Law and Marxism*. As many Soviet institutions, such as the prison, resembled their liberal-capitalist counterparts, it was necessary for Soviet legal thinkers to explain how they were different under socialist economic conditions. To summarize Pashukanis (2017): the establishment of communism requires a difficult transition, and capitalist values stubbornly linger, thus punishment serves rehabilitative and even retributive functions to reinforce socialist values during the slow march toward utopia. Thus, the Soviet regime could maintain the modern criminal-legal approach—which was originally championed in Russia by Catherine the Great on account of liberal philosopher Voltaire’s impassioned advocacy—without a sense of contradiction (Reddaway 2012, 239). American Marxists would later echo Pushakanis’s argument, contending that “equal justice is correlated with equality of status, influence, and economic power” and “the construction of a just system of criminal justice in an unjust society is a contradiction in terms. Criminal justice is

inextricably interwoven with, and largely derivative from, a broader social justice” (The American Friends Service Committee 1971, 6). The point here, it is arguably foundational to the conflict theory viewpoint of criminal justice that the problem lay not in the tool but the user—that is, liberal-capitalist society itself. This view has continued to shape conventional conflict theory accounts of criminal justice into the present.

The consequence is that typically macroscopic conflict theory is less attentive to meso-level, institutional, and socio-legal analysis that could clarify why criminal-legal systems are such dependable “petty sovereigns” of capitalist regimes (Butler 2004). Conflict theory positions criminal-legal systems as entirely reliable tools of the Bourgeois state; however, criminal-legal systems are in fact politically savvy organizational complexes which desire and achieve considerable autonomy (Scheingold 1998; Miller 2004; Kochel 2011). The process of consistently coordinating these self-interested organizations to serve capitalist interests is implicitly assumed in many conflict theory accounts yet remains analytically under-specified. Often, the link between capitalism and criminal justice is explained in historical terms which focus on a single country. For example, Brucato (2014) notes,

“The legal construction of probable cause and its practical interpretation has normalized racial profiling. The legal principles of reasonableness function to justify racist outcomes of use-of-force determinations. These two factors primarily impact officer discretion. However, administrative discretion functions in the determination of ‘hot spots’ and the implementation of data-driven policing such that these methods – originally intended, at least nominally, to reform the institution and diminish racial police outcomes – have instead reconciled racist outcomes in contemporary practices. Finally, police officers, unions and managers engage in political activity to maintain autonomy from government and community oversight, and to preserve traditions in policing” (43).

Brucato contends that the decentralized set of criminal-legal systems in the United States coordinate around the preservation of a racist policing tradition due to their shared origins in slave patrols and enforcement of the Fugitive Slave Act, which established a unique path

dependency for American criminal-legal development. While this is thoroughly plausible for explaining prison disproportion in the United States, it is difficult to extend this argument to places with differing histories and cultures who may nonetheless demonstrate comparable patterns of racial disproportion in their prisons. Ethnoracial and indigenous prison disproportion the world over suggests a broadly shared exclusionary element within criminal-legal development that conventional conflict theory, or single-country historical analysis, is unable to fully explain.

The concept of Racial Capitalism helps illuminate this exclusionary element of the criminal-legal approach that conflict theory assumes without clearly specifying in a cross-national context. A Racial Capitalist lens may clarify the global extent of prison disproportion without relying on a Late-Stage Capitalism thesis or running into a race/class impasse. However, as I will elaborate below, Racial Capitalism does not resolve conflict theory's tendency to gloss over the intermediate.

## **Racial Capitalism**

Werner Sombart's Late Capitalism thesis contained a prescient, though often overlooked, element: race. Sombart, who began his academic career as a Marxist and ended it as a supporter of National Socialism, recognized that capitalism was not just an economic paradigm but indeed also a racial one. For Sombart, capitalism was a self-consciously Eurocentric enterprise, an evolution of colonial social relations premised upon European cultural superiority but poisoned from within by a "Jewish spirit" (Harris 1942, 813). Building on Marx's theory of immiseration, Sombart (1932) argued that the racial-economic complex of capitalism would eventually become the victim of its own success. The final days of capitalism would be signaled by the

disestablishment of the “white race” from global economic and cultural dominance, as “the young capitalist countries will essentially build up their means of production by their own means and will have to do away with imports more and more” (37). The catastrophic consequences, Sombart predicts, include the death of global “free trade” and a crippling economic dependence on imports in the capitalist core of Europe, leading to the immiseration of white culture (42). For an avowed racist such as Sombart, this immiseration would not precede the liberation of the proletariat but rather usher in a second dark age in which European white culture faded into regional obscurity. Marxist revolution would only cement this outcome by equalizing the economic position of the various “races” through regimes of collective ownership. Hence, Sombart – seeing white liberal-capitalist culture as inherently doomed - abandoned Marxism to embrace National Socialism as the only ideology capable of sustaining the threatened colonial world order.

Sombart’s racist, misguided, and misanthropic motivations aside, he can be credited as an early articulator of Jodi Melamed’s (2015) exhortation to “recognize that capitalism *is* racial capitalism” (77). Drawing upon the work of Cedric Robinson, Melamed summarizes the inextricability of racial subjugation and a capitalist mode of production:

“Capital can only be capital when it is accumulating, and it can only accumulate by producing and moving through relations of severe inequality among human groups—capitalists with the means of production/workers without the means of subsistence, creditors/debtors, conquerors of land made property/the dispossessed and removed. These antinomies of accumulation require loss, disposability, and the unequal differentiation of human value, and racism enshrines the inequalities that capitalism requires” (77).

In this formulation, the Racial Capitalism framework resolves conventional conflict theory’s ambiguity regarding the primacy of class or race in capitalist domination—without race, the conditions of inequality required to accumulate capital are untenable; without economic

inequality, race loses much of its meaning as a signifier of human worth. Thus, race and class are mutually constitutive, and equally necessary, features of capitalist society (Robinson 2000).

The Racial Capitalism frame has further been theorized to encompass the intersection of gender and sexuality in the race-class complex. “The world Robinson describes is not merely a ‘race-based structure’ but a structure that produces and inscribes strict forms of discipline based on gender, sexuality, race, national origin, ability, character, and intelligence” (Ralph and Singhal 2019, 865). These recent expansions of the Racial Capitalist framework seek to clarify the near-totalizing force of identity categorization under capitalist social relations. Succinctly put by McCann (2020), “there was, quite simply, no capitalism historically before or apart from racial and gendered differentiation (16).

However, a Racial Capitalist thesis posits that this matrix of control is far from perfect. Identities of all kinds are seeded with a stubborn sense of economic and social possibility, made all the more volatile by the vagaries of liberal law such as universal rights and purported equality of political status (McCann 2020, 4 – 11). In particular, the American history of near-constant egalitarian social movement activity suggests the inherent instability of Racial Capitalism. Specifically, the abolition of slavery was a topic of discussion from the onset of the American state and a through line to the civil rights movement and the recent “racial reckoning” can be traced back to this early abolitionist thought (Lebron 2017). Thus, it should be expected that a racial capitalist society would rely on a significant capacity for violence, both official and extralegal, to reinforce racial capitalist social arrangements when the need inevitably arises (Reddy 2011). One consequence of this reliance on violence would logically be racial disproportion in its application. Hence, prisons under racial capitalism would be racialized spaces.

## **Racial Capitalism and Prison Disproportion**

Among the many radical claims in Cedric Robinson's (2020) *Black Marxism*, the most disruptive to extant interpretations of prison disproportion is the argument that racial differentiation precedes and shapes the emergence of capitalism. For Robinson, it is not that crime and punishment became racialized by way of the politicization of criminal justice (e.g., see Brewer and Heitzeg 2008), but rather that racial differentiation began as marker of cultural and therefore *moral* inferiority long before the establishment of modern capitalist institutions. Thus, racial differentiation and "crime" are bound from the beginning; this "conceptual bind" (Melamed 2011, 187) was sustained within the Eurocentric worldview to the present, predisposing Eurocentric modes of social control to racially disproportionate implementation.

Robinson (2020) explains that European concept of "race" as a hereditary difference in blood and soul which determines a culturally (often religiously and linguistically) distinct group's strengths and weaknesses. This concept permeated European feudal society as a legacy of Greek and Roman thought (80 – 90). In this context, race was not necessarily based on phenotypical cues but rather used to differentiate between the conqueror and the conquered such that the subordinated status of the conquered was naturalized; race was as political then as it is now (26; Smith 2004). As evidence, Robinson (2020) looks to the discourses of inter-European conquest—the various conquering European ethnicities tended to historicize their victories in racial terms, as the overcoming of inferior blood (e.g. 22, 34 – 37, 54). The conquered races, in this view, were to either be exterminated or bureaucratically managed, the latter thus introducing the salience of "law & order" in the context of blood differentiation.

As racial differentiation hinged on a group's status as conqueror or conquered, anti-Black racism, specifically, did not develop until European's consciously "conquered" Africa as colonizers. This comparatively late emergence of anti-Black racism occurred despite evidence of significant contact between groups that might be called today "whites" and "Blacks" in the ancient world (85 – 90). Thus, as Saxon, Irish, Scot, Burgundian, Slav, and other colonized peoples of Europe were racialized under the regimes of their conquerors (Foucault 2003), so too, Robinson points, were the diverse peoples of Africa. However, Robinson (2000) does not draw equivalencies—Europe's emerging capitalist mode of production intensified the means of repression available to the colonizers, resulting in unprecedented forms of dehumanization and the first truly "carceral" form of racialization, the Middle Passage and chattel slavery (187; Smith 2009; Calathas 2017, 446 - 448).

Robinson's historical insights and conceptualization of racial capitalism radically reorients the interpretation of global ethnoracial disproportion in prisons. Rather than being a puzzling new phenomenon, prison disproportion represents a continuity of foundationally racist European social management practices, which always involved punishment but to which the prison has become central. Just as the conquering Normans presented a "choice" to the vanquished Irish of the 12<sup>th</sup> century—"freely" work for bare subsistence or be forced to do so as punishment—subordinated and racialized groups today may exist under similar, though eminently more bureaucratized, terms. For example, "contemporary punishment practices reduce both aggregate and racially specific unemployment rates and are used to quell resistance and imprison those who are made redundant through retrenchment" (Calathas 2017, 446). In this, racial capitalism presides over a "wrap-around" repression, racialized poverty on one end and

racialized legal violence on the other. The result is prison populations disproportionately composed of the conquered, that is, the racialized and poor.

This helps to clarify why American prisons, well before the advent of mass-incarceration, were racially disproportionate and why many European countries, despite lacking the characteristics of mass-incarceration, exhibit similar disproportionality in their incarcerated populations. Racially disproportionate punishment is a European tradition. However, this tradition has not remained confined to Europe and its settler societies. European colonialism established European traditions, including ethnoracially disproportionate punishment, as norms and best practice of contemporary governments worldwide.

### **Of Suitable Enemies and Dependable Allies**

To sum so far, liberal criminology explains prison disproportion as a consequence of group differentials in offending and differential selection (bias), yet has difficulty determining if one factor is a primary cause. Some liberal criminologists locate group differentials in offending in conspicuously illiberal social and economic conditions that purportedly liberal societies are willing to tolerate. Conflict theorists disagree, seeing liberalism itself as a façade to obscure the underlying social conflict inherent to capitalism. In conflict theory's Late Capitalism thesis, mounting economic contradiction and welfare retrenchment make liberal societies increasingly authoritarian; the lowest rungs of the capitalist social order – those at the intersection of economic and racial subordination - are warehoused in prisons as social detritus. In a racial capitalism interpretation, racialized state violence is inherent to the accrual of capital and rooted in Eurocentric cultural practices which precede the emergence of capitalist institutions: prison

disproportion reflects a centuries' old colonial paradigm in which domestic state violence is utilized primarily to manage perceived inferior and vanquished enemies.

The task of determining if these interpretations fit the findings of the first chapter would be significantly easier if they could simply be accepted in full or entirely dismissed. However, they each contribute some degree of clarity to the issue of prison disproportion, and each leave some number of questions unanswered.

For instance, it is difficult to dispute that each country seems to have at least one identifiably distinct group which is differentially involved in crime—liberal criminologists are not merely fabricating this observation. However, liberal criminology is unable to theorize this observation as a global pattern except to argue that purportedly liberal societies generally fail at inclusion. This bleeds into the conflict theory notion of an underlying economic conflict within all modern capitalist societies which distributes state violence along class and then racial lines. In contrast, a racial capitalism lens suggests that this underlying conflict is primarily racialized and produces economic differentiation through social domination. In either scenario, prison populations are likely to be disproportionate, though Robinson's racial capitalism thesis perhaps better explains the considerable extent of disproportionality in countries without settler colonial or enslaving histories.

Yet, it cannot be overlooked that many members of the dominant racial group in both the US and Europe are incarcerated alongside racialized "others". As Alexander (2020) suggests, perhaps they are "collateral damage" of expansive penal policies such as drug prohibition (254). Alternatively, as Robinson (2020) suggests, it is not inconsistent for Eurocentric forms of racialized violence to target members of the dominant group who become racialized on account of their perceived social and economic "failures" (160; Foley 1998).

Though a conflict theory viewpoint makes the most sense of prison disproportion as a global issue, at least more so than liberal criminology, questions remain. Modern criminal-legal systems are based on a tripartite division of labor, which each component—police, courts, and prisons—facing differing exigencies and developing differing professional subcultures that may produce institutional dissensus within the system as a whole (Fagan 2008). Actors operating within the institutions of police, courts, and prisons may have differing views on which institutional needs should be prioritized in the criminal process (Schulhofer 1988). Such tensions have been addressed in the American context by empowering prosecutors; however, similar strategies have not necessarily developed elsewhere (Kagan 2006; Sarat and Clarke 2008). Thus, the organizational components of a criminal-legal system may have divergent goals and exist within an institutional framework designed to fragment state power (Feeley 2017; Dias and Vaughn 2006). Yet conflict theorists may posit that such unwieldy and self-interested institutions are nonetheless dependable allies of racial capitalism across a wide array of national conditions. How is such consistent coordination achieved among these potentially competing organizational components under varied conditions?

For example, Wacquant (1999) argues that racialized Others make for “suitable enemies” in justifying Europe’s slide toward neoliberalism in the post-Fordist era. Likewise, Neocleous (2000) argues that modern criminal-legal systems were intended from their inception to administer poverty and reinforce economic exploitation. Why do criminal-legal systems make for such dependable allies of capitalism in its waning days? How have racist and classist intentions been maintained so consistently for over 200 years, across many institutionally fragmented criminal legal systems? Historical observations of the more or less consistent differential impact of criminal-legal activity—that is, higher rates of incarceration and state-

initiated criminal justice contact—on poorer and racialized communities, across time and space, suggest that incentives and ideology motivate criminal-legal systems generally. However, a more detailed analysis is required to excavate these factors and begin the process of formulating a more generalizable theory.

Given the limitations of existing frameworks typically employed to analyze prison disproportionality, the following chapter offers a novel general theory for prison disproportionality. I build on critiques of the “criminal justice paradigm”—a distinct ideology encompassing the fundamental theory, practice, and discourse utilized by every modern criminal-legal system. I argue that this ideology encompasses an implicitly nationalist logic which predisposes criminal-legal systems to ethnic, racial, and indigenous disparities, including disproportionate police-initiated contact of groups perceived outside the bounds of an idealized national identity. This inherent “selection bias” of the criminal justice paradigm is a significant contributor to prison disproportionality and represents the missing “link” between liberal and conflict theory accounts of criminal justice disparities.

## A GENERAL THEORY OF PRISON DISPROPORTIONALITIES

---

“There be no shelter here. The frontline is everywhere.”

— Rage Against the Machine, *No Shelter*

**INTRODUCTION**

As the previous chapter argued, extant explanations of prison disproportionality rooted in liberal and conflict theory starting points do not sufficiently generalize to clarify the global pattern of ethnoracial and indigenous prison disproportion demonstrated in Chapter 1. While group differentials in crime, criminal-justice specific bias, and socioeconomic structural factors cannot be refuted as contributors to this issue, conventional liberal and conflict theory accounts remain vague regarding the motives, incentives, and rationales which would have varied criminal-legal systems respond so similarly to these factors under varied conditions. Indeed, all countries have outgroups and inequality. However, these disparities manifest in culturally

specific ways and to varying degrees; it remains unclear why a pattern of global prison disproportion is evident amid such variation.

Given that extant theories tend to target either the micro or macro level of analysis, this chapter engages the meso—institutional—level of analysis as the least explored area with regard to explaining a global pattern of prison disproportionality. I make the following arguments: criminal-legal systems, despite their variation, are motivated and legitimated by a foundational “criminal justice paradigm” which rationalizes and legitimates their existence, irrespective of the political regime in which they are embedded. Referencing Critical Race and Critical Indigenous theory, I show that the criminal justice paradigm facilitates a continuation of a “colonial dynamic” which helps explain prison disproportionality in settler societies.

However, similar dynamics occur in non-settler societies as well. To explain the appearance of a colonial dynamic in non-settler contexts, in which particular out-groups are targeted by police and overrepresented in prisons, I develop a novel general theory of prison disproportionalities. I argue that the criminal justice paradigm contains within it an inherently exclusionary logic that I articulate as “nationalist”. Through an excavation of the criminal justice paradigm’s core logic, I find that the crucial criminal justice concept of ‘society’ is implicitly equated with “the nation”—that is, with whichever group represents the dominant and idealized national identity. The defense of society is the overriding mission of any criminal-legal system; from the liberal standard premising equality under the law, an implicit association of society with any particular identity prejudices this mission.

The nationalistic reasoning within the criminal justice paradigm conditions police discretion in a way that brings groups that are pathologized for failing to conform with an idealized national identity into disproportionate unwanted contact with police. Criminal justice

theory and discourse then legitimates this exclusion at the adjudicatory level by structuring narrow legal questions regarding individuated culpability. In combination with the inherent challenges of police work—which I consider through a phenomenological thought experiment—and group differentials in offending rooted in socioeconomic disadvantage, the criminal justice paradigm’s nationalistic logic predisposes criminal-legal systems to ethnic, racial, and indigenous discrimination, increasing likelihood of disproportionality in incarceration.

The argument is divided in two parts: Part I addresses the general toxicity of the criminal justice paradigm to colonized and criminalized communities, and Part II establishes my general theory that the criminal justice paradigm is an implicitly nationalistic ideology. My meso-level analysis begins with a phenomenological thought-experiment intended to establish the inevitability of profiling in police work as a response to the unique exigencies of law enforcement. This thought-experiment follows one of the most important characters in the American jurisprudence of police, the “reasonable officer”.

### **A Phenomenological Thought-Experiment**

The concept of the reasonable officer is crucial to the judiciary’s regulation of American policing — they are the imaginary “control” with which to test the legality of questionable criminal-legal conduct (Alpert 1994). For example, former Minnesota police officer Derek Chauvin was convicted for the murder of George Floyd because the jury determined that Chauvin had not behaved as the reasonable officer would have in the same set of circumstances and with the same level of situational awareness; the jury concluded that Chauvin’s use of force was *unreasonable* and, therefore, criminal.

For now, I will present the reasonable officer as they have been constructed in American law: an agent utilizing imperfect information in a complex world who must necessarily employ violence to enforce the law at their discretion. “Reasonableness” in this context is the juridical recognition that average persons are given extraordinary power over others when acting as police; misunderstandings and mistakes — and constitutional violations — are viewed as human, and therefore inevitable. Suspicion of police misconduct is thus judged according to what an officer *should* have known given their situational awareness at a discreet moment in time rather than all they *could* have known at that same moment.

### **Sensing to Defend Society**

The reasonable officer has two primary modes: patrol and response. Patrol has been a mainstay of law enforcement since the inception of centrally organized policing organizations. Louis XIV of France, who oversaw what many argue to be the first modern police force, defined the purpose of patrol as “ensuring the peace and quiet of the public and of private individuals, purging the city of what may cause disturbances, procuring abundance, and having each and everyone live according to their station and their duties” (Riley 1983). As a practice, patrol has changed very little, if at all, since the first uniformed officer walked the frenetic Parisian streets of the 17<sup>th</sup> century. Thus, imagine the reasonable officer is on patrol.

It is irrelevant whether this patrol is on foot, bicycle, horse, or in a vehicle. The identity characteristics of the reasonable officer are also irrelevant in this scenario—*unimagine* their sex, gender, ability, skin color, accent, or body type—the reasonable officer is reducible to a uniform and a set of tools. Now the reasonable officer can be viewed, unencumbered by our assumptions, as the physical manifestation of criminal justice’s official overriding goal: the defense of society from crime as encoded in law.

In this mission, the reasonable officer must employ their senses, intuition, social knowledge, and prior experience in the search for threats to society. Sensory stimuli are paramount, however, as policing is an inherently ocular and auditory profession, dependent upon cues, signifiers, and pattern recognition. Notwithstanding inevitable discretion, the reasonable officer's use of their senses is limited by procedure as to when, where, and how they search for threats. These procedures are intended to safeguard societal values of privacy and expectations of non-interference. By way of simile: if society is the body, the officer is the immune cell — just as immune cells are regulated so as not to destroy the body, the officer is regulated so as not to destroy society; procedure is the immunoregulatory process of society.

So, the reasonable officer is primarily a sensor, yet their sensory capacity is limited by procedural constraints. Nonetheless the reasonable officer must defend society from crime. Some crimes are obvious — daring daylight bank robberies; assaults on a crowded street corner; explicit public drug use; reckless driving at rush hour in a red vehicle, etcetera. However, much of the behavior society labels as criminal is easily concealed and easily perpetrated. This is especially true for high-priority “crimes of possession” — illicit substances, weapons, and outstanding warrants are veiled in backpacks, pockets, and court orders; these are crimes for which there is no conspicuous, sensory evidence. Any individual could simultaneously possess a kilogram of cocaine, a handgun, and several outstanding warrants and nonetheless appear law abiding otherwise. The reasonable officer knows this. Yet they also are aware of their limitations — they lack x-ray vision and cannot investigate everyone at once. Senses can be augmented by the use of technology and animals; however, the reasonable officer must still choose when and how these enhancements are utilized, which, again, depends on their limited capacity to anticipate and detect crime.

## **Profiling is Police Work**

Given inherent and procedural limitations, the reasonable officer must rely on an array of cues, often visual, to navigate urban modernity and use their discretion effectively. But where does the reasonable officer look? In contemporary cities, police are severely outnumbered in a target rich environment. The world average police-per-capita is approximately 300 law enforcers for every 100,000 residents (United Nations 2010, 19). The United States tends to be below average in this national characteristic at 238 police officers per 100,000 people (Federal Bureau of Investigation 2018). Thus, the task of interdicting any crime, and especially the typically “invisible crimes” of possession, is overwhelming. Law enforcers, amid a finitude of time and energy, have everyone, and thus no one, to suspect. The “front line”, is indeed, everywhere.

This phenomenological thought-experiment makes the inevitability of profiling in police work abundantly clear. Police profiling is the process of categorizing individuals according to perceived levels of threat — it is not against procedure per se, but edges dangerously close to discrimination. In a target rich environment, the reasonable officer must pick among many potential targets and utilize some kind of selection method to produce manageable categorizations. Appearance is generally the first set of cues available to the patrolling reasonable officer; this makes it easier to understand why appearance-based profiling is a routine, cross-nationally ubiquitous, and likely inalienable aspect of police work. Our unchosen appearances—phenotype, body type, decrepitude—is of particular salience in police work, perceived as “honest indicators” of potential threat. Thus, the inherently ocular character of police work, and the necessity of profiling, is a constant threat to the reasonable officer’s standard of neutrality; they may, for various reasons, perceive categories of threat informed by

social categories such as race, gender, and ability. This situates police work in tension with the principle of equality under law; the reasonable officer must constantly navigate this tension.

Apart from appearance, the remaining cues available to the patrolling officer are behavioral. Here too the reasonable officer must employ their senses — eyes, ears, and nose — and interpret potentially complex and unclear meanings from a variety of stimuli. This is where the selection method of pattern recognition is emphasized: does the behavior observed seem normal and appropriate to the context? Does appearance correlate with behavior? Does this body belong in this setting? Here too, the reasonable officer must resist constructing categories of threat based on perceived characteristics which do not, in actuality, predict threat (Schafer et al 2006; Warren 2009; Devery 2010).

### **Interpretation and Social Conditioning**

All this places the reasonable officer at risk of abandoning reason; interpretation of appearance and behavior are inevitably socially conditioned, meaning that the reasonable officer is vulnerable to the *unreason* of stereotyping and its false predictions. The sensory and legal limitations of the reasonable officer are thus compounded by a multitude of evolving cultural narratives that may lead the reasonable officer astray and waste precious time and resources (Smith and Alpert 2007). This is why astute drug cartels take advantage of the police reliance on profiling by employing individuals to smuggle contraband that officers tend to overlook, such as women of the ethnic majority, children, and the elderly (Fleetwood 2014).

However, without social conditioning, the target rich milieu of policing would be paralyzing if devoid of cues on which to base discretion. Imagine being tasked with policing a society that is utterly alien; roaming urban modernity without semiotic bearings; left culturally

adrift. This level of detachment is not only unachievable, but also counter to police work entirely. We are thus caught in the paradox of deciding what degree of prejudice the unprejudiced reasonable officer is allowed to act upon.

### **Toward a General Theory of Prison Disproportion**

There is far more that could be discussed about the practice of patrol; for example, the concepts of deterrence and community policing. Policing is not solely a proactive endeavor; police are called upon in addition to initiating contact themselves. However, thinking about patrol in particular—the emphasis on sensing and the target rich environment—lays bare the fundamentals of police work: it is a hunt, but often an oddly hamstrung affair. It is a demonstration of State power, but so too an admission of society’s perennial insecurity under the State’s protection.

Moreover, police work, by virtue of its sensory nature, precipitates ethnic and racial discrimination by placing police in a target-rich environment in which they must pick and choose among potential targets of investigation based on cues of difference; these conditions engender discrimination based on perceived identity. Given the inherently discriminatory predisposition of police work, the American Supreme Court eventually came to institutionalize the practice of racial profiling in *Whren v United States*. The Court concluded that racial profiling which produced an otherwise justifiable arrest is permissible, therein employing an “ends justify the means” logic to legitimate the already widespread practice of basing discretion on cues of racial difference (Chin and Vernon 2014). Thus, this ruling did not signal the arrival of racial profiling to policing but rather the American judiciary’s cynical surrender to the reality of police work.

My question is not why the reasonable officer profiles and why this easily slides into racial and ethnic profiling, but rather why the reasonable officer is placed in these circumstances in the first place. That is, I aim to consider what set of ideas legitimate and normalize the arrangements of criminal justice processes that place the reasonable officer in constant temptation to violate the principle of equality under law and even the rule of law itself—for there can be no authentic equal protection under law if law enforcers pay special attention to some and not others based merely upon objectively non-threatening cues of social difference. One objection to this line of questioning may be that identarian discrimination by police is warranted if some groups are known for a differential propensity to violate the law. However, unless one is to resurrect long refuted theories of innate biological criminality, we must recognize that differential criminal involvement is rooted in social and economic factors which can change over time and space. Thus, there is no guarantee that any particular group is involved in crime at a stable rate, meaning that assumptions of criminal propensity are based merely on the unreason of stereotyping. How can we expect to achieve a free and fair society through methods of governance that invite so much unreason?

### **Overview of the Argument**

Critical criminologists look toward a “criminal justice paradigm” to deconstruct the underlying motivations of the criminal-legal approach. The first part of this chapter argues that the criminal justice paradigm is further clarified through the lenses of Critical Indigenous and Critical Race scholarship, what I term a “Subaltern’s Criminology”. From the vantage of Subaltern Criminology, the criminal justice paradigm legitimates practices that reinforce racial, ethnic, and indigenous subjugation. I argue that this critique is generalizable beyond the cultural contexts in which it is typically employed, thereby outlining a *general* theory of prison

disproportionality. However, while this valuable scholarship is crucial to understanding the differential impact of criminal-legal activity on colonized, criminalized, and subaltern communities in a broad scope, further theorizing is necessary to establish a single, overarching explanation for the global pattern of ethnoracial and indigenous disproportionality of prisons.

Thus, the second part of this chapter delves further into the criminal justice paradigm to uncover the idea that legitimates identity-based discrimination in criminal-legal contexts. I argue this paramount idea is the conceptual definition of ‘crime’ *as an injury to society*. ‘Crime’ is a socially constructed concept without inherent and stable specification of its moral significance; ‘crime’ is a violation; yet, what is violated and why that violation matters is culturally determined. Thus, defining ‘crime’ as an injury to society is only one of limitless possible formulations. I compare ‘crime as injury to society’ with two other formulations to demonstrate that defining ‘crime’ carries with it high-stakes political implications which legitimate particular arrangements of power; ‘crime’ is a consummately political concept. With this established, I then move to theorize how defining ‘crime’ as an injury to society engenders discriminatory legal violence. I argue: 1) defining ‘crime’ as an injury to society equates ‘society’ with prevailing ideals of national identity; ‘society’ in the criminal justice paradigm is a “nationalist” construction; 2) national identity is perennially contested and dominated by the wealthier segments of a single ethnic or racial group; and 3) the criminal justice mission to defend ‘society’ from ‘crime’ is in fact a mission to preserve prevailing ideals of national identity and the socioeconomic hierarchies they justify. In short, criminal-legal institutions are guided by a “nationalist” paradigm veiled in universalistic rhetoric. This contributes to prison disproportionalities by normalizing “selection bias” in discretionary investigation and patrol distribution. The implications are stark: criminal-legal institutions, as realizations of the

implicitly nationalist criminal justice paradigm, are at odds with commitments to anti-discrimination and paradoxically corrosive to the rule of law.

## **PART I: A SUBALTERN’S CRIMINOLOGY<sup>11</sup>**

The term “subaltern’s criminology” is not intended to debut yet another sub-genre of criminological analysis — the discipline is already replete with a plethora of criminological offshoots (Garland 2011, 418). Rather, I mean to suggest a division in the analysis of criminal justice between the perspectives of those who study punishment and those who disproportionately experience it; a “Subaltern’s Criminology” thus serves as an umbrella category for criminological perspectives drawn from the experience of criminalized communities. The result, I argue, is a more specific and nuanced critique of the ways in which criminal-legal systems differentially impact colonized and economically subjugated groups. I further argue that there is room to generalize these single-country, cultural and community-specific accounts of criminal justice’s general toxicity to identity-based justice. Key to the following analysis is the idea of a “criminal justice paradigm” and the ways in which Critical Race and Critical Indigenous perspectives help clarify its influence and impact.

### **The Criminal Justice Paradigm**

First, it is important to distinguish between “*a* criminal justice paradigm” and “*the* criminal justice paradigm” — both are valid concepts but refer to different things. “*The* criminal justice paradigm” refers to the fundamental assumptions, concepts, and rationales that underly

---

<sup>11</sup> The following analysis draws upon the scholarly work, activism, and experience of indigenous and Black authors. It is important, given patterns of “identity theft” in academia, to state my own positionality clearly (Viren 2021). I am not indigenous, and I am not Black. I do not speak for, or represent, these identities nor do I claim a right to decisively define these identities as objects of study (Tuhiwai-Smith 2021). I am a white-passing, “straight”, cis-man, and experience privilege in most contexts of the culture in which I live – I cannot, and do not, claim a “subaltern” identity.

and surround any centrally organized, modern, punitive criminal-legal system; it is a paradigm of governance that coexists with various regime types, from liberal democracies to autocracies. The existence of a single, overarching “criminal justice paradigm” is disputed by some on account of the tremendous variation in criminal-legal systems around the world — it may be argued that there are many criminal justice *paradigms* rather than single, cohesive set of ideas associated with criminal-legal activity generally. Criminal justice systems vary primarily in terms of their punitiveness, and indeed, this variation can be described as “paradigmatic” (Walker 1992). Similarly, social movements may adopt “*a* criminal justice paradigm” by advocating for increased State protection in response to neglect by authorities, therein suggesting a multiplicity of ways to reimagine the legitimate use of criminal law and enforcement mechanism (Russell 2016). However, the concept of *the* “criminal justice paradigm” speaks to the hegemony of particular sort of disputing method employed by modern States, which although allowing for variation in punishment, presents the range of punishments experienced today to be inevitable, indispensable, and morally universal. The criminal justice paradigm is a “normal science” of State intervention in relation to lawbreaking (Kuhn 2021). Coyle and Schept (2017) summarize:

“The historical and social production of ‘crime’ has fabricated a theory, a set of practices, and a dominant discourse that collectively is understood as the paradigm of ‘criminal justice’. This paradigm recognizes a trifle of the transgressions humans complete, labels these chosen transgressions as ‘crimes,’ and names their chosen actors ‘criminals’. In time, a sprawling ‘criminal justice’ system has been produced, and it is recognizable as the penal process through which a ‘criminal’ traverses: from law, to police, to courts and finally to prisons” (399).

What this excerpt makes clear is that the “criminal justice paradigm” refers to a distinct, historically contingent social construction of the concept of ‘crime’. ‘Crime’, as a concept, is a cultural “empty vessel”, devoid of ontological reality and always requiring specification — it has no inherent meaning other than to refer an unacceptable category of behavior (Hulsman 1997).

Thus, as a category of behavior, ‘crime’ is socially constructed and culturally specific rather than universal and objective; any list of officially sanctioned offenses and related official interventions is the product of discourse and subject to inevitable reinterpretations and changes over time.

The criminal justice paradigm is just one such trajectory of the socially constructed concept of ‘crime’. Its origins are distinctively European, and as will be discussed, reflect particular socio-cultural developments of secularizing and urbanizing colonial powers. The criminal justice paradigm has many local variations, yet they each build upon a shared theoretical, practical, and discursive foundation which emphasizes State dominance on behalf of popular sovereignty through institutionalized violence. The following review lays the groundwork for a Critical Race and Critical Indigenous critique of the criminal justice paradigm, which in turn contributes to a general theory of ethnoracial prison disproportionalities.

### **Criminal Justice Paradigm: 3 Tenets**

Criminal justice theory developed alongside social contract theory and built many of its core concepts on the assumptions of political liberalism. However, the criminal justice paradigm and liberalism are distinguishable, as I will establish in more detail after summarizing the central tenets of criminal justice theory.

The criminal justice paradigm aims to justify State dominance in matters that are legally codified as criminal (Mathiesen 2014). The core tenet of this paradigm is that individual acts of lawbreaking are an offense — that is, an injury or harm — to society at large (Zehr 1994). This is succinctly elucidated by the US Bureau of Justice Statistics on its *What is Criminal Justice?*

website: “crimes against an individual are crimes against the State.” Thus, “individuals [are prosecuted] as though they victimized all of society.”

As the representative of society, the State derives its authority to prosecute alleged offenders on society’s behalf (Hulsman 1986). Thus, in the criminal justice paradigm, society is figured as a victim of crime and the State a representative of society. Hence, criminal case titles feature society’s representative in the plaintiff’s position e.g., *State of California v Anderson*. Direct victims of lawbreakers are acknowledged; however, society retains the legal position of primary victim in the criminal process. Further, direct victims are not necessary to initiate criminal proceedings since any act of lawbreaking, regardless of direct victimization, is theorized to injure society by undermining the collective good derived from the rule of law (Bohm 1986).

A second tenet is that legal accountability is individuated and evaluated according to evidence of intention and knowledge of wrongdoing. Individuals take on the status of “criminal/offender” when determined to have violated law, which signifies a loss of rights otherwise ensured by the State. To demonstrate the significance of criminal status and the dominance of the State, offenders are punished. Punishment is theorized to restore security to society to the extent that it was threatened by an individual act of lawbreaking (Coyle 2010).

A third tenet is the procedural division of labor (Cover 1986). As a theory of *State* dominance, the criminal justice paradigm reflects the separation of powers which characterizes modern governments such that State violence is a collective bureaucratic responsibility, as opposed to any single person’s or institution’s prerogative. The criminal justice paradigm is not only focused on State dominance over society at large, but also on State dominance over criminal-legal actors themselves—that is, vertical and horizontal regulation of legal discretion.

### **Criminal Justice Paradigm: 3 Defining Practices**

In accordance with underlying theory, criminal justice practices — policing, criminal proceedings, and punishment — reflect the primacy of demonstrating the dominance of the State. However, these demonstrations do not necessarily correlate with effective social control. For example, punishment is the most literal expression of State dominance over the individual, and the prison represents an ongoing experiment in refining the state’s domineering potential. As many have detailed elsewhere, incarceration is an attempt to establish a “totalizing institution” in which bodies are meticulously managed and morality deliberately curated (Foucault 1975). However, the success of the State in this endeavor is routinely overstated. Prisons can be chaotic and bureaucratically messy environments in which the condemned and their overseers wrestle for meaningful authority, often resulting in implicit power-sharing arrangements between prison administration and organizations within the prisoner population. Nonetheless, the practice of forcefully segregating offenders from their communities clearly demonstrates State dominance even if the actual implementation of punishment exposes the limits of State control.

Before individuals are officially punished, State dominance is expressed as criminal proceedings; among criminal justice practices, criminal proceedings are the most thoroughly controlled. Proceedings are organized according to the procedural division of labor which establishes the dispassionate violence of criminal-legal bureaucracy to be a collective action done on behalf of society (Cover 1986). Each individual present during proceedings is assigned a specific role which delineates their contribution within an orchestrated drama intended to uncover the veracity of the accusations. The State dominates the production of truth by narrowing analysis to questions of individuated culpability, which typically excludes broader contextual evidence that may otherwise clarify the circumstances surrounding the accusations.

‘Society’—figured in criminal proceedings as blameless and potentially victimized—is implicitly present during these rituals, when, for example, state-actors reference “the people” in order to gesture to their representation of society as a whole.

The defense of ‘society’ defense begins, of course, with the criminal justice practice of policing. Policing styles vary considerably by region, and the field of Police Studies has produced a rich cross-national literature detailing the different approaches to policing in various cultures. Among these various styles are Islamic, Totalitarian, Continental, Transnational, Private, and Anglo-American (Manning 2005, 32). Each style emphasizes differing procedural obligations and social order-priorities determined by each corresponding regime type. It may be controversial to suggest that each of these styles is merely a variation on a common institutional blueprint, drawing upon a single overarching paradigm; however, this is the argument that I am advancing. Of course, the procedure and priorities of “Totalitarian” and “Anglo-American” police differ—the former is far less limited in its intrusions than the latter. However, regardless of regime type, policing as a practice is generally defined by the discretionary use of violence and motivated by essentially the same mission: the defense of society according to the law. It is the *law* that differs so drastically among regime types, not the basic practice of policing itself. Further, the example of Derek Chauvin demonstrates how easily these purportedly antithetical policing styles can converge.

The intersection of discretion and violence means that, of the three domains of criminal justice practice, policing is perhaps the most improvisational and prone to extralegal excursions (Walzak 2020). In totalitarian regimes, police have the position and opportunity to defy the regime’s genocidal projects (Fogelman 2011, 121). In liberal societies, police may behave if they serve a totalitarian regime—as the example of Derek Chauvin shows. No matter the regime type,

the practice of policing is defined by the discretionary use of violence, and this remains an imperfectly controllable field of human behavior.

### **Criminal Justice Paradigm: Discourse**

Like criminal justice practice, criminal justice discourse varies geographically, typically reflecting differing cultural attitudes about punishment and various national political conflicts, such as the term “law and order” in the United States or the modern Chinese equivalent of “Strike Hard” (Trevaskes 2016). Changes in criminal justice discourse signal and accompany shifts in punitiveness and the emergence of new criminological models, therein occupying significant scholarly interest (Garland 1996; O’Malley 1999; Gray and Salole 2006).

However, there is a core criminal justice vocabulary, often taken for granted, that transcends cultural and linguistic barriers. For example, criminal-legal approaches universally rely on words akin to “crime”, “criminal”, “victim”, “people/society”, just as they rely on policing, criminal proceedings, and punishments. The criminal justice paradigm retains its fundamental discourse whether it is situated in an explicitly liberal or illiberal regime. China, for instance, justifies punishment through essentially the same discourse as the United States, stating on its English language United Nations mission website that crimes against individuals are crimes against society and that punishment is imposed to “protect the people” (Criminal law of the PRC, Art. 1).<sup>12</sup> Thus, an American prosecutor in the PRC would not encounter a totally alien justice paradigm, although both the American and Chinese governments tend to emphasize the differences between their respective regimes.

---

<sup>12</sup> Available from: <https://www.fmprc.gov.cn/ce/cgvienna/eng/dbtyw/jdwt/crimelaw/t209043.htm>

Apart from the discursive fundamentals of the criminal justice paradigm, there is a cross-national and paradoxical pattern in the rhetorical “superstructure” of criminal justice discourse that, on the one hand, tends toward euphemism to frame demonstrations of State dominance as less violent than they really are, and on the other hand, employs the language of war (Neocleous 2014). For example, terms such as “offender”, “inmate”, “felon”, “criminal”, “convict”, and “delinquent” generally distract from the fact that an imprisoned human being is caged, isolated from their community, and, in Agamben’s (2020) words, reduced to “bare life”. In contrast, a word like “patrol”, which is endemic to the criminal justice paradigm, signifies the innate organizational militarism and violent capacity of criminal-legal systems. War, in general, is productive of euphemisms that rationalize violence (Fussell 1975); discursively at least, though arguably in all other respects as well, the criminal justice paradigm is on a war footing.

### **The Criminal Justice Paradigm is Not Synonymous with Liberalism**

As I have argued in the previous sections, the criminal justice paradigm incorporates much of the vocabulary and assumptions of political liberalism; yet, the two worldviews are distinct, even if compatible. One problem with conflating the two is that critiques of liberalism will tend to overshadow the specific and discrete ways in which criminal justice paradigm reinforces ethnoracial and indigenous inequality.

Liberalism is “moderate” in the Aristotelian sense in that it identifies a desirable middle ground between the interests of the individual and the collective; the criminal justice paradigm reflects only one side of this equation — collective security — and aligns well with illiberal “statist” regimes by legitimating coercive government authority. The previously mentioned example of the People’s Republic of China demonstrates this point. Furthermore, liberal

assertions of individual rights frustrate the criminal justice paradigm's emphasis on collective security, leading to tensions such as the decades long "competition" between the security-focused "crime control" and rights-focused "due process" models of criminal justice in the United States and elsewhere (Findley 2008). If liberalism and the criminal justice paradigm were ideologically one-in-the-same, the tension between the governing goals of crime control and due process may not have arisen in the first place. One possible objection to this framing is that liberalism as a whole is unclear to the correct balance between individual and collective interests (Turner 2012). However, the criminal justice paradigm does not require individual rights at its core theoretical, practical, or discursive levels, whereas liberalism is defined by the notion of a rights-bearing individual. This does not mean the goals of liberalism and the criminal justice paradigm are entirely antithetical. Rather, the tension within liberalism itself regarding the ideal balance between individual and collective interests can move both toward and away from an emphasis on security, whereas the criminal justice paradigm is focused intently on security, leading to occasional ideological conflict.

## **Historical Origins**

The inherent illiberalism of the criminal justice paradigm is evident in its origins. While this analysis is by no means a comprehensive genealogy, it does demonstrate that the basis of the criminal justice paradigm was developed by explicitly illiberal regimes and later adopted as a sort of "insurance" in liberal regimes.

The genesis of modern policing begins with absolute monarch Louis XIV, who instituted the first recognizably bureaucratic, uniformed, disciplined, and paramilitary police force in the 17<sup>th</sup> century. This was an evolution in the technology of State dominance, driven by unraveling

socioeconomic conditions in a declining regime — remarkably similar, in fact, to the description of “late Modernity” in recent accounts of the rise of mass-incarceration in the United States.

In 1667, the medieval era “police” of Paris—a loosely organized, often competing, and relatively undisciplined band of part-time “king’s men”—were entirely reorganized under the command of a new office, the Lieutenant General of Police, and its first iron-fisted occupant, the stalwart Bourbon-loyalist Gabriel Nicolas de La Reynie. With a near-absolute mandate over Paris, La Reynie imbued the Parisian police with a new purpose: the proactive repression of popular revolt in the burgeoning urban slum, as fastidiously directed by Louis XIV. This required the discipline of Louis’s army to be impressed upon the newly appointed commissaires. Riley (1983) explains,

“[La Reynie] required the commissaires to keep archives, wear clean uniforms, and improve the quality of their neighborhood police. Assigned two or sometimes three to a quarter, the commissaires were prodded to patrol their quarter at least once a fortnight, write detailed reports of these patrols, keep file copies of all correspondence, and send daily reports to the lieutenant's bureau in the Chatelet. Each Monday morning the commissaires met in the home of their respective quarter's senior commissaire to plan their week's police” (314).

The innovation was to make the police an effective intelligence gathering device, with which Louis XIV could attempt to anticipate and prevent the revolutionary inclinations of urban Parisian culture (Rule and Trotter 2014). Louis XIV saw the tremors of popular revolt as emanating from moral decline, as opposed to the famine, war, and grinding poverty that plagued the Kingdom; the newly bureaucratized police force embarked swiftly to address the moral decrepitude of Parisian life as exemplified by beggars, single women, unorthodox life-styles, sub-standard religiosity, and “indifferent fathers” shirking their patriarchal duties (327). These insuperable social problems served as effective pretexts with which to regularly demonstrate the King’s dominance, and when that dominance could not be achieved by Louis’s uniformed police,

La Reynie and his successors turned to a shadowy network of informants to deliver undesirables to the commissaire's hands—Louis XIV's Paris was a police state. Of particular interest to the commissaires were perceived outsiders—foreigners, Huguenots and Jews—who were surveilled closely and arrested at the first inkling of wrongdoing (322).

The growing Bourgeoisie became accustomed to the new patrols and soon learned that the police were powerful allies in their disputes, especially if their opponents were poor, foreign, protestant, or Jewish. A complex schedule of fines, and a growing network of dungeons and penal dormitories, became mainstays in Louis's war on Parisian disorder. British newspapers routinely reprinted Louis's propagandistic claims to have cleansed Paris of moral turpitude; governments across Europe sought to emulate the French model as best practice in urban governance (Klaitz 2015). Ultimately, these innovations would not save the Ancien Régime from overthrow in 1789; however, the model served as a powerful example of bureaucratic State dominance, and social contractarians took notice.

Europe's Enlightenment revolutions thus sought to appropriate police bureaucracy from monarchs rather than disestablish the authoritarian mechanism altogether. For example, the French Constitution of 1791 explicitly mentions police 9 times, such as “no man may be arrested except to be brought before police officers; and no one may be placed under arrest or detained except by virtue of a warrant from police officers.” Thus, the increasingly sophisticated system of police, courts, and punishments—once a guarantor of monarchial authority—were now reconceived as a guarantor of popular authority. However, the ideological mission of Louis XIV's former police state, and its various imitators, underwent a subtle but crucial transformation. No longer would proto-criminal-legal systems, or any State apparatus for that matter, be an explicit extension of the monarch. Rather, under the auspices of popular

sovereignty, the police would exist to defend society, courts would enforce the social contract, and punishments would reflect a newfound emphasis on the secular rationality of the Enlightenment (Axinn 1971; Foucault 1975). In Foucault's words, the "right of sovereign power" was incorporated into the social contract as a public right of repression, therein remaining a vestige of Europe's illiberal past (Foucault 2001, 74).

This theoretical modification did not substantially change criminal-legal behavior, however; outsiders—the "usual suspects" of foreigners, religious minorities, and gender non-conformists—remained disproportionately targeted by police in post-revolutionary France and elsewhere in Europe. The findings in Chapter 1 suggest a remarkable continuity in this regard; the category of "foreigners" is significantly overrepresented in French prisons and evidence suggests that self-identified Muslims are even more overrepresented in criminal legal proceedings. Reflecting on the period immediately after the French revolution, Brubaker (1989) writes,

"The pervasive fear of enemies within and enemies without, grounded in the experience of foreign war, civil insurrection, and factional struggle, but passing over into paranoia, helps explain the multiplication of exclusions. But why specifically foreigners? Certain police measures directed against citizens of countries with whom France was at war are understandable. Yet some of the harshest measures were directed not at enemy nationals but at foreigners as such. What accounts for this singling out of foreigners?" (43).

For Brubaker, the answer lies in the intersection of popular sovereignty and the concept of the nation-state. "A nation-state is a nation's state, the state of and for a particular, bounded, sovereign nation, to which foreigners, by definition, do not belong...sharp external boundedness, to be sure, does not dictate the terms on which resident foreigners are to be treated: but it does mark them clearly and axiomatically as outsiders—indeed as paradigmatic outsiders" (43).

While social contract ideology does not explicitly justify excluding minorities through punitive mechanisms, republican France had adopted Louis XIV's police-state apparatus, which

was founded precisely to “dictate the terms” of foreign and minority residency in his dominion with the aim of preserving a preconceived and moralistic social order. Social contractarians may have asserted individual rights in this process, but did not alter policing substantially: police continued to patrol, profile, and use discretionary violence in post-revolutionary France much as they did during the final decades of the monarchy. The difference was that this official behavior was reconfigured to be understood as done on behalf of society at large as opposed to the king, specifically.

The historical developments of one European country do not, of course, automatically generalize to the rest of the world. Neither can the French be cast as the sole originators of the criminal justice paradigm; its development was an iterative process involving emulation and ideational dispersal across various European cultures and eventually, through colonialism, to the rest of the world (Vogler 2017). However, the parallels between early and contemporary French criminal justice disparities, and the global pattern of ethnoracial and indigenous prison disproportion suggests a paradigmatic continuity in which perceived outsiders or low-status identities remain a primary focus of criminal-legal activity.

Scholars have critiqued the criminal justice paradigm as overly bureaucratic, domineering, and individualistic, therein marginalizing and disempowering the primary “stakeholders” of any criminal dispute—the victim, offender, and their social networks—in order to reinforce State dominance (Barton 1999). Furthermore, the criminal justice paradigm is critiqued as inadequate to address root causes of crime or meaningfully “restore” either victims or society in general to a harmonious condition in the wake of criminal harm (Braithwaite 2003). However, few scholars have considered whether or how the criminal justice paradigm may be inherently exclusionary with respect to marginalized identities. The following section draws

upon Critical Race and Critical Indigenous scholarship to begin considering the exclusionary logic of the criminal justice paradigm.

### **Critical Race Critique of the Criminal Justice Paradigm**

The criminal justice paradigm is typically assumed to be premised on universal values and thus distorted by bad actors who contribute to ethnic and racial disparities in criminal-legal outcomes. However, as critical race theory demonstrates, the criminal justice paradigm is not value neutral but premised on the culturally specific values which underlie Eurocentric law. “Several schools of legal thought now acknowledge law’s relationship to culture”, writes Nunn (1997); “but what is often overlooked is that the law is the creation of a particular type of culture. Law, as understood in European-derived societies, is not universal;” rather, the law is an epistemically “Eurocentric enterprise” (556). The implication, according to Nunn, is that Eurocentric law, and by extension “criminal justice”, is predisposed to justify and reinforce European-derived hierarchical social arrangements, including racial hierarchies.

Eurocentric law is distinguished by its emphasis on dichotomous and hierarchical reasoning (555). Through legal processes, human experience is fragmented into dichotomies, which are organized “into hierarchies of greater and lesser value,” establishing power relations based on the “dominance of the ‘superior’ form or phenomenon over that which is perceived to be inferior” (557). In contrast, the “diunital reasoning” employed by various afro-centric and indigenous cultures “leads to ‘both-and’ conclusions” which are less facilitative of hierarchical social relations due to the absence of superior/inferior categories of analysis (556). “In its most robust form”, writes Alberta and Wood (2009), “diunital reasoning allows one to accept as true two mutually exclusive concepts. One might, for example, come to accept that both Western

European medical treatment and the indigenous healing practices of a specific group are acceptable approaches to healing” (569).

In the context of disputes, diunital reasoning allows for an acknowledgement that a person behaved in an unacceptable way that led to harm yet also made decisions on account of personal harm that they experienced themselves due to various environmental or social factors. This reasoning complicates understandings of individual culpability but expands the scope of analysis to consider a fuller range of experience of all stakeholders in a dispute, therein providing opportunities to better understand the causes and consequences of the conflict. The dichotomous reasoning of Eurocentric law, on the other hand, narrows analyses of disputes to a question of guilt/innocence and produces dehumanizing statuses in which persons become defined by their offenses.

This dichotomous, domineering reasoning is distinctly evident in the criminal justice paradigm’s underlying theory, fundamental practices, and discourse. It is not that criminal-legal actors are incapable of diunital reasoning; police, judges, and prison administrators may see responsibility in complex terms and become frustrated with the dichotomy of discretionary paths before them (Goldstein 1977). Nonetheless, the criminal justice paradigm structures criminal-legal discretion into dichotomous conclusions which reinforce State dominance at every turn. However, if law, as understood in European-derived—and I would add European colonized—societies is a “Eurocentric enterprise”, then reinforcing State dominance also reinforces a culturally and epistemically Eurocentric worldview, one in which ethnic and racial hierarchy is central (Delgado and Stefancic 2007). In short, the overriding criminal justice emphasis on State dominance is not culturally neutral, but a factor of European epistemologies, ideologies and valuations.

To consider the specifics of how this Euro-centric criminal justice paradigm differentially impacts excluded, marginalized, and low-status communities to the extent that identity-hierarchies are preserved, I turn to Critical Indigenous scholarship.

### **Critical Indigenous Critique of the Criminal Justice Paradigm**

Indigenous communities are some of the most over-represented groups in the world's prisons. The contemporary mainstream of criminology tends to explain this overrepresentation in ways that leave the criminal-legal paradigm unacknowledged and thus largely unscrutinized (Tauri 2013). Mainstream criminology, argues counter-colonial scholar Juan Marcellus Tauri, is comfortable critiquing issues such as implicit racial bias and criminogenic social inequality; yet, this line of scholarship generally does not interrogate the criminal justice paradigm itself—an omission which may inadvertently reinforce of the notion that criminal-legal systems are premised on universal, rational, and discovered values. Hence, Tauri points out that the criminal-legal systems of colonized jurisdictions such as Aotearoa (New Zealand) are “informed by Eurocentric, imported theories and interventions” which normalize the profiling and incarceration of already marginalized Indigenous peoples, thereby perpetuating a colonial dynamic (8). These imported values and beliefs include:

- that lawbreaking, even absent demonstrable harm, morally demands the harming of the offender in response.
- A rigidly individuated account of responsibility which decontextualizes social harms.
- Adherence to a set of European justice philosophies which condone State practices of retaliation (retribution), segregation (incapacitation), disciplining (rehabilitation), and terror (deterrence), all of which have been employed with devastating effect against indigenous peoples throughout the history of colonialism.

- A devaluation of social bonds and interpersonal reconciliation in favor of symbolic and actual State domination.

These beliefs and values motivate particular forms of State intervention that reinforce colonial dynamics in at least three ways. First, Eurocentric norms of punishment, particularly incarceration, contribute to the fragmentation of communities, especially communities under economic and social stress (Haebich 2000, 421-424; Walker 2020; Genty 2002). Referring to the ongoing colonial dynamic of New Zealand, Tauri (2005) explains that whereas the criminal-legal system seeks a reassertion of State dominance in the face of social harm, Maori traditions of addressing social harm seek the reassertion of social bonds through processes of reconciliation (6). Social bonds are the bedrock of resistance against displacement and cultural erasure; thus, incarceration can constitute a colonial act which weakens the collective socio-economic and political position of colonized peoples relative to the colonizers (Cunneen 2006).

Second, the logic of the criminal justice paradigm, particularly the use of punishment, rests on the decontextualization of illegal acts. Indigenous communities typically face significant relative disadvantage in settler societies, in the forms of both economic deprivation and “non-economic deprivation such as damage to identity and culture, as well as trauma and grief” (Cunneen and Rowe 2015, 17). These factors may contribute to survival strategies that involve lawbreaking or offenses driven in part by psychosocial-environmental stressors (Hall and Patrinos 2012). Higher rates of offending are observed in many indigenous communities; yet, “mainstream positivist/conventional approaches” to the investigation of crime are unlikely to clarify the causes of this disproportion (Cunneen and Rowe 2015, 6). The dichotomous reasoning of the criminal justice paradigm disconnects legal analysis of individual choice from an analysis of the social contexts in which choice occurred (Miethe and Meier 1994). This can mean that

those who engage in illegal behavior as a survival strategy, or those contending with psychosocial and environmental challenges, are judged as if they have experienced the same opportunity structure as their relatively privileged counterparts. This amounts to a colonial “innocence”, to use James Baldwin’s (2013) term; a willful ignorance of the differing social realities experienced by the colonizer and the colonized.

Third, the police patrol, as an imported and alien construct motivated by imported and alien ideas, potentially symbolize the colonizer’s hegemony over colonized land and people (Cunneen and Tauri 2016, 67). From the point of view of communities which have borne a disproportionate degree of State violence in the form of cultural repression and geographic displacement, the patrol is a thinly veiled threat of further abuse. Nonetheless, police “legitimacy” is an ongoing obsession among settler governments, who puzzle over why indigenous communities distrust state-centered institutions (Cunneen and Tauri 2016, 13).

Critical Race Theory clarifies the Eurocentrism of the criminal justice paradigm, specifically its reliance on dichotomizing and hierarchizing logic. Critical Indigenous scholarship clarifies the differential impacts of criminal-legal activity upon colonized peoples, therein specifying how Eurocentric values manifest as particular forms of legal violence. Critical Race and Critical Indigenous perspectives are typically applied to specific cultural contexts, such as settler societies. The following section makes a case for why these perspectives are applicable to cultural contexts without conspicuous settler society characteristics.

### **Generalizing the Critical Indigenous Critique**

As previously discussed, the criminal justice paradigm achieved global hegemony alongside Eurocentric law as a result of European colonialism. Thus, processes of State

domination similar to those described by Critical Indigenous scholars may occur in various “non-colonized” places and involve non-indigenous groups. Furthermore, the criminal justice paradigm, as a specifically state-centered worldview, facilitates and justifies the dominance of any group and effectively excludes other groups from the centers of state power; the beneficiaries of the criminal justice paradigm need not be categorical “colonizers.” To provide an example, I want to identify a country that is not typically considered a settler society and a group that is long-established in residency, overrepresented in that country’s prisons, but considered non-indigenous: Latvia and its Roma minority are just such an example.

Roma peoples have been an ethnic minority in Europe for over 600 years, and a constant target of discrimination, coercive state management, and “outright genocide” (Paxton 1987, 1). Roma peoples in Europe are disproportionately poor and excluded, often callously, from social and economic opportunities, therein representing an ongoing and largely unaddressed human rights crisis (Cahn 2002). Roma have also been racialized,—that is, subject to a dehumanizing discursive and legal process asserting their hereditary inferiority in relation to a purportedly superior counterpart race (Bancroft 2005). Despite official acknowledgments of Roma genocide, this racialization persists as a “pariah” status throughout Europe (Waluszko 2020). The parallels between the experience of Roma in Europe and indigenous peoples in settler societies is obvious. However, I am not trying to establish an equivalency between groups. Rather, I intend to establish an equivalency of criminal-legal systems in terms of how they differentially impact groups locked at the bottom of a cultural hierarchy. With respect to Roma and indigenous communities, the criminal justice paradigm is central to continued subordination, fragmentation, and racialization.

According to the findings of Chapter 1, the Roma of Latvia comprise 4% of Latvia's incarcerated population but only 0.3% of the total Latvian population. This fits a general pattern of Roma overrepresentation in European prisons (Fekete 2014). State-defined criminology would explain this pattern as the result of differential offending. Latvian crime statistics are unavailable to confirm this hypothesis; however, a recent report states "although there has been no research on offenders..., the high percentage of minorities in the prison system is sometimes explained by higher crime rates in urban areas, such as the capital Riga and 2nd largest city Daugavpils where minorities form 54% and 82% respectively" (Kamenska et al 2013, 35).

Differentials in offending are indeed a possible, perhaps even likely, contributor to Roma disproportion in Latvian prisons. However, through the lens of the criminal justice paradigm, differentials in offending are disconnected from social and economic contexts. For example, Roma have been identified as disproportionately involved in the illicit drug and scrap-metal trades, prostitution, and petty theft across the Baltic region (Tumalavičius 2017). These crimes are typically high risk and low reward and predominate among poorer communities with few worthwhile licit opportunities (Payne et al 2017). Furthermore, these crimes are typically perpetrated in public spaces, where patrolling officers must rely on cues of difference to determine their use of discretion; Roma are stereotyped, physically and behaviorally, and attract disproportionate criminal-legal attention (Olomofofe 2005). Nonetheless, the criminal justice emphasis on individualized culpability typically means that those found guilty of such crimes are regarded as having the same opportunities as anyone.

The consequent incarceration of the offending individual, deemed necessary to defend society, contributes to the fragmentation of already vulnerable communities characterized by significant gaps in economic, social, and health outcomes compared to ethnic Latvians (Revenge

et al 2002; Kanapeckienė et al 2009). Social networks, comprised of friends and family members, are disrupted by the process of incarceration. In some cases, this disruption may remove a vulnerable individual from toxic associations; however, there is no guarantee of this, and the Latvian State proceeds relies on incarceration without first considering the broader impact upon an individual's community. Impacts may include loss of crucial social resources such as parents, siblings, friends, and workers; in contrast, these social network resources remain more stable within the Latvian majority due to their underrepresentation in prisons. This parallels the differential impact of incarceration in settler societies such as Australia, Canada, and the United States, which further fragments indigenous communities historically impacted by genocidal policies such as forced relocation, cultural repression, and extermination (Cunneen 2011; Chartrand 2019; Navarro and Robertson 2020). Thus, despite Latvia's status as a non-settler society, it is difficult to interpret the dynamic between the Latvian State and Latvia's Roma minority as anything other than "colonial."<sup>13</sup>

The example of Europe's Roma minority demonstrates that the differential impact of criminal-legal systems on outgroups is not confined to settler-society contexts. Yet, a general theory to explain this differential impact cross-nationally remains undeveloped. I utilize the concept of "nationalism" to provide a new framework that explains the ubiquity of ethnic, racial, and indigenous "selection bias" among criminal-legal systems under varied national conditions.

## **PART II: A GENERAL THEORY OF PRISON DISPROPORTIONALITY**

"What so proudly we hailed at the twilight's last gleaming"

---

<sup>13</sup> The term "colonial" refers to the distribution of opportunities, resources, and esteemed statuses along identarian lines such that one group reserves disproportionate access to social and economic rewards through mechanisms of State violence.

-The Star-Spangled Banner

“The police are nothing other than the majority under arms.”

-Tocqueville

The parallels drawn between the carceral experience of Roma in the Baltic and Indigenous communities in settler societies could be further extended to include Black Americans, the Scheduled Tribes of India, Iraqi immigrants in Finland, foreign workers in Saudi Arabia, Irish Travellers, and so on, as I demonstrated in Chapter 1. Each of these otherwise disparate groups would likely recognize each other’s relationship to the criminal justice system as familiar. However, scholars have not fully explained these carceral experiences under a single unifying theoretical framework.

Single-country historical analyses can explain the establishment of the hierarchies in which these criminalized groups exist, and theories of cultural-institutional path dependency can help clarify why hierarchies persist even after the formal acknowledgement of equal rights was codified by the 1964 Civil Rights Act (Omi and Winant 2020; Bonilla-Silva 2006). Further, Racial Capitalism clarifies the incentives which drive racialized economic exploitation and reinforce ethnoracial hierarchies cross-nationally (Melamed 2011; McCann 2020). What remains missing is a theory of why criminal-legal systems—as sets of bureaucratically separated, political unwieldy, and self-interested organizations—play such a dependable roll in sustaining social hierarchies of such varied origins and under such varied contemporary conditions.

The analysis of the criminal justice paradigm in Chapter 2 showed how axiomatic criminal-legal theory, practice, and discourse focuses the State’s violent capacities on marginalized groups and normalizes this dominance as identity-neutral. However, the concept of a “paradigm” is merely a way of understanding a relationship between theory, practice, and discourse;

recognition of a paradigm does not in itself explain why the relationship between these three fields of knowledge exists in the first place. I argue that the criminal justice paradigm is held together by a single, seemingly simplistic idea: that ‘crime’ is consistently defined as an injury to society. This definition is typically understood as a logical and benign expression of popular sovereignty, a progression away from the rule of men toward rule of law. I argue that popular sovereignty as expressed through the definition of crime as a collective injury does not result in an authentic rule of law based on the premise of legal equality. Rather, defining crime as an injury to society sustains ethnocracy, perpetuates colonialism, underwrites Racial Capitalism, and constitutes a moral failure according to the most widely accepted standards of legitimate governance. My argument draws from a wide range of literature but is especially indebted to the work of Michael Coyle (2010), Michael Foucault (2003), and Michael McCann (2020), each of whom place an emphasis on the relationship between language, belief, and power.

The argument proceeds as follows: First, I establish the contingency of defining ‘crime’ as an injury to society; other definitions of crime exist and have been accepted historically. I identify two alternative definitions of the crime concept in addition to the extant popular sovereignty formulation: ‘crime as sin’ and ‘crime as harm to persons’. Of the three, ‘crime as harm to persons’ is the most inclusive and facilitative of democratic principles. Next, I aim to clarify the exclusionary logic of defining ‘crime’ as injury to society. This definition of ‘crime’ constructs a moral distinction between the criminal and society such that ‘society’ is conceived of as innocent by default in the context of crime and thus morally superior to the criminal. This is the moral basis of the State’s defense of society. However, ‘society’ is at the same time figured as dependent on the State’s defense because it is continually threatened by crime (lawbreaking), highlighting society’s inherent vulnerability. This paradoxical concept of society as both superior

and vulnerable constitute the defining characteristics of the “nation” in a nationalist worldview, as articulated in overtly nationalist rhetoric. I argue that the criminal justice paradigm implicitly equates ‘society’ with the prevailing ideal of national identity in a country. In defending ‘society’, criminal-legal systems are predisposed to defend which ever group currently dominates the ideals of national identity. The consequence is disproportionate criminal-legal attention to groups perceived as outside the bounds of the “nation” and a skewing of prison demographics.

### **3 Definitions of ‘Crime’ in History**

The way in which the concept of ‘crime’ is defined provides the moral basis of criminal law and authority in criminal matters. In other words, differing definitions of ‘crime’ authorize differing agents and institutions to assert jurisdiction over matters deemed criminal. It is typically taken for granted that the concept of ‘crime’ means an offense or injury to society in the form of lawbreaking. By this standard, crimes are morally condemnable because of their negative impact on the collective. This definition of ‘crime’ provides the warrant for legal violence in defense of the popular sovereign— that is, “the people” or “society.” Historically, however, ‘crime’ has been conceptualized in various ways with distinct moral and political implications. These various conceptualizations of ‘crime’ reflect differing arrangements of power within a culture and condition the production of criminal laws. As such, ‘crime’ is a heavily contested, unstable, and inherently political concept.

I will discuss 3 differing conceptualizations of ‘crime’ and the way each legitimates certain power arrangements and institutions: crime as sin (theocratic); crime as injury to society (bureaucratic); crime as harm to persons (democratic). These conceptualizations should be understood as potentially overlapping, and only representing a few of potentially limitless

permutations of the ‘crime’ concept. Nonetheless, these 3 conceptualizations are highly influential, both contemporarily and historically. Somewhat in keeping with a functionalist theorization of ‘crime’ ala Durkheim (1985) and Merton (1938), ‘crime’ can be conceived of in ways that facilitate social inclusion or exclusion. Thus, the following suggests that although ‘crime’ is necessarily a *behaviorally* exclusive concept, it need not always be socially exclusive as well. Of the three conceptualizations, I find that ‘crime’ defined as harm to persons offers the most opportunity for inclusive power sharing.

### **A. Crime as Sin<sup>14</sup>**

To understand ‘crime’ conceptualized as sin, it is useful to consider how this definition was contested in the course of the European Enlightenment; this is one way to distinguish between the moral rationales of modern and premodern European criminal law which lays bare the politics and exclusionary principles underlying each legal era. Here, I will use the reason-based critiques of superstition offered by theorists such as Thomas Hobbes to clarify ‘crime as sin’.

For generations of European civilization, spanning millennia, ‘crime’ and sin — an offense to God or gods — were of the same moral category; that which was criminal was so because, ultimately, it offended gods/God and was sinful; that which was sinful was by default criminal. This placed religious authorities at the forefront of moral regulation and behavioral exclusion, and standards of proof under auspices of ‘crime as sin’ necessarily involved appeals to the supernatural (Ho 2003). Because this process was tied to a specific religious identity—for

---

<sup>14</sup> This is primarily a Eurocentric account of ‘crime’s’ historical transformations; in fact, ‘crime’ undergoes similar transitions in ancient China and elsewhere alongside political upheavals – ‘crime’ is not only political in Europe. The eurocentrism that I emphasize here is justified only to the extent that the prevailing criminal justice paradigm is Eurocentric as well, which is this argument’s primary critical focus.

example, Catholicism—it inevitably involved social exclusion of groups deemed by established churches to be inherently sinful. Jews, Muslims, and Apostates of all sexes, in addition to single or otherwise non-conforming Christian women, were of particular interest to clerical law enforcement (Chazan 1980). The consequence was that medieval criminal law enforced segregation and social hierarchy based on religious distinctions (Duneier 2016).

However, most pre-modern European societies, from the early Romans to the last absolute monarchies, were not pure theocracies but rather a power sharing arrangement between aristocratic and religious institutions. Thus, pre-modern European criminal justice regimes tended to reflect a hybrid model of theocratic and proto-bureaucratic theory, practice, and discourse in which jurisdictional authority shifted between clergy, judges, laypersons, and juries depending on local conditions and Papal attitudes. Nonetheless, morally speaking, ‘crime’/sin was analyzed in essentially the same manner by pre-modern European authorities, even when non-religious authorities were at times given jurisdiction over the accused. The way in which crime and sin were conceptually unbound by liberal thinkers and their forebearers exemplifies the politics inherent to the ‘crime’ concept.

A notable challenge to the pre-modern European view of ‘crime’ was offered by Hobbes who, inspired by the positivism of Galileo, aimed at uncovering rational motives for the existence of government in opposition to the religious rationale of divine right. On the topic of crime in *Leviathan*, Hobbes (2016) proclaimed that “a crime is a sin consisting in the committing by deed or word of that which the law forbiddeth...every crime is a sin; but not every sin a crime” [sic] (113). Here, Hobbes seeks to morally distinguish ‘crime’ as an offense to society in the form of lawbreaking rather than primarily an offense to God in the form of moral transgression. The political implications of this distinction were profound; Hobbes sought to

elevate legislation, the domain of the King, over liturgy. This was, unsurprisingly, greeted as heresy, not only because Hobbes impugned the ability of the clergy to determine guilt by appealing to supernatural forces, but also because the conceptual unbinding of crime and sin implied that the clergy had no legitimate business in earthly disputes. If Hobbes's argument were to be taken seriously, clergymen of all ranks would find their coercive authority significantly delegitimized and their political position more vulnerable. Hence, the initial reception by the established church to Hobbes's proposal was hostile, and by the early 1700's, Hobbes's reputation lay in infamy, "his name...a byword for atheism" (Parkin 2007, 1).

Hobbes had attacked a centuries long tradition of religion's jurisdictional authority over morality. From at least the four-thousand-year-old Code of Hammurabi to the Roman Corpus Juris Civilis and through the punitive crime control regime of the Roman Catholic Church, the assertion that crimes were an offense to God(s), i.e., a "sin", had been used to justify punishment and the authority which meted it out. This was, on the one hand, a concession of monarchs which delegated significant governing authority to religious officials. On the other hand, given the notion of divine right, monarchs could in turn claim that any crime was an offense directly to themselves as they enforced God's ordained social order. Hence, the interests of monarchs and the Church converged around 'crime as sin'. However, 'crime as sin' represented a constant point of tension between monarchial and religious authority which would flare into open dispute, rebellions, religious schism, and civil wars. That is to say, 'crime as sin' was never a stable, uncontested conceptualization but rather a fragile political arrangement.

Hobbes, and other thinkers such as Machiavelli, Locke, Beccaria, and Montesquieu, challenged the religious punitive tradition by suggesting that crime and sin fall within different moral jurisdictions, one ruled by a transcendent God and the other ruled by "society." For

example, the foundational assertion of Beccaria's (2017) *On Crimes and Punishments* is that "crimes are only to be measured by the injury done to society" rather than divinity. To say 'crime'—here redefined from sin to lawbreaking—injures society is simultaneously to claim that society is preserved by law, rather than religious virtue. The implication is a shifting of jurisdictional authority over earthly wrongdoing to an increasingly secular State whose rationale for existence was popular sovereignty. In turn, religious authorities would have a diminished role in social exclusion and subsequently become dependent upon the bureaucratic state to reinforce religious dominance over acceptable beliefs and lifestyle, with varying degrees of success. This eventually opened the door to religious pluralism—which, although anathema to the interests of established churches, posed less of a concern to secular bureaucracy. Thus, the conceptualization of 'crime' has far-reaching significance, well beyond context of individual behavior.

## **B. 'Crime' as Injury to Society**

The logic of Hobbes and others who challenged religion's criminal jurisdiction imbued the notion of "lawbreaking" with a sufficient moral weight to justify punishment, while still maintaining the crime/sin distinction necessary to a secular moral morality, thereby legitimating secular authority and sidelining religious authority. This redefinition of 'crime' would find real-world realization in the eventual victory of popular sovereignty over monarchical sovereignty during the Enlightenment. This political development helped established the common-sense assertion that 'crime' is "an offense against the state whose proper sanction is punishment," in which the "state" represents society, and in which punishment represents society's dominance over the offender (Barnett 1977, 287). Though achieving a status of "common sense," in the Geertzian (1975) sense, this formulation of 'crime' is not self-evident nor absent complexity. Indeed, it relies on a sort of superstition which resembles that of 'crime as sin.'

By way of syllogism, ‘crime as injury to society’ can be clarified accordingly: crime injures society; secular society is governed by the rule of law; thus, ‘crime’ is an act that violates law. This is the fundamental logic of the criminal justice paradigm. This formulation acknowledges the ultimate authority of the popular sovereign, as expressed through law, and situates the State as a servant of society, with legitimate jurisdiction over disputes involving violation of law. The obvious response to lawbreaking in this framing is to reimpose the law—fix what has been broken, which typically means punishment as a symbolic reconstitution of law. This may seem banal and unworthy of further analysis; however, much more has transpired in this logic than is immediately apparent.

First, this conceptualization of ‘crime’ alters the purpose of punishment from its previous religious intention. Medieval European punishments were intended to purify the condemned of their sin in preparation for judgement before God; this purification would be achieved through confession (Merback and Merback 1999). Punishment also demonstrated sovereign power, thereby serving the interest convergence of religious and monarchical authority. In contrast, punishment resulting from the configuration of ‘crime as injury to society’ is primarily employed to purify *society* of moral contamination, that is, of lawbreaking individuals. This intention is expressed in the punishment philosophies of retribution, deterrence, and incapacitation; as rationales for segregation, each is a logical practice if ‘crime’ is understood as a contaminant within society. However, a vestige of the religious tradition of punishment remains in the philosophy of rehabilitation, which requires that the condemned be subject to purifying suffering. Other vestigial echoes of religious punishment exist in criminal-legal practices such as plea bargaining, in which the accused is implicitly threatened, that is, psychologically tortured by the prospect of a longer sentence, to induce confession (Langbein 1978). Thus, the transitions from

‘crime as sin’ to ‘crime as lawbreaking’ does not represent a clean break in ideology but rather a new arrangement of power that does not necessarily require an entire rejection of the previous arrangement’s rationales. Theocratic and bureaucratic crime control regimes share a common intention to expunge impurity and legitimate authority; where they differ is in terms of where purity and authority is located.

‘Crime as injury to society’ locates purity and authority in popular sovereignty; thus, the intention of punishment to purify society through segregation implies that lawbreakers are aberrational, even antithetical, to society. The convicted individual is the discovered “outsider” whose transgressions have exposed their alien morality. Consequently, the criminal justice paradigm, like Louis XIV’s police state, is driven by the search for deviant outsiders and the preservation of society’s imperiled purity. The alienation of the criminal produces the ‘criminal’ and ‘society’ as binary opposites; society is figured as a blameless and subject to the victimization of immoral individuals, that is, pure in contrast to the offender. Thus, this conceptualization of ‘crime’ defines the very moral essence of ‘society’ and vice versa. Without ‘crime,’ the concept of society would no longer signify a legitimate moral authority; without ‘society’, ‘crime’ would have unclear moral implications.

This logic forms what Melamed (2011) terms a “conceptual bind”. A conceptual bind is a system “made up of two distinct concepts that condition the meaning of one another and act together to unify and police the boundaries of an episteme or structure of knowledge” (187). When concepts are “bound” they derive meaning through their relationship; the significance is in the whole and not the parts. Hence, the seemingly simple logic that ‘crime’ injures ‘society’ holds within it a set of potent moral assumptions. Indeed, this conceptualization of ‘crime’ is part

of the theoretical bedrock of popular sovereignty—a crucial rationale for why government exists on behalf of the public: to defend society from ‘crime’.

There is no small degree of superstition, that is, unverifiable belief, involved in this conceptualization of ‘crime’. Firstly, the notion that an individual act of lawbreaking “injures” society closely resembles the older notion that crime is an offense to God. ‘Crime’, whether conceived of as sin or lawbreaking, prompts us to imagine the impact of human actions on an ethereal, abstract, non-human entity. Moreover, the idea that lawbreaking harms or endangers the continuity of “society” does not bare out empirically. Laws of all kinds are violated incessantly, day in and day out—with no end in sight—and only a fraction of this lawbreaking results in punishment. In the case of American criminal law, the sheer number of statutes, many of them redundant, means that violating the law is practically unavoidable—some claim that as much as 70 percent of American adults are routine lawbreakers, and that many remain unaware of their transgressions (Husak 2008). If violating law really did “injure” society in the way imagined through the criminal justice paradigm, life in the contemporary world, with its excess of criminal law and thus criminal offenses, would take place in a Hobbesian wasteland. Further, there is no small irony in that fact that modern governments, charged with defending society from ‘crime’, tend to produce voluminous criminal legislation to do so, thereby making lawbreaking *more*, rather than less, likely.

While the actual social utility of defining ‘crime’ as an injury to society is debatable, the extent to which this ideology legitimates and empowers the bureaucratic State is not: ‘crime as injury to society’, whether employed in a liberal or illiberal regimes, situates the State as the primary stakeholder in criminal disputes. Direct, demonstratable stakeholders to criminal disputes—victims, accused, and their respective social networks—are sidelined in criminal

proceedings, resulting in strictly limited opportunities for democratic participation (Strang and Braithwaite et al 2017, 17). Even the jury, the most democratic aspect of modern criminal proceedings, is confined within analytical boundaries determined by state actors when determining guilt or innocence (Amar 2008). Thus, defining ‘crime’ as societal injury is best understood as an ideology of State dominance, employable by any regime which prioritizes a bureaucratic mode of governance.

### **C. ‘Crime’ as Harm to Persons**

‘Crime’ necessarily implies ‘harm’; the who, or *what*, deemed harmed by ‘crime’ is of immense political significance in that it confers legitimate authority upon the aggrieved party to govern behavior. Hence, ‘crime’ understood as sin legitimates the governing authority of religious institutions and ‘crime’ understood as lawbreaking legitimates the governing authority of secular bureaucracy. Likewise, ‘crime’ understood as harm to persons legitimates the authority of direct stakeholders in criminal disputes: the person(s) whose actions resulted in harm and the person(s) harmed. This understanding of ‘crime’ is evident in a variety of indigenous disputing practices, both historical and contemporary, and contemporary theories of “restorative justice” (Hand et al 2012). “Restorative justice” has no single, agreed upon definition or theoretical consensus, and represents a range of views, some that radically challenge the criminal justice paradigm and other which accommodate it. The final chapter of this dissertation discusses an understanding of “restorative justice,” which I argue helps address the tendency of criminal-legal systems to engage in ethnoracially disparate behavior. Setting this aside for now, the following analysis is intended to further demonstrate the political implications of defining ‘crime’ and the ways in which a redefinition of ‘crime’ from ‘lawbreaking’ to ‘harm to persons’ disrupts criminal justice rationales for State dominance.

The criminal justice paradigm engenders a focus on the dangerousness of individuals and the susceptibility of society. This focus is criticized as distracting from the harmful actions and criminogenic influence of powerful social policy makers such as private enterprise and indeed governments themselves (Johnstone 1995, 9). Routine criminal justice practice and discourse “mystifies” social conflict through a narrow analysis of individuated culpability and forecloses opportunities for democratic deliberation (Tayler et al 2013, 9). Furthermore, the criminal justice paradigm is criticized as “appropriating” interpersonal conflicts as opportunities to assert State dominance, further obstructing opportunities for meaningful dialog about how best to live together (McEvoy and Newburn 2003). Thus, criminal-legal systems are criticized as some of the least democratic institutions in contemporary democracies (Western and Pettit 2002). These criticisms suggest that the conceptualization of ‘crime’ as injuring society, although an expression of popular sovereignty, is nonetheless paradoxically undemocratic. Rather than empowering citizens to self-govern, the criminal justice paradigm concentrates decision-making authority in the hands of a bureaucracy that is, at most, only sporadically subject to democratic influence.

Restorative justice scholars suggest that a “paradigm shift” in which ‘crime’ is defined as harm to persons would democratize criminal processes (Zehr 1994; Braithwaite 2002). However, this notion depends upon which parties are conceptualized as legitimate “stakeholders”—that is, individuals with a legitimate moral and social investment in the outcome of the dispute. Under the criminal justice paradigm, and a definition of ‘crime’ as injury to ‘society,’ the State is the only a single “stakeholder” in criminal disputes, which produces inherently undemocratic disputing conditions.

In contrast, when ‘crime’ is understood as ‘harm to persons,’ there is room to expand “stakeholder” status to those who have been directly harmed and even those who have done the harming—they are each demonstrably connected to the ‘harm’ and thus can be conceived of as legitimate “stakeholders.” “Harm” is notoriously difficult to define; yet, is typically viewed as “demonstratable” and evidence-based negative impacts of discreet, unwanted behaviors that produces specific needs in order to repair (McCold and Wachte 2003). A more inclusive range of stakeholder statuses sets the stage for reconciliatory processes in which the outcome is determined by deliberation rather than bureaucratic procedures. Based on the principle that individuals cannot consent to violence, the deliberated outcome cannot involve the range of harmful impositions currently employed by the State, such as fines and incarceration. The State is not necessarily shut out of this process but rather shifts from being a primary stakeholder to a supporter of the stakeholders based on the democratic principle that government exists to facilitate self-governance. This support can take the form of mediation and provision of neutral space in which to deliberate. Overall, defining ‘crime’ as harm done to persons expands the inclusion of stakeholders in the disputing process and consequently democratizes the process.

However, it should be noted that ‘crime as harm to persons’ does not necessarily expand democratic influence overall; indeed, it limits democratic influence over legislation. This was the crux of J.S. Mill’s (1998) argument in *On Liberty*: basing the prohibition of behavior on an analysis of harm potentially disqualifies much of the moralistic and intrusive legislation majorities may support to regulate what Mill termed “self-regarding” conduct. For example, in the contemporary context of the American Drug War, it has been proposed that a harm-based understanding of ‘crime’ could be construed as nullifying various drug prohibitions on account

that drug possession violations have no direct victim and thus cannot constitute a demonstrable offense (Husak 1992).

In sum, as with the other definitions of ‘crime’ discussed here, the consequences of defining ‘crime’ as ‘harm to persons’ are far reaching. Radical changes to the disputing process, criminal law, and indeed the character of governance itself are all implicated in how ‘crime’ is defined. The primary point has been to demonstrate how defining and redefining ‘crime’ is productive of radically differing notions of the legitimate role of the State in society. The conceptualization of ‘crime’ is consummately *political*.

With this established, the balance of this chapter addresses how the construct of ‘crime as an injury to society’ predisposes criminal-legal systems to ethnoracially disparate impact. I argue that the criminal justice paradigm, and its definition of ‘crime’ and an injury to ‘society,’ constitutes a nationalistic ideology. That is, the conceptual conditioning of ‘society’ as injured by ‘crime’ engenders a nationalistic posture among criminal-legal institutions and a reactionary attitude among police and other criminal-legal actors toward ethnic, racial, and indigenous difference. The consequence is disproportionate State-initiated contact between criminal-legal institutions and communities perceived as outside the boundaries of national belonging and legitimate “peoplehood.” In combination with the criminogenic influence of relative deprivation and anomie, the inherent nationalism of the criminal justice paradigm is theorized as a primary contributor to the global pattern of ethnoracial disproportion in prisons. To be clear, this argument differs from those that suggest criminal-legal systems are at times overtaken by “penal nationalism” according to national mood and economic conditions (Haney 2016). Nationalism—which encompasses a logic of identity-based exclusion—is not aberrational, but rather foundational to the criminal justice paradigm.

## **Nationalism is Foundational to The Criminal Justice Paradigm**

‘Society’ in the criminal justice paradigm takes on several traits which make it indistinguishable from the nationalist construct of “the nation.” The consequence is that criminal-legal institutions are predisposed to primarily, albeit implicitly, defend “the nation” in their overriding mission to defend ‘society’ from ‘crime.’ This mission encompasses an exclusionary logic driven by nationalist sentiment. In the sections below, I clarify how the criminal justice paradigm places ‘society’ in a nationalist frame and how that framing subsequently conditions criminal-legal practice and discourse. First, I will discuss what I mean by “nationalism.”

### **Nationalism**

By “nationalism,” I refer to a “bloody, generation-long struggle over who should rule over whom” based on the expectation that “rulers and ruled hail from the same ethnic background” (Wimmer 2012, 4). In the context of the ethnic, racial, and indigenous diversity of contemporary nation-states, nationalism is expressed as the dominance of one group’s culture—including language, lifestyle, norms of appearances, and narratives—over “national identity,” or the default member of society. National identity—as defined by monuments, official holidays, pedagogy in public educations, etc.—constitutes an often bitter political battleground (Gillis 1994). Nationalism is the construction and reconstruction of “peoplehood” rooted in an agreed upon, though always contested, historical narrative through which groups claim a right to land and how it is used (Smith 1996).

As Freedman (1998) argues, various flavors of nationalism—liberal, conservative, fascist, socialist, etc.—“embellish” certain aspects of their “host ideology” to emphasize exclusion, thus

constituting the nation as distinct and superior compared to constructed enemies. In other words, although *nationalisms* of varying rhetorical-political character simultaneously exist, they each share a common “DNA” of exclusionary logic which is framed in accordance with familiar, though typically distorted, cultural narratives of legitimate governance. For example, in Melamed’s (2015) words, a liberal-oriented nationalism “differentiates people into individuals and citizens whose collective existence is reduced officially to a narrow domain of the political beset by an economic sovereignty that increasingly restructures the domain of ‘democratic participation’ according to neoliberal logics of privatization, transactability, and profit” (79). The result is a justification of seemingly identity-neutral policy that in practice tends to exclude disfavored groups from worthwhile economic opportunity and positions of decision-making authority. Consequently, prevailing conceptions of the dominant group—representing “the nation”—are reinforced, at least with respect to a prioritized identity category such as race or ethnicity. Melamed’s view on nationalism should not be overstated; individual members of disfavored groups can achieve immense wealth, political power, and favorable statuses in contemporary society. However, the “base-line nationalism” Melamed describes ensures that such achievements are the exception.

From a critical functionalist viewpoint, the purpose of nationalism, regardless of its host ideology, is a mobilization of violence on behalf of exclusionary goals related to a narrative of superior “personhood” (Gorski 2000). The key to mobilizing nationalist sentiment is a narrative combining pride and fear. A “nation”—that is, people belonging to the dominant national identity—must believe, paradoxically, that it is both innately superior and perennially vulnerable to its enemies (Geertz 1973). Thus, the defining virtue of the “nation” in nationalist rhetoric is *resilience*, a condition only achieved in the face of adversity. This purported resilience serves as

the evidence of both superiority and recurring susceptibility, thereby suggesting both a *right* and a *need* for violent defense. National anthems are fitting place for nationalist sentiment, and the opening lines of the *Star-Spangled Banner* speak to the inherently fragile condition of “peoplehood.” “What so proudly we hailed at the twilight's last gleaming” conjures an image of the embattled nation, on the verge of destruction, overcoming existential threat through superior moral fortitude. To reconstitute the nation in moments of doubt requires a convincing narrative of resilience and self-preservation, that is, a reminder of both superiority and susceptibility. Thus, idealized national identities are rooted in a paradoxical self-concept; the criminal justice paradigm reproduces this nationalist logic and implicitly equates the concept of society with a national identity.

### **‘Society’: A Nationalist Construct in the Logic of Criminal Justice**

As discussed previously, the criminal justice paradigm consists of theory, practice, and discourse intended to defend society—“the people,” “the public,” “the State,” etc.—from ‘crime’, that is, lawbreaking and lawbreakers. In this formulation, ‘society’ is conceived as perennially under threat and dependent on the State’s violence to survive. Figuring society as an entity protected/defended through violence conditions the meaning of ‘society’. When something is defended, this posture implies a demarcation or battleline; defended subjects are encircled by defenders scanning the horizon for oncoming threats. ‘Society,’ as an entity to defend, represents a social boundary within a national boundary.

In constructing a binary opposition between ‘society’ and the ‘criminal’, the criminal justice paradigm presupposes society’s inherent moral purity and the impending danger that necessitates society’s defense, thereby providing a powerful rationale for legal violence. In

contrast, impure individuals, lurking amid society's idealized members, are exposed by their criminal acts and segregated together in the separate subaltern society of the prison. This moral distinction between criminal and society is succinctly articulated by Locke (2015):

“crime...consists in violating the law, and varying from the right rule of reason, whereby a man so far becomes degenerate, and declares himself to quit the principles of human nature, and to be a noxious creature” (35). In this logic, mainstream ‘society’ cannot include the criminal, nor can ‘society’ be held responsible for individual acts of ‘crime’, which are attributed to individual moral failure. Thus, the criminal justice paradigm guides the administration of a purportedly deserved and necessary social segregation between criminal and society. Criminal justice practice is intended to appropriately sort individuals between two separate but mutually reinforcing domains of moral status, freedom and incarceration, all to preserve society’s moral constitution.

Thus, ‘society’ within the criminal justice paradigm is defined at once by the paradoxical amalgamation of pride and fear, superiority and susceptibility. ‘Society,’ which alternatively could be conceived of as an inclusive, pluralistic, and cosmopolitan construct takes on a nationalistic, and thus exclusionary, character in the criminal justice context: to maintain its moral superiority, ‘society’ must actively exclude moral inferiority. Thus, nationalism is a security-obsessed and moralistic worldview. However, the same tension-ridden logic motivates the criminal justice paradigm, even in the absence of the familiar and heavy-handed nationalistic rhetoric of the 20<sup>th</sup> century. The criminal justice paradigm frames ‘society’ in the same way that populist elites frame “the people”, as entitled to violent defense and perpetually under threat, and thus in need of a righteous protector. It is little wonder that nationalists throughout the modern era emphasize the establishment of police states; overt nationalist regimes and the criminal

justice paradigm are cut from the same ideological cloth. ‘Society’ in the criminal justice paradigm is a nationalist construct.

Nationalism cannot exist in the absence of a belief that humanity is naturally subdivided, either biologically or culturally, into distinct breeds of varying quality; the assertion of the nation’s simultaneous moral superiority and susceptibility to contamination or extinction requires essentializing narratives. ‘Society’, like its counterpart the Nation, is also conceived in essentialist terms when defined by superiority and susceptibility; ‘society’ thus cannot include just any kind of person. Rather, membership in ‘society’ is qualified by culturally specific cues and symbols of belonging and superiority, which in turn paradoxically represent a threatened condition. Using the term “patriotism”, though admitting that there is little if any “difference, at least in effects, between patriot and nationalism”, Kateb (2000) writes:

“Patriotism is dedicated to preserving and expressing or asserting the group's identity in agonistic or competitive or antagonistic political deeds that are violent or threaten to become so. We the people are one unit matched against other unit”

‘Society’ in the criminal justice imaginary is likewise *one unit matched against another unit*; ‘society’ and lawbreakers are figured as inherently hostile social forces. Thus, the criminal justice paradigm frames the concept of society in exclusionary and nationalistic terms. That is, despite liberal taboos against exclusion, ‘society’ is conceptually primed to be associated with a national identity, be it ethnic, racial, or otherwise. Groups which have been elevated in national discourse as founders, liberators, or civilizers—and lionized as such in monuments, holidays, and public education—are the most undisputed members of ‘society.’ These are the groups criminal justice institutions primarily defend from ‘crime.’ All other groups are suspect, at best

provisional and precarious members of ‘society,’ and worst perennial outsiders bereft of either the State’s protection or mercy.

To sum, nationalism defines a favored group in paradoxical terms of superiority and susceptibility, thereby distinguishing them from groups framed in similarly paradoxical terms of inferiority and threat. The goal is the authoritarian political structures necessary for mobilization of state violence. The criminal justice conceptualization of ‘society’ follows the same logic: ‘society’ is conceived of as inherently superior and innately vulnerable, distinct from the criminal, and thereby assumed dependent upon state violence to control ‘crime.’ This legitimates an authoritarian segment of the political order in the form of a criminal-legal system. In short, the ‘society’ of criminal justice is the “nation” of the nation-state, that is, the group which dominates the ideals of national identity. The overriding criminal justice goal of state dominance is not, and cannot be, authentically identity-neutral; rather, the legalized violence of criminal-legal institutions reinforces one group’s dominance over national identity and thus reinforces that group’s position within a social and economic hierarchy. The following section explains why the prison, as a symbolic and actual expression of state dominance, is a crucial mechanism of nationalism which evades taboos of identarian exclusion.

### **Prison Disproportionality: A Nationalist Outcome**

To further understand the nationalistic logic of the criminal justice paradigm, and thus why prison disproportionality can be interpreted as a nationalistic outcome, I want to first take a minor detour and consider a different, though related, instance of nationalistic logic in a legal context: the *Brown v Board* cases. The arguments of the Topeka Board of Education in 1953

contain many of the same elements of nationalism contained within the criminal justice paradigm that is so widely accepted today.

In the first *Brown v Board* case, the Supreme Court concluded that racial segregation of schools, especially under the sanction of law, was symbolic of racial inferiority and damaging to equal opportunity in education, thereby violating the principle of moral and legal equality guiding liberal democracy (Kluger 2011). Chief Justice Warren (1954) wrote, “to separate [minority children] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone” (4). The Topeka Board of Education criticized the Court for arbitrarily dismissing racial differentials in student performance which, they claimed, necessitated segregation to properly address. The inferiority of Black students, the Board argued, would not only place them at a disadvantage vis-à-vis white students but also imperil the performance of white students, who would receive less attention as teachers struggled to equalize the classroom (Stephan 1978). The Court countered that objective appraisal of student performance was impossible under segregated conditions that psychologically disadvantaged Black students. Thus, justifying segregation based on student performance under segregated conditions required circular reasoning (Kluger 2011, 504). The “Separate but Equal” doctrine was declared unconstitutional and at least one conspicuous realization of white-nationalism was delegitimated. Among the many legacies of the *Brown* decision was an articulation that institutional evaluations of individuals are unreliable unless everyone is assured equal opportunity.

The logic of the criminal justice paradigm and the arguments of the Topeka Board of Education in 1953 bare remarkable similarity; both represent a perspective that equates

segregation with defense of a prioritized identity. Like the Board, the criminal justice paradigm proceeds as if all individuals have roughly equal opportunities and social standing, despite ample evidence to the contrary. When members of a disadvantaged group run afoul of the law, the instance is constructed through the criminal process on the basis of individuated culpability, meaning that sociological analysis is typically excluded. When patterns of ethnoracial disproportion are observed in prisons, individual instances of lawbreaking are aggregated into a “differential offending” hypothesis which prompts researchers to uncover social and environmental factors, typically unrelated to criminal-legal institutions specifically. Similarly, the Topeka Board of Education was willing to acknowledge inequality to some extent, even lamenting the disadvantage of Black students, yet it remained unwilling to consider that its own practices were the primary contributor to Black inequality in education. As an institution of white-nationalism, the Board, over and over again, asserted two interrelated ideas: that it was morally in the right and that “students,” implicitly white by default in the Board’s mind, were existentially threatened by integration. The defining features of nationalism, superiority and susceptibility, guided the Board’s *legally* defeated yet still culturally resonant arguments. Statistics show that American schools are just as segregated today, if not more so, than they were 4 decades ago (Garcia 2020). A nationalistic defense of ‘students’ reemerged from the ashes of sanctioned segregation and wielded to abolish integrated bussing, establish charter schooling, uphold housing segregation through racially neutral zoning laws, and mount sustain opposition to reformulating the ways in which schools are funded.

The Court’s articulations in *Brown* are just as relevant to a defense of prisons today as they were to schools in the 1950s. Prison are institutions of segregation which separate individuals from ‘society’ based on an institutional evaluation of their character, which takes

place under conditions of blatant inequality. These criminal proceedings are tainted not only by the material inequality of American society but also, per the logic of *Brown*, by the psychological impact of an ethnoracially disproportionate prison population which engenders a sense of inferiority among groups who are consistently overrepresented in prisons and jails. A “separate but equal” doctrine comparable to that which governed school segregation justifies incarceration: individuals are treated as if they each have equal opportunity to avoid punishment without considering the social contexts in which they make decisions.

Such an argument is unlikely to be taken seriously by authorities, however. By emphasizing individuated moral culpability based on dichotomous reasoning, the criminal justice paradigm reproduces a narrative of moral agency; lawbreaking is construed as an individual moral failure to adhere to the law. This reasoning, however, excludes analysis of how individual choice may be structured by social and economic inequalities. While knowingly violating the law is a choice, our range of perceived choices is not entirely within our control; individual judgement unfolds under social complexity and various exigencies which we do not ourselves author. Even under the best circumstances, we can never know the full range of choices available to us and the possible consequences of those choices. Diunital reasoning, as opposed to dichotomous reasoning, accepts that individuals are, at once, both responsible for their choices and lack control of the environments in which choices are made. This idea is expressed in the restorative justice axiom of “200% true”: it is 100% true that we make choices, and 100% true that our choices are impacted by our circumstances. However, diunital reasoning is incongruent with the nationalist conception of ‘crime’ as an injury to ‘society,’ which establishes the offender and society as binary opposites and justifies their segregation on grounds of their difference.

Thus, the emphasis on individuated culpability stemming from the definition of ‘crime’ not only decontextualizes individual behavior but also decontextualizes patterns of ethnoracially disparate criminal-legal outcomes. For example, the findings of the first chapter show that the “flipside” of ethnoracial and indigenous overrepresentation in prison is the conspicuous *underrepresentation* of groups historically associated with the ideal national identity. The following chart shows the least represented groups in each country’s total prison population, where 100% would represent perfect proportionality between each group’s share of the total and incarcerated population:

Country	Group	Representation
Ireland	Irish Citizens (non-Traveller)	73%
Switzerland	Swiss Citizens	43%
Australia	White and other	74%
Greece	Greek Citizens	40%
Finland	Fins	86%
Norway	Norwegian Citizens	75%
Latvia	Latvian	71%
Canada	Caucasian	75%
Italy	Italian Citizens	74%
France	Secular-Christian	80%
England and Wales	White	85%
New Zealand	European Descended	46%
United States	White (non-Hispanic)	70%
Spain	Spanish Citizens	83%
South Africa	White	20%
Brazil	White (Branco)	65%
Germany	German Citizens	90%
India	All castes, Hindu (Hindi Speaking)	76%
Saudi Arabia	Saudi Citizens	80%

**Table 1. List of countries showing underrepresentation in prison.**

What can be surmised from the list above is that unambiguous members of the socio-economically dominant national identity experience significantly lower risk of incarceration across a wide variation in national conditions. By “unambiguous” members, I mean to suggest

that perceived membership in a dominant national identity is qualified not only by ethnicity and race but also class status: poor members of the dominant national identity may be perceived as somehow defective or dangerous and thus only provisionally belonging/deserving despite their ethnic or racial status. For example, the poor whites in the United States have at times been “racialized” to explain their apparent economic failure and thus socially marginalized based on cues of poverty such as dress and vernacular (Allen 2009). To overcome this barrier to national belonging, poor members of the national identity may act as a vanguard of nationalism and adopt explicitly exclusionary positions on immigration and multiculturalism (Winlow et al 2017). However, this nationalist vanguardism only partially substitutes for unambiguous membership in the dominant group as cues of economic difference may still be interpreted as threatening by police (Weitzer 1999). Hence, prisons are disproportionately comprised of the poor while also disproportionately confining members of disfavored ethnic and racial groups, who may be outsiders both economically and socially.

Another important aspect of the criminal justice paradigm obfuscates its nationalist logic: an “economy of violence” (Wollin 1960). When people see the word “nationalism” they may, based on the gruesome history of recent centuries, reasonably think of the word “genocide.” Genocide is the ultimate expression of nationalist logic, a self-defeating effort to resolve the inherent tension of the nation’s besieged identity by exterminating the threats which define it. Yet criminal-legal institutions, perhaps especially in liberal regimes, are wary of “excess” violence and the way it may suggest illegitimacy and spur resistance. In few cases, save perhaps contemporary America, criminal-legal institutions do not seem to be perpetrating something akin to genocide (Whitehorn 2014). Of course, many unambiguous genocides are only exposed after the fact, suggesting that nationalist regimes intend to hide, rather than celebrate, this aspect of

their worldview. What this suggests is that although nationalist logic terminates at the point of genocide, a perception of “excess” violence is counter to the nation’s narrative of moral superiority and the purported necessity of the nation’s violence. Thus, nationalism utilizes an “economy of violence,” that is, a “scientific” and politically strategic escalation and de-escalation of violence so as not to instigate cognitive dissonance among the nation’s committed membership or resistance among the nation’s subordinated outsiders (Wollin 1960, 198). The prison represents a refined economy of violence, in which the some of the ugliest consequences of State dominance are safely hidden behind concrete walls and a narrative of individual wrongdoing (Foucault 1973).

So far, I have argued that ethnoracial and indigenous prison disproportion is an outcome amenable to the base-line nationalism of contemporary nation-states, which are, categorically speaking, organized around an idealized national identity. Disparities in incarceration both symbolically and materially reinforce the dominance of an idealized national identity, in a comparable fashion to the school segregation of the Jim Crow era in the United States: prison disproportion, through the lens of the criminal justice paradigm, is interpreted as the consequence of fair and dependable institutionalized evaluations of individual character and segregation via the prison is interpreted as defense.

The following section considers how the nationalistic logic of the criminal justice paradigm may unfold in the “street level bureaucracy” of modern policing. Importantly, the criminal justice paradigm acts here more so as a conditioning mechanism rather than a causal mechanism: the paradigm does not control the behavior of police but acts as a lens with which to interpret a complex world. These interpretations will tend to bring groups perceived as outside the bounds of national belonging into disproportionate contact with police investigations.

## The Reasonable Officer and the Criminal Justice Paradigm

This chapter began with a brief walk alongside the reasonable officer as they patrolled the target-rich environment of urban modernity. The reasonable officer, surrounded by crime, has everywhere and thus nowhere to look; therefore, they depend upon sensory cues to determine when, where, and how to use their discretion. They search for threats based on appearance, behavior, and patterns; the reasonable officer inevitably profiles potential targets. Nonetheless, they abide by taboos (due process) and rituals (procedures) which preserve the purity (legitimacy) of their violent profession. Their reliance on sense and profiling is a source of constant temptation to interpret possibly misleading cues—skin color, dress, trivial behaviors—as credible threats. Yet they also know policing is often about instincts rather than outright evidence—probable cause is more often discovered than simply encountered. Should they employ discretionary violence, the reasonable officer knows they must remain “reasonable” and avoid excesses.

The “reasonable” officer on patrol inevitably finds themselves riddled with tension that could very well overcome a mere *human* officer in the same circumstances. Fortunately, the reasonable officer, as an abstract construct of judicial imagination, lacks many of the human frailties which would tempt human officers to discrimination and overreaction. Notwithstanding these challenges, even the imaginary reasonable officer situated in a thought experiment reveals the complicated charge of policing replete with uncertainty. However, at least some of that uncertainty is resolved by the criminal justice paradigm’s nationalistic logic.

As previously covered, the reasonable officer faces many challenges but one of the most acute is the interdiction of “invisible” crimes—possession of contraband and warrants. These are

crimes for which there is little if any outward indication, meaning that the reasonable officer must rely exclusively on subtle cues, patterns, and patience. The reasonable officer is not facing a new challenge; since the inception of centrally organized and uniformed police, the patrol has constituted a hunt for hidden and obscured infractions. For example, Louis XIV's police were instructed to root out moral violations of various kinds that required all manner of deception and intrusion to discover, ranging from cohabitating unmarried couples to illicit protestant bibles. The infamous slave patrols—forerunners of modern American police—similarly relied upon subtle cues to distinguish enslaved bodies from free bodies, often rounding up *any* Black body because the job of discerning escapee status was virtually impossible. Police work has *always* meant uncovering what others prefer to hide and has always been prone to mistake. The problem was then and is now, where to look.

The problem of where to look brings with it another problem: who to protect. After all, the defense of 'society' from 'crime' is the overriding mission of police; the reasonable officer is commanded to "protect and serve." However, who to protect from 'crime' can be just as unclear as where to look for lawbreaking. Sometimes the goal of protection is obvious. For example, an incapacitated and clearly wounded child laying on the street is very likely to elicit a protective response from all but the most negligent officer. However, this type of clarity in policing is exceedingly rare. Take for example the cases of Charleena Lyles, Justine Diamond, Andrea Thomas Churna, Isaiah Brown, Quintonio LeGrier, and Ma'Khia Bryant, all shot and killed by police in the last few years after calling 911, sometimes repeatedly, for help. In each of these cases, officers were unable to determine who to protect from whom, and the person requesting aid lost their life. Response calls involving ambiguous threat are common in policing—so common in fact, that American police are instructed to assume the presence of threat *any* time

they are called to a scene, even when encountering the person who themselves requested their presence (Flin et al 2007).

On the patrol, however, the challenge of protecting ‘society’ is simplified by the criminal justice paradigm. In the absence of any actual person requesting aid, police may fall back on protecting ‘society,’ which resembles the idealised national identity. Cues—skin tone, dress, behavior—which signify membership in the nation also indicate obedience, thus providing patrolling officers with a sense of where *not* to look for ‘crime.’ Instead, officers can focus their attention on deviant signals, cues, or behavior. Does the reasonable officer also rely on a ignore/focus binary to navigate the target-rich environment? If they did not, the reasonable officer would be just as paralyzed on patrol as if they refused to engage in profiling; profiling some *and ignoring others* define the patrol, and the boundary separating the two modes of perception is based on assumptions of threat; absent physical infirmity, the least threatening individual in any society is the one who most comports with the ideal national identity. Thus, the police patrol is as much a practice of ignoring as it is profiling, and both actions are conditioned by a sense of who belongs to the ideal national identity.

So, ignoring is central to police work and this is a dilemma for the reasonable officer: is it reasonable to assume that someone is law-abiding based on their identity, especially given the many “invisible” crimes that officers must interdict? However, the reasonable officer may not have to struggle with this question due to the way in which patrols are distributed. The norm of “selective distribution” in policing means that officers are concentrated in “high crime” areas, which are typically also areas where individuals resembling the ideal national identity are a relatively rare sight. Walton (1958) explains the concept of selective distribution:

“As Chief of Police of a city containing 26 radio car districts, you have learned over the years that most of the crimes, most of the demand for police service, most of your police problems, occur in districts K, P, and X. As an alert police administrator, do you spread your patrol force equally over these 26 radio car districts? Of course not! Just like the fisherman who drops his line into the pools which past experience shows will produce the most trout, so do you concentrate your patrol strength in the districts which will be most productive in terms of reduced crime, criminals captured, calls answered, and community service” (165).

Selective distribution is a criminal justice mainstay across the world, and, as Walton argues, the practice is seemingly driven simply by “experience” of where crime is more likely to occur. The problem Walton overlooks is that police were never in any sort of “original position” with which to objectively build this knowledge. Policing enters the modern world with a preconceived distinction between ‘society’ and outsiders built into the very foundation of its guiding paradigm. Police administrators in Walton’s scenario may use identity-neutral statistics, but they still employ criminal justice concepts, which are laced with exclusionary significance. Police administrators are thus likely to assume “criminals” congregate in communities already outside the bounds of the ideal national identity well before implementing selective distribution. Thus, selective distribution only ratified the preconceptions endemic to policing, just as “predictive policing” has done so again more recently (O’Donnell 2019).

“The function of ideology”, writes Robert Cover (1986), “is much more significant in justifying an order to those who principally benefit from it and who must defend it than it is in hiding the nature of the order from those who are its victims” (1608). The point here is not to suggest that some sort of mind control or false consciousness emanates from the criminal justice paradigm and overtakes the rationality of law enforcement. Rather, I have sought to highlight the inherent challenges of police work and how the nationalistic and exclusionary logic of the criminal justice paradigm provides a short-cut for police work’s inevitable dilemmas. The criminal justice paradigm rationalizes “selection bias” in police work, without which, policing

would be a paralyzing affair. Similarly, socioeconomic inequality contributes to a corresponding “selection bias” in criminal involvement—marginalized groups differentially select lawbreaking as a survival mechanism. Both processes of selection bias reinforce a prevailing national-identity imaginary composed of narratives about who belongs and who is a threat, which in turn conditions the selection bias utilized by police. The process is cyclical, meaning that “criminal justice”, as a set of institutionalized evaluations of individual moral worth, is tainted with bias at every level of its implementation. Prison disproportionality is thus properly interpreted as outcome of institutionalized and economized nationalist State violence.

## **CONCLUSION**

The “reasonable officer”, or any officer for that matter, is a conscript of nationalism, whether they realize it or not. The chapter began by considering how a “subaltern’s criminology” specified the differential impact of criminal-legal activity on subaltern communities. The criminal justice paradigm justifies the targeting and fragmentation of colonized groups; I made a case for generalizing this dynamic beyond settler-society contexts. It was still necessary, however, to theorize why criminal justice was invariably exclusionary under such differing national conditions. I approached this puzzle by considering the various ways in which ‘crime’ has been defined historically, determining that the definition of ‘crime’ as an injury to society—the foundation of the criminal justice paradigm—is a nationalistic worldview which equates ‘society’ with a dominant and idealized national identity. Criminal-legal actors may embrace the nationalism inherent to the criminal justice paradigm to varying degrees—certainly,

there can be resistance from within criminal-legal institutions to criminal justice’s exclusionary predisposition. However, the nature of policing invites exclusionary logic and rationalizes selection bias; it is inherently “unreasonable” work. The seemingly common-sense binary distinction between ‘society’—implicitly the ideal national identity—and the criminal—implicitly a threat to the ideal national identity—conditions the necessary “profiling and ignoring” police *must* engage in, therein significantly heightening the chance that police rely on cues of racial, ethnic, or indigenous difference in discretion. Alongside criminogenic socioeconomic inequalities, the exclusionary predisposition of criminal-legal activity produces a cycle involving ethnoracial disproportion in prisons. In other words, the conventional explanation for prison disproportionalities—that differential criminal involvement combines with differential selection—is not wrong, per se, but rather overlooks that this process is nationalist and thus counter to the very principle of the rule of law. “Criminal justice” is the rule of the nation, not the rule of law, and this is empirically observed in the character of prison demographics worldwide.

The following chapter considers ways in which we might address the nationalism of criminal justice in the United States. The implications of my argument so far suggest that the abolition of “criminal justice” may be necessary in order to promote equality and equity. However, I instead suggest an intermediary: the expansion of restorative justice-based institutions. I do not present restorative justice as a panacea or as utopian. Rather, I present restorative justice primarily as a “harm reduction” approach to American nationalism that, instead of merely reforming existing approaches to crime, can subtly reconceive the fundamental logic guiding government intervention in criminal disputes. While most analyses of “restorative justice” focus on the process and its intended outcomes, I focus instead on how ‘crime’ is

defined in a restorative context as “harm to persons”, and how this definition can empower inclusive democratic participation in to counter exclusionary nationalism. I will argue that a restorative definition of ‘crime’ can interrupt base-line nationalism as currently facilitated by the criminal justice paradigm yet do so in a way that minimizes resistance to accepting a plural and inclusive notion of national identity.

## 5

### REDUCING HARM AND REDEFINING ‘CRIME’

---

“Darkness cannot drive out darkness, only light can do that.

Hate cannot drive out hate, only love can do that.”

— Martin Luther King Jr., *Strength to Love*

### INTRODUCTION

Many of Martin Luther King Jr’s sermons have been reduced to platitudinal status. The quote that leads this chapter, taken out of the context in which it was written—*strategic*

resistance to white supremacy—may seem to some as innocuously suggesting that the antidote to hatred is love—that is, selfless rejection of rage and bitterness to embrace our collective being. Thus, King’s affirmation of love’s healing power, after decades of cooptation, seems uncontroversial despite in actuality being aimed directly at America’s greatest controversy: racial inequality (Sokol 2018). However, although now thoroughly “mainstreamed”, King’s (2019) reasoning—that injustice cannot be extinguished through emulating the unjust—has radical potential, particularly in the context of approaching ‘crime’.

Although King deployed this reasoning in a broader exhortation to love one’s enemies, my focus here is not “love” —that analysis has been done elsewhere, and more adeptly than I could hope to achieve (see Butorac 2018). Rather, for now, I want to think about “darkness.” It is the driving premise of criminal justice that the darkness of the human soul can only be contained by the more enveloping darkness of the State. For centuries, the overriding imperative of the criminal justice paradigm to defend ‘society’ from ‘crime’ has meant, with no small irony, that the State emulate the definitive feature of the “criminal”: the will to harm others. King proclaimed “darkness cannot drive out darkness”, yet this is the fundamental theory of the criminal justice paradigm: that darkness can indeed sequester—”drive out”—darkness.

As used throughout *Strength to Love*, the word “darkness” is paired with descriptions of hierarchical social relations; I read King’s use of the word “darkness” to mean, essentially, domination. I have argued that the overriding goal of the criminal justice paradigm is to assure State dominance and that this dominance is nationalistic, that is, proceeding on behalf of an idealized national identity. Thus, I find it to be no accident that King’s reasoning is at odds with the State’s logic regarding crime, although King himself never articulated this specifically; King intends to dismantle racial domination while the criminal justice paradigm is a crucial element of

that domination. Thus, with King’s reasoning in mind, the final chapter of this dissertation considers how to address the implicit nationalism of the criminal justice paradigm and its influence over American criminal-legal systems.

I began this dissertation by situating an observation of global ethnoracial and indigenous prison disproportion in a national debate about whether to reform or abolish the American penal regime. If my subsequent theory explaining this pattern is correct—that the criminal justice paradigm is inherently nationalistic and exclusionary—the obvious implication would be to abolish the American penal regime on grounds that it can never be made consistent with an authentic rule of law through liberal reform. Indeed, the criminal justice paradigm cannot shed its nationalistic logic without wholesale transformation; it is an inherently exclusionary worldview which contradicts the fundamental premise of equality under the law. However, I suggest a different approach than to attempt outright and immediate abolition.

Instead of outright penal abolition, I argue that the United States should greatly expand its reliance on “restorative justice”, an approach to crime that does not emphasize dominance as an antidote to dominance. This argument requires first, defining the mercurial notion of “restorative justice” and its fundamental concepts, and second, theorizing why restorative justice, and not abolition (or liberal reform), is the best solution to America’s nationalistic punitive regime. I do not present restorative justice as either utopian or a panacea for racial inequality. Restorative justice does not address centuries of racial capitalism or resolve root causes of crime. The expansion of restorative justice can, however, reduce the *frequency, intensity, and duration* of racialized legal violence—that is, racially disproportionate arrests and incarceration rates.

## **Why Not Abolish?**

Those familiar with addiction medicine may have noticed the criteria for harmful substance-use in the previous claim: “frequency, intensity, and duration” (McLellan 1992). This was intentional, as I interpret restorative justice in this chapter as “harm reduction” applied to a society long dependent, both psychologically and economically, on nationalistic legal violence. I do not oppose abolition on moral terms—based on my own theory, abolition is the normatively correct thing to do if we take a commitment to racial equality seriously. However, any strategy to address the future of America’s relationship with “crime” must consider the depths of the nation’s dependence on criminal justice reasoning.

I argued in the previous chapter that the criminal justice paradigm implicitly equates ‘society’ with the group currently dominating prevailing ideals of national identity, and that these identarian cues condition the behavior of police by alleviating the inherent dilemmas of police work. The consequence is racial differentials in police-initiated contact and a greater likelihood that members of the favored group equate police with protection and non-harassment (Alberston and Gorey 2018). At the same time, the criminal justice paradigm produces a sense of threat within the nationally dominant group by facilitating the interpretation of identity-difference as indicative of danger (King and Wheelock 2007). Moreover, the criminal justice paradigm facilitates the interpretation of crime as disconnected from the character and structure of society, therein reinforcing a sense of moral superiority within the least criminalized group. Thus, in providing a sense of protection, fairness, and superiority, the criminal justice paradigm induces a paternalistic dependence on State dominance.

There are essentially two strategies with which to approach a harmful dependence: abstinence and harm reduction. The most familiar is abstinence, the total cessation of a harmfully

dependent relationship. Abstinence most correlates with the abolitionist view, that the United States must go “cold turkey” on criminal justice. One of the known risks of the abstinence approach in the context of substance-use disorders is that it can backfire by alienating the person seeking help, leaving them without a coping mechanism, and thus reinvesting them in their dependency (Henwood et al 2014). That is, the “all-or-nothing” of the abstinence paradigm can spur resistance which may in fact increase harmful behavior, especially under stressful conditions (Mabit 2001).

This critique of the abstinence paradigm applied to abolitionism is meant to suggest that trying to pull the United States too far, too fast, in the direction of racial justice risks reconstituting a sense of dependence on the criminal justice paradigm. However, in highlighting this risk, I am not suggesting mere “reformism” as an alternative to abolition. Criminal justice reformers make a similar argument—that outright abolitionism will backfire—to support maintaining and re-regulating existing punitive institutions (Ben-Moshe 2013). If the core reasoning driving the criminal justice paradigm exclusionary then it is beyond reform; though well-meaning, liberal reforms merely re-legitimate its implicit nationalism. However, if King is correct that attempting to destroy that which intends to destroy me only multiplies destruction, then my effort to abolish—*destroy*—the American penal regime may only escalate or relocate conflict rather than resolve it.

Hence, I look to restorative justice as a “non-reformist reform” that can meaningfully reduce the harms associated with the American penal regime without instigating widespread resistance in those who believe police and prisons keep them safe. In fact, as I will detail, this cultural shift is already underway. What needs to be understood is that the shift from criminal

justice to restorative justice is essential to American racial justice. The following analysis explains why.

## **WHAT IS RESTORATIVE JUSTICE?**

No one can claim to definitively answer the question “what is restorative justice?” Rather, “restorative justice” currently has no single agreed upon definition or set of practices (McCold 1998). Sometimes restorative justice is described as a movement “within criminal justice” (Van Ness and Strong 2014), and at other times it is described as an alternative to criminal justice entirely (Zernova and Wright 2013). This sort of disagreement, as I hope to make clear, speaks to the *politics* of restorative justice, that is, the capacity of restorative justice ideas to shift the locus of power in disputing processes and beyond by legitimating “stakeholders” in relation to ‘crime’. Thus, any proposal to “expand restorative justice” must therefore describe precisely what is meant, especially in terms of principles.

Many analyses of restorative justice focus primarily on practices and desired outcomes. I instead focus more so on principles, specifically how the concept of restorative justice may include redefining the ‘crime’ concept and distributing power more democratically during disputes. As my theory of prison disproportionality attributes a significant portion of the problem to the definition of ‘crime’ as lawbreaking, I argue that the restorative justice proposal that ‘crime’ should be analyzed primarily in terms of harm most directly addresses the underlying nationalism motivating and legitimating criminal-legal systems in the US. In short, my understanding of “restorative justice” places it in clear opposition to “criminal justice”. However, restorative justice practices have been adopted by some criminal-legal systems as a tactic to address their own diminished legitimacy in the face of racial disparities. This presents an

interesting opportunity to undermine the criminal justice paradigm and its nationalistic logic from within.

Before making this argument, I first need to first clarify my interpretation of “restorative justice”. I propose that “restorative justice” encompasses approaches to disputing premised on non-dominance, rejection of violence, equal participation, and the deliberative production of truth about a specific instance of harm, all intended to reconcile differences. These characteristics are evident in restorative justice’s historical development.

### **“Paradigm Shift” and Power Shift**

The first modern efforts at a “restorative justice” approach emerged in the 1970’s from within criminal-legal institutions themselves. A Canadian probation officer, Mark Yantzi, having grown frustrated with a group of repeat petty vandals, determined that the conventional sanctions allowed by the Ontario justice system were both ineffective at deterring future offending and did little for victims. Yantzi, who claimed to have been motivated by notions of Christian forgiveness that he found absent in his profession, took it upon himself to find an alternative approach that would interrupt the cycle of harm. He arranged for the offenders and the victims, local small business owners and two churches, to begin a negotiated settlement in lieu of a standard criminal process. Yantzi’s objective was 1) to impress upon the offenders the harm they were causing 2) to meaningfully address the harm itself. The victims were satisfied with the negotiated restitution and the teenage offenders seemed genuinely remorseful; the experiment was deemed a success and the local court agreed to probation instead of jail time. This eventually led to the establishment of the first victim-offender reconciliation program, in Kitchener, Ontario, with support of the Mennonite Central Committee and local probation department.

Cities throughout North America, also frustrated by repeat offenders, followed suit, beginning what eventually came to be known as the “restorative justice” movement (McCold 1999). By the late 1990’s, this movement had been acknowledged by the criminal-legal mainstream, such as the Canadian Supreme Court:

“In general terms, restorative justice may be described as an approach to remedying crime in which it is understood that all things are interrelated and that crime disrupts the harmony which existed prior to its occurrence, or at least which it is felt should exist. The appropriateness of a particular sanction is largely determined by the needs of the victims, and the community, as well as the offender. The focus is on the human beings closely affected by the crime” (*R. v. Gladue*, paragraph 71).

Zehr (2015) is credited as among the first to succinctly theorize “restorative justice” as a distinct approach to crime that differed principally from the conventional criminal-legal approach. The central tenet of Zehr’s formulation was that in order to facilitate a dialog between victims and offenders that would produce a meaningful result for both parties, ‘crime’ would need to be analyzed primarily in terms of harm rather than lawbreaking. All restorative practices, from mediation to healing circles and otherwise, are rooted in the view that “crime” is first and foremost analyzed in terms of the specific and articulable harm done (Marshall 1999). The objective of these practices is not to punish but to repair, and the rationale of repair is simply the acknowledgement that, again to use King’s words, “darkness cannot drive out darkness” —harming the offender through incarceration does not heal the harm done but only multiplies the harm experienced. Accordingly, restorative justice centers the direct victim, rather than the State, in the process and focuses the dialog on actual lived experience rather than abstract legality.

Thus, freed from the constraints of a formal criminal proceeding, the victim and offender can deliberate about how best to move forward—on agreed terms—from the harm that had

occurred, thereby “restoring” their wounded relationship to acceptable status. The State’s role in this process is to facilitate the dialog and provide a space for deliberation. For Zehr and other restorative justice theorists, these notions together constituted a “paradigm shift” in which ‘crime’ would no longer be primarily approached as mere lawbreaking but rather signify articulable and reparable harm (Elliott 2002).

Thus, restorative justice is based on a politically radical claim in light of this dissertation’s preceding chapter: that ‘society’ is not the primary victim of ‘crime’. The implication is that much of the authority government derives from the understanding of ‘crime’ as an injury to ‘society’ is unwarranted. This makes restorative justice as much a political project as it is a criminological one.

Nonetheless, restorative justice tends not be analyzed in terms of its political implications but rather its therapeutic and crime-reducing potential. In one notable exception, proponents of civic republicanism like John Braithwaite (2002) argues that defining ‘crime’ as a “violation of people and relationships”, as opposed to a “violation of the state, defined by lawbreaking and guilt”, logically engenders disputing practices based in deliberative democracy that can build civic virtues of self-governance and active citizenship. That is, redefining ‘crime’ from lawbreaking to harm shifts the locus of power away from bureaucracy and toward individual “stakeholders” who collectively participate in the restorative process and refine their civic capacity. Thus, Braithwaite contends, restorative justice represents a consummately political activity which redistributes power and changes society. This fits with my own historicization of the shift from defining ‘crime’ as sin to defining ‘crime’ as lawbreaking during the Enlightenment; redefinitions of ‘crime’ signify changes in power arrangements.

Perhaps precisely because notions of restorative justice imply a radically different understanding of State authority than that formulated through the criminal justice paradigm, “restorative practices” were coopted by criminal-legal systems during the 1990’s and 2000’s (McCold and Wachtel 2002). That is, some criminal-legal bureaucrats embraced “restorative justice” as an addendum to conventional punitive practices, preserving their control over the criminal process while at the same time appearing progressive (McAlinden 2011). In the words of Zehr (1985, 3), the criminal-legal system is “so impregnated with self-interests, so adaptive that it takes in any new idea, molds it, changes it until it suits the system’s own purposes”.

Restorative justice has been no exception to the coopting capacity of criminal justice. Hence a tremendous amount of disagreement surrounds the concept; a version that is politically tamed and made compatible with bureaucratic control over disputing is typically contrasted with a more politically inclusive conception which legitimates deliberative democratic control over disputing. These two conceptions need not be understood as a dichotomy but rather points on a continuum; bureaucratic administration and deliberative democracy are not mutually exclusive. Indeed, as Etzioni-Halevy (2013, 2) contends “although a powerful, independent bureaucracy poses a threat to democracy, it is indispensable to its proper functioning”. The “threat” posed by bureaucracy to democracy thus depends on the balancing of decision-making authority between the two processes (15). The distinction between the two ends of the “restorative justice” continuum is similarly conceived—one end favors the continued dominance of bureaucracy over disputing and the other end favors the democratization of the process. A “politics” of restorative justice, as embedded within criminal-legal systems, thus involves disagreement about the correct balance of bureaucratic and democratic control.

With a politically minded view of “restorative justice”, it becomes clear that its fundamental distinction from conventional criminal justice is its implication of a democratic, participatory, and inclusive distribution of decision-making authority. The warrant for bureaucratic control over the criminal process and the rationale to reimpose law through punishment are both undermined when ‘crime’ is defined as harm as opposed to lawbreaking. When ‘crime’ is defined as harm to actual living persons, ‘society’ is no longer positioned as a victim and government no longer positioned as society’s representative in disputes. Further, the role of government in disputes logically shifts from one of domination to facilitation—that is, the government’s role is to aid disputants in self-governance (Richards 2011). Thus “restorative justice” poses a radical challenge to the arrangement of power currently overseeing the American approach to crime.

So, what is restorative justice? In short, authentic restorative justice proceeds from a definition of ‘crime’ as harm to persons and their relationships. It is this conceptualization of ‘crime’ which I argue can disrupt the implicit nationalism of the criminal justice paradigm. That is, I am proposing that expanding restorative justice constitutes some degree of “transformative justice”: the dismantling of violent and repressive structures in social systems (Daly 2001). However, at this point, “restorative justice” may sound utopian and appear as a “cure-all”, which it is not. Indeed, I will propose restorative justice as a method of “harm reduction” rather than a panacea, at least in the short term. Notwithstanding this limitation, if restorative justice is to be taken seriously as way to at address racial injustice in the United States, we must face its several shortcomings.

## **Limits of Restorative Justice**

So far, I have highlighted the political implications of restorative justice, which can be summed as the legitimation of the redistribution of decision-making authority in disputing based on the redefinition of ‘crime’ as harm to persons. I will further argue that restorative justice has political implications beyond contexts of interpersonal dispute. However, before this argument is made, it is important to acknowledge that restorative justice, as I have described it, suffers from several significant shortcomings. These limitations include: 1) the practical and theoretical difficulty of defining “harm”, 2) the ”empathy gap”, and 3) the dependence of restorative practices on extant punitive institutions. These shortcomings are discussed and acknowledged as intractable; however, I will argue that similar shortcomings characterize extant criminal justice institutions as well. Expanding restorative justice does not necessarily mean a degradation of the American approach to crime from its current punishment-based implementation.

### **“Harm”**

Defining ‘crime’ as harm implies that “harm” itself is defined. “Harm” in the context of participatory, democratic deliberation will always be somewhat subjective and contested, as would be any resolution to “harm”. That is, defining ‘crime’ as “harm” means accepting that violations are difficult, perhaps impossible, to standardize. Indeed, this is the primary topic of a restorative dialog: coming to an agreed upon articulation of the harm done and how that harm can be meaningfully addressed; restorative justice invites the participants to create their own standard. However, there is no guarantee of this agreement, and any restorative practice runs the risk of breaking down mid-process, leaving the participants potentially worse off in terms of stress and time-spent than when they started. Therefore, restorative justice requires a neutral third-party mediator to guide the process. Yet this mediator does not control the process and

cannot guarantee outcomes; the participants are ultimately in control, and they begin their encounter in acrimony. Thus, it could be reasonably argued that restorative justice is far too indeterminant to implement on a wide scale.

Restorative justice *is* indeterminant; it may result in repair or further conflict. That is, restorative justice is fundamentally without guarantee, and for some this seems the antithesis of the rule of law (Keenan 2017). This concern is particularly acute when considering vulnerable persons who are unable or unwilling to advocate for their needs or may only engage in performative, inauthentic self-advocacy to please others. Restorative justice requires self-awareness, and victims of abuse and otherwise traumatized persons struggle specifically with a fragmented self-concept that may prevent authentic self-advocacy (Kubany et al 2003). Thus, the indeterminacy of restorative justice does not merely toggle between repair and conflict but also passes through the possibility of “false repair” which could reinforce diminished self-esteem. This constitutes a psychologically *ableist* bias in restorative justice that ought to be acknowledged.

However, conventional criminal proceedings and punishment cannot guarantee that victims feel satisfied or restored; indeed, there is significant pressure in criminal proceedings for victims to accept punishment as the only redress available, which poses a risk of false repair in criminal justice as well (Heffner and FeldmanHall 2019). Criminal proceedings are characterized by vocabulary, communication style, and ritual signifying moral certainty, all elements of what Derrida termed the “mystical foundation of authority” (Glendinning 2016). For example, norms of court room civility, the Anglo-formal communication style, formal and ritualized dress, gavels, bailiffs, calls to order—these social devices obfuscate the fact that legal interpretation is taking place; law, rather than being discovered and clarified, is constructed (Cover 1992). Thus,

the pseudo-scientific milieu of criminal proceedings invites a confusion between authority and certainty—wherever there is interpretation there is uncertainty, and law must always be interpreted to be applied, no matter how authoritative the tone of that interpretation may be.

Moreover, criminal proceedings, in limiting the analysis to questions of formal law, necessarily reduce lived experience to abstract concepts, therein enabling the appearance of certainty only by excluding the messy and morally ambiguous aspects of contemporary social life. The judgement of a criminal proceeding may be decisive; yet, the impact of that judgement on offender, victim, and society at large remains indeterminate. Therefore, the optimization of security, remorse, and resolution cannot be determined by a criminal court (Dorf 2003).

To sum, there is no necessary correlation between authority and certainty. The difference between a restorative justice process and a criminal proceeding is largely in displays of authority. Thus, while the indeterminacy of restorative justice cannot be dismissed, it should not be assumed that conventional criminal justice is a more authentically certain alternative. Neither should it be assumed that punishment will be perceived as a morally satisfying result for victims. Yet victims, sidelined as mere witnesses to the injury of ‘society’, are left little choice but to accept punitive outcomes.

### **The Empathy Gap**

Many advocates of restorative justice claim that restorative practices “nurture empathy” (Wallis 2014). For example, Daly (2006) writes,

“Restorative justice (RJ) is a set of ideals about justice that assumes a generous, empathetic, supportive, and rational human spirit. It assumes that victims can be generous to those who have harmed them, that offenders can be apologetic and contrite for their behavior, that their respective ‘communities of care’ can take an active role of

support and assistance, and that a facilitator can guide rational discussion and encourage consensual decision-making between parties with antagonistic interests” (1).

As Daly goes on to explain, this is a tremendous assumption about the empathetic capacities of persons sharing a recognizably “wounded” relationship. As related to the previous section, differing capacities for empathy—the “empathy gap” —is a significant contributing factor to restorative justice’s inherent indeterminacy. “Empathy” is the capacity to relate one’s own experience to that of another, and for a moment at least, see the world as the other sees it; this is most achievable when people share common ground (Sherman 1998). Thus, the empathy gap may be widest between individuals with differing backgrounds and differing norms of communication (Umbreit 2000). Indeed, a restorative process may build empathy, and may even build multicultural understandin; yet, it is unclear if we as a society have the moral right to demand something as intimate and subjective as “empathy” from any of its members, especially in the context of a violated relationship. Some critics of restorative justice thus suggest that institutionalized demands for empathy intrude on individual moral autonomy (Cohen 2019).

Indeed, for any institution to demand a specific psycho-spiritual consensus among persons is arguably oppressive, even if “the conception of the person as an autonomous agent is a cultural construction” (Gergen 2011). Restorative justice, when attached to expectations of empathy-building, can exert its own authoritarianism cloaked in the guise of therapeutics. This can include something akin to the punitive logic of rehabilitation, in which individuals who do not exhibit signs of institutionally expected moral growth are regarded as beyond redemption or inherently immoral. In point of fact, empathy is a set of cognitive and emotional skills (Elliott et al 2011) —there will always be some degree of gap between two person’s empathetic capacity, and thus expectations of roughly equivalent mutual capacity for empathy and moral unity in restorative justice are unfounded. Moreover, empathy and moral consensus are in fact

unnecessary to the restorative process, which aims for mere *agreement* about the harm done and the method of repair. An agreement about how to move forward can be reached while not agreeing on everything else—a restorative agreement can be motivated by self-interest and still be beneficial. At best, restorative justice is only an *opportunity* to engage and refine our empathetic capacity; the “empathy gap” is unavoidable.

Of course, there is little opportunity to exercise empathy in a conventional criminal proceeding (Dubber 2006). The criminal legal paradigm emphasizes emotional detachment, formality, and purported objectivity; empathy is antithetical to these values. Lawyers may attempt to evoke *sympathy*—that is, the legitimization of a person’s suffering— in jurors and contend with a “sympathy gap” when their clients are perceived as threatening or undeserving, and thus bereft of legitimate pain (Leon and Shdaimah 2015). However, empathy, which requires a threshold of intimate interaction and discussion, is unlikely in a setting which holds persons at an emotional distance, as objects of evaluation. Thus, although restorative justice is hampered by the empathy gap, extant criminal justice proceedings also reinforce an empathy gap and tend to deprive participants of the opportunity to employ empathy in decision-making altogether. Moreover, although restorative justice can devolve into an implicit authoritarianism when the process is attached to expectations of empathy-building and moral unity, criminal justice proceeds entirely on the assumption that an abstract entity conceived of as ‘society’ encompasses perfect moral unity and unanimously demands retribution. Thus, restorative justice is not a guarantee against domineering inclinations; however, criminal justice invariably reinforces the exercise of dominance while eschewing a capacity for empathy.

### **Dependence of Restorative Justice on Punitive Institutions**

It has been suggested that restorative justice may replace criminal justice entirely and end reliance on incarceration as a means to regulate society (Walgrave 2003). This is indeed a future possibility; however, for the time being restorative justice still depends on conventional punitive approaches as “back up”. The threat of punishment is a dependable incentive for offenders to participate in restorative processes, a way of getting them to the table, so to speak. Further, the inherent indeterminacy of restorative justice necessitates a “plan B”, in which disputes can be referred back to a criminal court in the event of an insurmountable breakdown in dialog between the participants. Thus, despite the rejection of conventional punishment in a restorative paradigm, the process itself still relies, practically speaking, on coercion and the existence of a conventional penal regime (Walgrave 2013).

That said, restorative justice has been shown to reduce reliance on incarceration in the United States and elsewhere while successfully addressing the needs of victims and holding offenders accountable (Sawatsky 2010; Sered 2011; Collins 2015). Programs such as *Common Justice*, located in Brooklyn and the Bronx, New York, now have a demonstrable record of diverting violent offenders from prison (Sered 2019). Further, the innovative approach of *Common Justice* is also associated with reduced recidivism among its participants, even among those associated with the most serious of crimes (Gonzalez 2019). However, we should be wary of uncritically accepting what Woods (2015) terms the “transformation assumption” of restorative justice—that is, the assumption “that RJ practices at the micro level can transform justice practices at the macro level, including the use of incarceration as punishment” (884). As Woods points out, restorative justice has been, so far, kept at the margins and is typically implemented in a way that does not threaten the supremacy of the criminal justice paradigm. Restorative practices have been primarily aimed at low-level youth offenders and used in

addition to conventional incarceration rather than to replace it. Further, restorative justice principles are not typically applied to drug offenses, which are an important driver of incarceration in the United States (890). All this suggests that actors have merely coopted the restorative paradigm in order to legitimate the criminal justice status quo. Furthermore, restorative justice, as a primarily micro-level intervention, can do little to address structural determinants of crime.

Taken as a whole, this overview of restorative justice's limitations should disabuse any "magical thinking" around its current implementations: as a concept, it has inherent limitations, and as a policy it has been marginalized and coopted, rendering it currently of little threat to the criminal-legal status quo. However, restorative justice nonetheless contains transformative potential. This is because discussion and implementation of restorative justice carries with it the opportunity to redefine 'crime' from its current exclusionary and nationalistic interpretation. Further, precisely because restorative justice has been coopted, criminal justice bureaucrats can no longer simply disavow restorative principles. Thus, the criminal-legal status quo must contend with restorative justice's stubborn political implications that an approach to 'crime' need not center the State and the 'society' it defends. As the example of *Common Justice* reveals, the concept of restorative justice has already resulted in novel redistributions of authority in criminal matters and altered the politics and discourse of city governments—albeit, to a limited extent. I begin by discussing the practical "harm reduction" qualities of expanding restorative justice before making a case for why restorative justice can "de-nationalize" conceptions of society.

## **RESTORATIVE JUSTICE AS HARM REDUCTION OF LEGAL VIOLENCE**

Criminal-legal systems exist in order to violently defend society; this State violence harms individuals, whether intentionally through punishment or inadvertently through proactive policing. Currently in the United States (and at least 18 other countries per the findings of the first chapter), this harm is distributed in an ethnically, racially, and indigenously disparate manner, highlighting systemic bias. Restorative Justice can be thought of as “Harm Reduction” applied to this racialized legal violence.

Harm Reduction is a concept typically applied to contexts of substance use, mental health, and sex work. Harm Reduction is based on diunital reasoning, that is, employing “and/both” logic rather than a “this/that” logic. As a result, it is offered as illuminating a third way between two dichotomous positions, such as forced abstinence and forced treatment to address illicit substance use (Inciardi and Harrison 1999). As a policy approach to risky and harmful behavior, Harm Reduction is based on the following principles: 1) Acceptance that people will engage in risky and harmful behavior, even when admonished, excluded, or punished for doing so; 2) acknowledgement that total elimination of risk and harm would be an ideal outcome; and 3) acceptance that ideal outcomes are rare due to the complexity of the problem. Therefore, 4) reducing the risk and harm of a behavior as much as possible is the most rational approach to problem behavior; and 5) harm reduction is best achieved through the meaningful participation of those experiencing the harm themselves (Marlatt 1996).

Expanding restorative justice constitutes a harm reduction approach to racialized legal violence that moves beyond mere incremental reform but stops short of total abolition. Restorative justice, I argue, can strike at one of the root causes of criminal justice disparities, the definition of ‘crime’ as an injury to ‘society’. In the preceding chapter, I argued that ‘crime as

injury to society’ is an implicitly nationalistic logic that in combination with the practical challenges of policing and criminogenic social conditions produces a “selection bias” in criminal-legal systems, leading to disproportionality in prisons. I have also argued that American society is currently “dependent” on this selection bias and that efforts to immediately abolish the criminal-legal approach risk mobilizing a countermovement that would further entrench the criminal justice paradigm. Expanding restorative justice, based on the definition of ‘crime’ as harm to persons, is theorized here as reducing the considerable harm inflicted by criminal-legal systems in the form of racial disparities. The following analysis uses criteria drawn from the Addiction Severity Index (ASI) to articulate the harm reducing potential of restorative justice as applied to the penal regime of the United States: frequency, duration, and intensity (McLellan et al 1992). Using the specific example of the Common Justice program based in Brooklyn, New York, I will explain how a restorative justice approach reduces the frequency, duration, and intensity of legal violence imposed on criminalized and economically isolated communities.

### **Frequency**

In the context of evaluating dependency on a potentially risky and harmful behavior, “frequency” refers to the numbers of times a specific behavior is recorded in a discreet period; frequency is the *rate* of engagement with risk/harm (McLellan et al 1992, 41). The exceptionally high yearly incarceration-rate of the United States, typically over 600 incarcerated persons for every 100,000 of the total population, represents a problematic “frequency” of incarceration, especially when considering the racial disparities of American criminal justice. As previously covered, one of the harms associated with this high frequency of incarceration is ethnically and racially disproportionate risk of incarceration, in which Black Americans in particular are significantly overrepresented. As the findings in Chapter 1 reveal, the overall incarceration rate

is not the cause of prison disproportionality. However, reducing the frequency of incarceration, if implemented in a race-conscious manner, can reduce the harm currently experienced by overrepresented groups. An effective way to reduce frequency of harmful behavior is through “replacement behaviors”, that is, alternatives to the harmful behavior that meet similar needs while reducing harm (Volkow 2010). Restorative practices represent just such a replacement behavior for harmful criminal-legal practices.

One of the driving rationales of the criminal justice paradigm is that State violence counters violence in the community, creating social stability which allows for democratic and economic participation. This belief in the stabilizing impact of State violence legitimates incarceration as a seemingly necessary and morally appropriate intervention in social life. Indeed, roughly 53% of convictions nation-wide are for violent offenses, further reinforcing the seeming necessity of incarceration (Sakala 2014). The United States now relies on incarceration more than any other country. Ideally, incarceration would be regarded as unnecessary—however, so long as violence remains a stable feature of American life, there will remain a case for continuing to rely on legal violence to manage illegal violence. One of the primary problems with this logic is that communities experiencing disproportionate illegal violence also experience disproportionate legal violence, and thus the harms of both will come to define life within that community. Sered (2011) writes:

“We cannot incarcerate our way out of violence. That is in part because incarceration is an inadequate and often counterproductive tool to transform those who have committed violence or protect those who have been harmed. It is neither the most effective way to change people nor the most effective way to keep people safe. Its standing in society is based largely on its role in protecting people from violence and those who commit it, but as a violence intervention strategy, it fails to deliver the outcomes all people deserve — at great human and financial cost. Increasingly, this message is being sounded not only by justice reformers, but by crime survivors themselves” (4).

The organization Common Justice offers a “replacement behavior” for the legal violence of incarceration routinely employed to counter illegal violence in the community: restorative justice. In partnership with local courts, prosecutors, and law offices, Common Justice diverts violent offenders in the post-plea stage to a restorative process in which they enter mediated dialog with victims. The basis of the dialog, and its legitimation as a policy, is an understanding of ‘crime’ as being primarily harm done by one person to another, as demonstrated by articulable bodily, property, and relational injury (Sered 2019, 3). The range of accountability measures for offenders may include “restitution, extensive community service, and commitments to attend school and work—while supervising their completion of the 12- to 15-month intensive violence intervention program. Responsible parties who successfully complete both their commitments to those they harmed and the violence intervention program do not serve the jail or prison sentences they would otherwise have faced” (Common Justice).<sup>15</sup> Importantly, accountability in this process is driven by the articulated needs of victims, in stark contrast to the more passive role of the victim in a conventional criminal proceedings. Offenders may also be connected to social services and drug and mental health treatment options to address the social harms they have endured. “90% of victims given the choice between incarcerating the perpetrator of violence or participating in Common Justice opted for the latter” (Jones 2020).

Since its inception a decade ago, Common Justice has diverted hundreds of persons from prison while maintaining exceptionally high rates of victim satisfaction (Sered 2019). As Common Justice operates in a majority Black American community beset by criminogenic conditions, their effort demonstrates a way to directly address the frequency of racially disproportionate incarceration in the communities they serve. An expansion of the Common

---

<sup>15</sup> Available from [https://www.commonjustice.org/common\\_justice\\_model](https://www.commonjustice.org/common_justice_model)

Justice model could conceivably reduce the frequency of racially disproportionate incarceration nation-wide. Common Justice, as a partnership with government, gives the State a “stake” in the process, thereby reducing the risk of resistance among state-actors who may otherwise pose a considerable barrier. Furthermore, in avoiding an explicit discourse of abolition, while at the same time acknowledging and addressing the issue of violence, Common Justice diminishes the perceived necessity of incarceration without instigating a community backlash.

### **Duration**

In addition to frequency, the duration of harmful behavior is a primary criterion for evaluating dependence and the potential for risk (McLellan et al 1992, 43). For example, engaging in risky behavior for a shorter duration reduces the likelihood of harm. Currently, the United States is known for exceptionally long durations of offender involvement with the carceral state, including lengthy prison sentences and periods of probation. The harms of extended exposure to the carceral environment manifest at both the individual and community level. Among the durational harms of incarceration to the individual is reduced life expectancy (Patterson 2013). Among the durational harms to communities are social fragmentation, dislocated families, and economic depression (Chesney-Lind and Mauer 2003).

Common Justice provides an intervention at typically far reduced duration compared to that of conventional criminal justice. The Common Justice dialog process occurs over a matter of weeks and subsequent monitoring of offender accountability (and victim satisfaction) lasts 12 to 15 months (Sered 2019). In comparison to incarceration and probation for violent offenses, these time periods are considerably shorter, and evidence continues to accrue that the benefits of the restorative intervention, such as reduced recidivism and victim satisfaction, continue for years

after (Sherman et al 2015; Sered 2019, 60). Thus, whereas criminal-legal interventions in the United States are characterized by lengthy duration, which compounds harm to individuals and communities, the Common Justice approach seems able to address violent offenses with far reduced duration, and thus reduced risk of direct and collateral harm. Expanding this approach could lessen the duration of State intervention in social relations, which under the current criminal-legal model is associated with significant risk of harm, especially for Black and brown Americans experiencing poverty.

### **Intensity**

“Intensity” in the context of evaluating dependence is the quality and character of engagement with a risky and harmful behavior; “intensity” refers to the extent of focus applied to a behavior and the extent that focus excludes the possibility of other behaviors (McLellan et al 1992, 61). Behaviors can be both frequent and of lengthy duration, yet also engaged in at a trivial level, limiting the potential harm. Thus, “intensity” is a crucial criterion for evaluating behavioral risk. For example, using alcohol is a risky behavior, however the risk magnifies significantly according to dose.

Unwanted contact with criminal-legal systems—be it arrest, adjudication, incarceration, or post-sentence monitoring—is an exceptionally intense experience, and those arguing otherwise have been exceptionally lucky, inured to legal violence, or have never experienced this unwanted contact directly. In other words, there is not a truly “low dose” of unwanted contact with a criminal-legal system, especially if that contact is perceived to have been driven by prejudice (Epp et al 2014).

Criminal justice contact is associated with a detrimental psychological impact, up to and including trauma, especially for people that feel unfairly targeted because of their identities (Sugie and Turney 2017). Furthermore, as Feeley (2017) contends, the criminal process, at every stage, constitutes “punishment” in the form of costs, both material and psychological, irrespective of a court’s final determination. Thus, the criminal process is intentionally “intense” so as to unambiguously demonstrate State dominance. The intensity of the criminal-legal approach is thus twofold: it likely constitutes an intense experience and relies on intentionally intensive demonstration of State power. Criminal-legal professions, such as policing, are also “intense” in that they demand a high level of personal commitment to the institution and produce solidarity based on shared experiences of this intensity (Herbert 1998; Rose and Unnithan 2015).

The prison is perhaps the most intense of the criminal-legal contexts, a zone of (attempted) total control over, in Foucault’s (1973) words, the “body of the condemned”. Indeed, there are varying levels of restrictions ranging from minimum to super-maximum and finally to the infamous Solitary Housing Units (SHU), the latter known for extreme adverse psychological and physical impacts (Arrigo and Bullock 2008). Thus, it would be an overstatement to say there is no range of intensity whatsoever in incarceration; indeed, the SHU is punishment within punishment. However, in comparison to a restorative justice dialog and subsequent accountability monitoring, which oversees activities the offender has explicitly consented to, the “intensity” of restorative justice and criminal justice are not of the same order. Typically, “clients” of Common Justice—offenders—engage in the restorative process while under release and remain so as long as they participate in the process (Sered 2019, 77). That said, the underlying coercion here is obvious—another reason to view restorative justice through a sober

lens—yet the “intensity” of the restorative experience is altogether different from awaiting trial and, for many in the system, long-term incarceration.

In sum, restorative justice, here exemplified by Common Justice, can address the frequency, duration, and intensity of the American approach to crime if sufficiently expanded beyond its currently limited implementation. In this, restorative justice can be thought of as “harm reduction” applied to legal violence. To be clear, it is only reduction, not resolution—the socioeconomic root causes of crime persist, armed police still patrol, and the criminal-legal system remains a powerful set of institutions which are positioned to impose significant harm on individuals and communities. However, the rationale of “harm reduction” is to take something inherently harmful and reduce the frequency, duration, and intensity of the harm; restorative justice can do this for the criminal-legal system while still providing a meaningful intervention in crime. Furthermore, as the following argues, the expansion of restorative justice, as modeled by Common Justice, may be productive of both political and social changes which could meaningfully address ethnic and racial disproportion in American prisons.

## **RESTORATIVE JUSTICE AND SOCIAL CHANGE**

Can restorative justice change the way Americans think about ‘crime’ and punishment? Can a new paradigm of ‘crime’ disrupt the nationalistic “selection bias” in criminal-legal activity? We are still in the early days of restorative justice and have already been warned of the “transformation assumption”; it is doubtful that these questions can be definitively answered at this point. Furthermore, restorative justice—as a discourse, literature, and research agenda—has historically been inattentive to the issue of racial inequality and the specific harms associated with racial repression (Gavrielides 2014; Davis 2019). Is restorative justice, given its historical

“whiteness”, truly up to the task of addressing racial inequality? I will argue it is. Given the current salience of the abolition/reform debate, and the continuing racial disparities of American criminal justice, we must envision the world we hope to live in and leave behind—restorative justice can be conceived of in a way that outlines a vision of a more racially just America. So, what grounds are there for hypothesizing the relationship between restorative justice, social change, and prison disproportionalities? Is there a version of this relationship that points toward a more racially just society?

Some proponents of restorative justice emphasize its therapeutic benefits and suggest that social change could arise from widespread implementation of an “emotionally intelligent justice” capable of contending with complex human experiences (King 2008). The central idea is that restorative processes offer opportunities for personal growth, which would then carry over into general areas of citizenship ala a Aristotelian cycle of virtue (Gavrielides and Artinopoulou 2016). In this formulation, instances of criminal harm are transformed into learning moments and the State is given a stake in facilitating active citizenship and self-governance (Braithwaite 2003). Perhaps the ultimate therapeutic and virtue-based hypothesis of restorative justice’s social change potential is represented by the interrelated ideas of “peacemaking” and “peacebuilding” (Shearing and Froestad 2007). These “forums” take place after a successful restorative process in which offender and victim have reconciled. Once that interpersonal relationship is stabilized, community members engage in the peacemaking forum to discuss ways to prevent a similar incident in the short term and engage in the peacebuilding forum to discuss long term solutions to the root causes of the incident. In this process, restorative principles guide “both the rowing and the steering of governance” in a bottom-up fashion (Shearing 2001, 20).

However, others are skeptical regarding the capacity of restorative justice to foster a virtuous deliberative democracy, or any other kind of social change, outside of restorative processes. For example, Aertsen and co-authors (2011) find that the range of empowerments offered to victims in restorative processes focused on personal growth and therapeutic intervention tends to be limited to the “private” sphere, resulting in little meaningful impact on the public realm. Using a 3 dimensions of power framework—individual, institutional, structural—Aertsen and co-authors doubt:

“The extent to which the third dimension of empowerment – the possibility to influence the social and the political level – is developed or promoted by restorative practices. Empowerment in this dimension appears to be more restricted.... victim’s participation may influence aspects related to the victim’s case at the personal level but does not necessarily influence aspects related to the institutional setting or broader social structures in which both the offence and the response are taking place.... restorative justice seems to be focused preeminently on the private dimension of the crime, and not on the public one. This emphasis on the micro-level does not encourage victims to become actors of social transformation” (12).

Indeed, restorative processes are unlikely to foment broader structural changes, leaving the conditions which contribute to interpersonal harm, such as relative economic deprivation, unchanged. Furthermore, restorative processes, in resolving interpersonal conflict, may demobilize individuals to address broader forms of social conflict. However, this critique overlooks the possible influence of restorative justice upon institutional power arrangements and beliefs in the necessity of State violence, the connection between the two, and the way these two fields of knowledge can impact social life.

### **Restorative Justice: A Quiet Revolution**

Proponents of restorative Justice in the United States have made for strange political bedfellows. Take for example, once again, Common Justice. On the one hand, Common Justice

is embedded with the conventional criminal-legal system; offenders are referred to the restorative process at the post-plea stage and with the permission of the prosecutor and approval of a judge (Sered 2019, 25). That is, the decision-making authority of the criminal-legal bureaucracy is not disrupted by restorative process; Common Justice is not disturbing bureaucratic dominance over the criminal process until a plea has been secured. Further, Common Justice legitimates the criminal-legal system by demonstrating a (limited) criminal-legal commitment to progressive ideas. The implementation of restorative processes is often a response to considerable community disapproval of the conventional criminal-legal approach and an effort to win “hearts and minds” (Braithwaite 2007). Cunnen (2008) writes, “restorative justice is a story of optimism, reform and social change. Yet it also demonstrates a tendency to work within traditional criminal justice systems and whilst doing so, fails to challenge the exclusionary processes of criminalization” (24). That is, the implementation of restorative practices does not suddenly and decisively resolve every problem associated with the criminal-legal system. So, Common Justice can be interpreted as both preserving bureaucratic control over the criminal process and legitimating that authority, while only making limited inroads to changing the system.

However, on the other hand, Common Justice works from an ideological position that is distinct from that of the criminal-legal system it works within. The significance of this is typically overlooked. In the restorative process, ‘crime’ is understood as harm, rather than injury to society, therein structuring the distribution of decision-making authority, discourse, and possible range of outcomes in a very different way than would occur in a conventional criminal proceeding. The redefinition of ‘crime’ also undermines the warrant for exclusive State authority in criminal matters—which is premised on the State’s defense of ‘society’—and undermines the seeming necessity of incarceration, which is a penultimate expression of State dominance. Thus,

the criminal-legal system, in order to defend its legitimacy, has invited within its walls a considerable ideological threat to its legitimacy and cannot excise this threat without also endangering its legitimacy; it is a classic “catch 22”. The management of the restorative justice threat to the conventional criminal-legal order is a primary driver of a tension-riddled politics of restorative justice in which restorative practices are acknowledged as a legitimate yet restorative justice on the whole is kept at the margins. Nonetheless, even when marginalized or coopted, the restorative justice principle that ‘crime’ can be defined as harm—and the potential political implications of this definition in terms of bureaucratic authority—remain at criminal justice’s doorstep.

In some cases, Common Justice in particular, the politics of restorative justice have led to rearrangements of institutional power in which decision-making authority is no longer the sole province of a punitive regime. Indeed, prosecutors and judges remain the gate keepers of the restorative process. Yet prosecutors and judges now have to consider an “economy” of restorative justice, that is, the right amount of restorative practice to allow in order to benefit from its legitimation without displacing the conventional criminal-legal system, and themselves, altogether. This brings a whole other set of decision-makers into the field, who have differing incentives than their criminal-legal counterparts. Restorative Justice practitioners want to prove their approach works while actors operating within the criminal-legal system want to prove that convention criminal proceedings are still a necessity; these desires represent divergent political interests contained within a single institutional framework. For if it is clearly and consistently demonstrated that society can be kept safe largely without the violence and domination of the State, the criminal legal paradigm—and the power and exclusion it legitimates—is made vulnerable to contestation and dismantling.

Thus, destabilizing the current “economy” of restorative justice by expanding the use of restorative practices represents a “quiet revolution” which can reorder institutional power arrangements while seeming to maintain the status quo. Quiet revolutions (Annan 1998; Goldin 2006) are generally slower, and of course far less spectacular, than their “loud” counterparts but not necessarily less impactful. The emergence of computing, for example, is a preeminent example of a quiet revolution that radically altered the scope and distribution of power in society yet instigated a minimum of resistance in the process (Hakken 1998). The capacity of restorative justice to change society lay not in its therapeutic effects on the victim and offender but rather in the way it legitimates new configurations of power based on reconstructions of fundamental social and political concepts, most importantly, ‘crime’ and ‘society’.

### **Redefining ‘Crime’ Means Refining ‘Society’**

The core motivation of the criminal justice paradigm is the defense of society from ‘crime’ through the imposition of State dominance. This logic defines ‘crime’ as lawbreaking, which represents the only conceivable way that ‘crime’ can injure the incorporeal and abstract concept of society. The harms associated with crime become at best a secondary concern in this formulation. However, it would be inaccurate to claim that criminal-legal systems and actors have no conception of harm—indeed, police, prosecutors, and judges have an intimate knowledge of the harm associated with crime; they may see this harm, in close proximity, day after day. Nonetheless, the prevention and resolution of harm does not legitimate criminal-legal authority; that authority is drawn from the prevention and resolution of lawbreaking, irrespective of its associated harms to victims.

This is why defining ‘crime’ in the popular and official imagination as primarily a violation of people and relationships constitutes a politically revolutionary act: the redefinition of ‘crime’ suggests a corresponding redefinition of role of the State in governance, a role that facilitates self-governance and repair in the context of crime, rather than demonstrations of dominance and violent reimpositions of authority.

Defining ‘crime’ as harm also reframes the concept of ‘society’, with equally significant social and political implications. I have argued that the criminal justice paradigm, through its definition of ‘crime’ as lawbreaking, implicitly equates ‘society’ with individuals and groups viewed as belonging to an idealized national identity; the criminal justice paradigm is premised on nationalistic exclusion. Redefining ‘crime’ as harm breaks this nationalistic logic apart. In a ‘crime as harm’ framework, ‘society’ has no binary opposite and thus is no longer a thing defended against an eternal rival. That is, ‘society’ is no longer conceived of the antithesis of the criminal, and thus sheds its association of inherent moral superiority and perennial susceptibility; ‘society’ is no longer the center of attention. This constitutes an ideological “denationalization” of the concept of society— ‘society’ is thus freed to take on more inclusive significance when decentered in the State’s logic. This represents an opportunity for social change. Considers the words of Danielle Sered (2011), founder of Common Justice:

“Current approaches to prevent violence fail to keep people equally safe. The rates at which people of color — including young men — experience violence are the result of current and historic policies in their communities that have made safety a privilege available to the few. Scholars have argued that “the history of black America is an unbroken story about the power of the state always being used to control and to harm,” and that the over-policing of some crimes (such as drug possession) coincides with under-policing of serious crimes including homicide — so that black communities are over-punished, but also fundamentally under-protected” (28).

Conditions of “over-punished” and “under-protected” fit with expectations of nationalist exclusion. A nationalistic understanding of ‘society’ contributes to over-punishment/under-protection by rationalizing and legitimating racial profiling and the under-prioritization of black and brown safety. Thus, a conception of ‘crime’ which both decenters and denationalizes society in its logic is indicated as part of the solution to racial disparities in arrests, police brutality, and incarceration. Changing the way American thinks about ‘crime’ will not in itself heal America’s racial history or present; however, the nationalistic conception of ‘society’ underlying criminal justice remains a barrier to racial justice that has so far remained unseen. Every successful case of Common Justice chips away at the nationalist foundation of the criminal justice paradigm. Thus, expanding reliance on restorative justice based on ‘crime as harm’ is both a means of harm reduction and a potential cultural transformation.

## **CONCLUSION**

Martin Luther King Jr’s reasoning that “darkness cannot drive out darkness” has informed the argument of this chapter on several levels. First, this reasoning exposes the criminal justice paradigm as premised on a logic of multiplying harm. This has led to my suggestion that we see Restorative Justice as a “harm reduction” strategy applied to America’s self-destructive dependence on legal violence. Second, I have read King’s reasoning as suggesting that dominance cannot be resolved by further dominance; meeting dominance with dominance multiples domination. Although I conclude that penal abolition is the normatively correct moral path in the face of an implicitly nationalist criminal-legal regime, abolition is only immediately achievable through law, the consummate mechanism of domination. This is problematic in several respects. The abolitionist movement is currently outmatched—numerically, financially,

and politically—by the combined force of liberal and conservative support of the criminal justice paradigm; an attempt to meet this opposition in the “open field of battle” is untenable. Further, an American faith in the legitimacy of the criminal justice idea remains strong, even in light of horrific police brutality. The failures of the American penal regime tend to be explained as an issue of individual moral failure or American exceptionalism, both of which can imply that criminal-legal systems can be successfully reformed by either rooting out bad-actors or making American criminal justice less exceptional—that is, emulating the penal regimes of other countries. Thus, abolition is regarded by a significant number of Americans as both frightening and unnecessary.

King’s reasoning in *Strength to Love* was both moral and *strategic*—King sought to warn us that the oppressed rarely liberate themselves by emulating the oppressor. In keeping with this reasoning, I suggest that movement for immediate penal abolition is morally right but strategically flawed. Restorative justice offers another way to dismantle the criminal justice paradigm and do so without relying on overt reconstructions of law that will be heavily resisted by both the American right and moderate left. Thus, I have argued that expanding restorative justice—premised on an understanding of ‘crime’ as harm to persons and relationships—is not only “harm reduction” but also a viable long-term strategy for social change toward racial justice. Restorative justice is a “non-reformist reform” already underway which, if understood as inherently antithetical to the nationalistic logic of the criminal justice paradigm, is a powerful resource for racial justice activism.

## 6

### CONCLUSION: CONFRONTING FAITH IN VIOLENCE

---

“Challenge a person's beliefs, and you challenge his dignity, standing, and power. And when those beliefs are based on nothing but faith, they are chronically fragile.”

— Steven Pinker, *The Better Angels of Our Nature: Why Violence Has Declined*

This dissertation indicts the entirety of the criminal justice paradigm, and thus every contemporary criminal-legal system it guides, as unacceptable to anyone who finds nationalism to be an inherently odious and destructive worldview. Criminal-legal systems the world over are constructs of “group idolatry”, to use George Kateb’s (2000) words; they exist to harm people on behalf of an abstraction, ‘society’, and the harm they dole out reinforces one group’s sense of national identity while excluding others. Even if the people being harmed by the criminal-legal system have themselves harmed others, the conventional criminal process simply multiplies the harm, all while helping to sustain the overarching harms of social hierarchy; it is a cycle of exclusion and harm with no end in sight.

Thus, the implication—morally at least—is abolition. I have suggested otherwise based on a strategic assessment of conditions in the United States, however, unless one is prepared to commit to the (il)logic of a nationalist worldview and all the suffering it promises, the criminal justice paradigm is at the very least *worthy* of abolishment. Nonetheless, abolishing institutions does not necessarily also abolish the ideas on which the institutions are based; the criminal

justice paradigm is a set of ideas that cannot be simply willed away or buried alongside its institutional manifestations. After all, *nationalism* has survived apocalypse—civil wars and world wars; so long as the globe is scarred by borders, a base-line nationalism will persist (and will be carried out by criminal-legal systems). Hence, my normative recommendation focused on *replacement* rather than abolition. Replacement and abolition are not mutually exclusive—they both aim toward the same goal; they differ, however, in where the emphasis is placed. Replacement emphasizes construction, abolition emphasizes destruction. It is logical—in the material world—to make way for the new by destroying the old. Yet this logic breaks down in the realm of belief; stories cannot be dismantled like architecture (King 2003). When faced with uncompromising belief we can only tell new stories, ones that may hopefully replace the stories which invite violence and exclusion.

So, what is the story I hope one day to be made irrelevant? It is not merely the criminal justice story of ‘society’ and ‘crime’ and their never-ending antagonism. Underlying the criminal justice narrative is a tale far more enticing—a story that tells us an uncertain and frightening world is indeed controllable. This story is that well-regulated violence can build and preserve the world we want without incurring moral dilemma. This story constitutes a *faith* in violence—not just a begrudging acceptance—but a sincere faith that violence is necessary and appropriate to protect everything we cherish, including our freedom, identity, and relationships. The criminal justice paradigm represents this faith in violence.

I do not suggest that “violence” is either good or bad, right or wrong. Indeed, violence is productive, a hallmark of nature transforming the cosmos; evolution, critical thinking, self-growth, even the transformative power of love—these all can be justifiably interpreted as “violent” in that these processes are cycles of destruction and creation. However, none of these

processes are truly subject to our will and control; we are part of the process, not its overseer. This is the distinction between acknowledging the fact of violence and a faith *in* violence: faith *in* violence rejects our lack of control and resists the inevitable passing of our realities; it is a desperate urge to hold fast to what is always slipping away. In this, faith in violence is tragically misguided; faith in violence assumes people, places, and processes can be made predictable through the controlled application of destruction; however, destruction implies change and change is, ultimately, beyond human control—in this sense, faith in violence is self-defeating.

Violence, whether legal or illicit, is also necessarily exclusionary—to destroy or change a thing is to attempt to exclude some other possibility. Thus, a faith in violence to build and preserve a worthwhile world is also a faith in exclusion to do the same thing. Violence, as a productive force, may help build identity and solidarity, but only ever to exclude some other identity (Gould 1999). To maintain whatever solidarity has been achieved through violence requires ongoing exclusion and thus ongoing violence, that is, a cycle of social reproduction. Hence the nationalistic mindset seeks enemies, and when none can be found, constructs them from the next best thing: those who are different. Thus, criminal-legal systems are not only self-defeating—caught in an endless cycle of harm in a fruitless effort to control—they also endlessly produce their own adversaries.

Confronting the criminal justice paradigm ultimately means confronting faith in violence. Even those who recoil in horror at the image of police brutality may nonetheless still remain faithful to the idea that violence can preserve the good in the world, if but properly regulated. This sort of faith cannot be abolished—yet it is not intractable either; any belief represents varying degrees of commitment. There are the fundamentalists, of course, who will never waiver, but there are also those who have passively accepted belief and may experience

cognitive dissonance that leads them to reevaluate their preconceptions. Restorative justice, although far from perfect, represents one way to confront the faith in violence at the very heart of our justice system. Every instance of non-violent resolution to harm and interpersonal conflict is another demonstrated *reason* to abandon faith in violence and exclusion. Beliefs cannot be abolished; however, people can be given reasons to reconsider what they believe.

## Bibliography

### Chapter 1: Introduction

Arendt, H. (2007). *The origins of totalitarianism* (pp. 417-443). Duke University Press.

Beckett, K., & Francis, M. M. (2020). The origins of mass incarceration: The racial politics of crime and punishment in the Post–Civil Rights Era. *Annual Review of Law and Social Science*, 16, 433-452.

Bevir, M. (2000). The logic of the history of ideas. *Rethinking History*, 4(3), 295-300.

Blumstein, A. (1988). Prison populations: A system out of control?. *Crime and justice*, 10, 231-266.\

Braithwaite, J. (2002). *Restorative justice & responsive regulation*. Oxford University press

Sered, D. (2019). *Until we reckon: Violence, mass incarceration, and a road to repair*. The New Press.

Brucato, B. (2014). Fabricating the color line in a white democracy: From slave catchers to petty sovereigns. *Theoria*, 61(141), 30-54.

Carter, J. S., Corra, M., & Jenks, D. A. (2016). In the shadows of Ferguson: The role of racial resentment on White attitudes towards the use of force by police in the United States.

*International Journal of Criminal Justice Sciences*, 11(2), 114.

Chessa, M., & Fragnelli, V. (2012). A note on “Measurement of disproportionality in proportional representation systems”. *Mathematical and Computer Modelling*, 55(3-4), 1655-1660.

Coyle, M. J., & Schept, J. (2017). Penal abolition and the state: colonial, racial and gender violences.

Cunneen, C. (2006). Racism, discrimination and the over-representation of Indigenous people in the criminal justice system: Some conceptual and explanatory issues. *Current issues in criminal justice*, 17(3), 329-346.

Dammer, H. R., & Albanese, J. S. (2013). *Comparative criminal justice systems*. Cengage Learning.

Davis, F. E. (2019). *The little book of race and restorative justice: Black lives, healing, and US social transformation*. Simon and Schuster.

Delgado, R., & Stefancic, J. (2017). *Critical race theory*. New York University Press.

- Durkheim, E. (1972). Crime as normal behavior. In *Readings in Criminology and Penology* (pp. 4-9). Columbia University Press.
- Elliott, L. (2002). Con Game and restorative justice: Inventing the truth about Canada's prisons. *Canadian Journal of Criminology*, 44(4), 459-474.
- Foucault, M., & Ewald, F. (2003). "*Society Must Be Defended*": *Lectures at the Collège de France, 1975-1976* (Vol. 1). Macmillan.
- Garland, D., & Young, P. (Eds.). (1983). *The Power to punish: contemporary penalty and social analysis* (pp. 37-61). London: Heinemann Educational Books.
- Gavrielides, T. (2014). Bringing race relations into the restorative justice debate: An alternative and personalized vision of "the other". *Journal of Black Studies*, 45(3), 216-246.
- Gerring, J. (1997). Ideology: A definitional analysis. *Political Research Quarterly*, 50(4), 957-994.
- Hulsman, L. H. (1986). Critical criminology and the concept of crime. *Contemporary Crises*, 10(1), 63-80.
- John R. Gillis (Ed.). (1994). *Commemorations: The politics of national identity*. Princeton University Press.
- Kaba, M. (2020). *Yes, we mean literally abolish the police*. Abolition Library Commons.
- Kennedy, E., & Marshall, T. (1982). A Philosophe in the Age of Revolution: Destutt de Tracy and the Origins of «Ideology». *Les Études philosophiques*, (4), 455-459.
- Lukes, S. (1986). Marxism and morality. *Capital & Class*, 10(2), 220-222.
- Manning, P. K. (2005). The study of policing. *Police quarterly*, 8(1), 23-43.
- Marshall, T. F. (1999). *Restorative justice: An overview*. London: Home Office.
- Marx, A. W. (2005). *Faith in nation: exclusionary origins of nationalism*. Oxford University Press.
- Mathiesen, T. (2014). *The politics of abolition revisited*. Routledge.
- Maynard, R. (2020). Police Abolition/Black Revolt. *TOPIA: Canadian Journal of Cultural Studies*, 41, 70-78.
- McCann, M. W. (1994). *Rights at work: Pay equity reform and the politics of legal mobilization*. University of Chicago Press.

- McCann, M., & March, T. (1996). Law and everyday forms of resistance: A socio-political assessment. *Studies in Law, Politics, and Society*, 15(1), 207-36.
- McCold, P. (1999). Restorative justice practice: The state of the field 1999. Retrieved on March, 7, 2002.
- McDowell, M. G., & Fernandez, L. A. (2018). 'Disband, Disempower, and Disarm': Amplifying the theory and practice of police abolition. *Critical Criminology*, 26(3), 373-391.
- McLellan, A. T., Kushner, H., Metzger, D., Peters, R., Smith, I., Grissom, G., ... & Argeriou, M. (1992). The fifth edition of the Addiction Severity Index. *Journal of substance abuse treatment*, 9(3), 199-213.
- Nelken, D. (Ed.). (2011). *Comparative criminal justice and globalization*. Ashgate Publishing, Ltd..
- Nunn, K. B. (1997). Law as a Eurocentric enterprise. *Law & Ineq.*, 15, 323.
- Pakes, F. (2019). *Comparative criminal justice*. Routledge.
- Piquero, A. R. (2008). Disproportionate minority contact. *The future of children*, 59-79.
- Reichel, P. L., & Reichel, P. L. (1999). *Comparative criminal justice systems: A topical approach* (p. 240). Upper Saddle River, New Jersey: Prentice Hall.
- Reiman, J. (1987). The Marxian critique of criminal justice. *Criminal Justice Ethics*, 6(1), 30-50.
- Riley, P. F. (1983). Hard times, police and the making of public policy in the Paris of Louis XIV. *Historical Reflections/Réflexions Historiques*, 313-334.
- Sampson, R. J., & Lauritsen, J. L. (1997). Racial and ethnic disparities in crime and criminal justice in the United States. *Crime and justice*, 21, 311-374.
- Shahidullah, S. M. (2012). *Comparative criminal justice systems: Global and local perspectives*. Jones & Bartlett Publishers.
- Smith, M. R., & Alpert, G. P. (2007). Explaining police bias: A theory of social conditioning and illusory correlation. *Criminal justice and behavior*, 34(10), 1262-1283.
- Tankebe, J. (2013). Viewing things differently: The dimensions of public perceptions of police legitimacy. *Criminology*, 51(1), 103-135.
- Tauri, J. (2005). Indigenous perspectives and experience: Maori and the criminal justice system. *Introduction to Criminological Thought. New Zealand: Pearson*, 129-145.
- Thompson, E. P. (2015). *Whigs and hunters* (pp. 158-158). Breviary Stuff Pub.

Tonry, M. (2012). *Punishment and politics*. Routledge.

Wacquant, L. J. (2009). *Prisons of poverty* (Vol. 23). U of Minnesota Press.

Whitman, J. Q. (2003). *Harsh justice: Criminal punishment and the widening divide between America and Europe*. Oxford University Press, USA.

Wu, Y. (2014). Race/ethnicity and perceptions of the police: A comparison of White, Black, Asian and Hispanic Americans. *Policing and society*, 24(2), 135-157.

Zehr, H. (1994). Justice paradigm shift: Values and visions in the reform process. *Mediation Q.*, 12, 207.

Zizek, S. (1994). Between symbolic fiction and fantasmatic spectre: towards a Lacanian theory of ideology. *Analysis*, (5), 49-62.

## **Chapter 2: A Third Front? Reform, Abolition, And Cross-National Awareness**

Abel, Brian. (2021). *Michigan one of 19 states that have not enacted police reform legislation since George Floyd's death*. Wxyz.Com. <https://www.wxyz.com/news/michigan-one-of-19-states-that-have-not-enacted-police-reform-legislation-since-george-floyds-death>

Akbar, Amna. (2020) "An abolitionist horizon for police (reform)." *California Law Review* 108, no. 6.

Alexander, M. (2012). *The New Jim Crow: Mass Incarceration in the Age of Colorblindness*. The New Press.

Alexander, Michelle. (2020) "America, this is your chance." *The New York Times* 8.

Al-Shazly, F., & Tinasti, K. (2016). Incarceration or mandatory treatment: Drug use and the law in the Middle East and North Africa. *International Journal of Drug Policy*, 31, 172-177.

Australian Bureau of Statistics. (2016) 4517.0 – Prisoners in Australia: Canberra

Australian Bureau of Statistics. (2016). 2940.0 – Census of Population and Housing: Details of Overcount and Undercount: Canberra

Bales, W. D., & Piquero, A. R. (2012). Racial/ethnic differentials in sentencing to incarceration. *Justice Quarterly*, 29(5), 742-773.

Barker, V. (2013). Nordic Exceptionalism revisited: Explaining the paradox of a Janus-faced penal regime. *Theoretical criminology*, 17(1), 5-25.

Bell, D. (2008). *And we are not saved: The elusive quest for racial justice*. Basic Books.

Bell, Monica C. "Police reform and the dismantling of legal estrangement." *The Yale Law Journal* (2017), 2054-2150.

Ben-Moshe, Liat. (2018) "Dis-epistemologies of Abolition." *Critical Criminology* 26, no. 3, 341-355.

Berreman, G. D. (1960). Caste in India and the United States. *American Journal of Sociology*, 66(2), 120-127.

Biden, Joseph Robinette. (2021). *Remarks by President Biden on the Verdict in the Derek Chauvin Trial for the Death of George Floyd*. White House Briefing Room.  
<https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/04/20/remarks-by-president-biden-on-the-verdict-in-the-derek-chauvin-trial-for-the-death-of-george-floyd/>

Bierbrauer, G. (1994). Toward an understanding of legal culture: Variations in individualism and collectivism between Kurds, Lebanese, and Germans. *Law & Society Review*, 28, 243-264.

Blumstein, A. (1982). On the racial disproportionality of United States' prison populations. *J. Crim. L. & Criminology*, 73, 1259.

Blumstein, Alfred. (2009) "Race and the criminal justice system." *Race and Social Problems* 1, no. 4: 183-186.

Bolton, K., & Feagin, J. (2004). *Black in blue: African-American police officers and racism*. Routledge.

Bramstedt, E. K. (1998). *Dictatorship and political police: the technique of control by fear* (Vol. 40). Psychology Press.

Brettfeld, K., & Wetzels, P. (2007). Muslims in Germany. Integration, barriers to integration, religion, and attitudes toward democracy, constitutional state, and politically motivated violence. Bundesministerium des Inneren. Berlin.

Brown, Michelle, and Judah Schept. (2017) "New abolition, criminology and a critical carceral studies." *Punishment & Society* 19, no. 4, 440-462.

Brucato, B. (2014). Fabricating the color line in a white democracy: From slave catchers to petty sovereigns. *Theoria*, 61(141), 30-54

Calahan, Margaret. (1979). "Trends in Incarceration in the U.S. Since 1880." *Journal of Crime and Delinquency* 25, 9-41.

Carson, Ann E. (2018). Prisoners in 2016. Bureau of Justice Statistics. Available from:  
<https://bjs.ojp.gov/library/publications/prisoners-2016>

Cavadino, Michael, and James Dignan. (2006) "Penal policy and political economy." *Criminology & Criminal Justice* 6, no. 4, 435-456.

- Cherribi, S. (2011). An obsession renewed: Islamophobia in the Netherlands, Austria, and Germany. *Islamophobia: The challenge of pluralism in the 21st century*, 47-62.
- Chessa, M., & Fragnelli, V. (2012). A note on "Measurement of disproportionality in proportional representation systems". *Mathematical and Computer Modelling*, 55(3-4), 1655-1660.
- Coyle, M. J., & Schept, J. (2018). Penal abolition praxis. *Critical Criminology*, 26(3), 319-323.
- Coyle, M. J., & Scott, D. (Eds.). (2021). *The Routledge International Handbook of Penal Abolition*. Routledge.
- Crump, B. (2019). *Open season: Legalized genocide of colored people*. HarperCollins.
- Crutchfield, R. D., Geerken, M. R., & Gove, W. R. (1982). Crime rate and social integration the impact of metropolitan mobility. *Criminology*, 20(3-4), 467-478.
- Cunneen, C. (2019). Institutional racism and (in) justice: Australia in the 21<sup>st</sup> century. *Decolonization of Criminology and Justice*, 1(1), 29-51.
- Dammer, Harry R., and Jay S. Albanese. (2013). *Comparative criminal justice systems*. Cengage Learning.
- Daniel, Roxanne. (2020). "Since you asked: What data exists about Native American people in the criminal justice system?." *Prison Policy Initiative*.
- Davis, Angela Y. (2011). *Are prisons obsolete?*. Seven Stories Press.
- DeKeseredy, W. S. (2010). *Contemporary critical criminology*. Routledge.
- Delgado, Richard, and Daniel A. Farber. (1998). "Is American Law Inherently Racist." *TM Cooley L. Rev.* 15, 361.
- Drummond, A. (2015). Becoming visible: Gypsy Roma Travellers in prison. *Prison Service Journal*, (219), 19-23.
- Epp, C. R., Maynard-Moody, S., & Haider-Markel, D. P. (2014). *Pulled over: How police stops define race and citizenship*. University of Chicago Press.
- Feagin, Joe. (2013). *Systemic racism: A theory of oppression*. Routledge.
- Feeley, Malcolm M., and Jonathan Simon. (1992). "The new penology: Notes on the emerging strategy of corrections and its implications." *Criminology* 30, no. 4, 449-474.
- Foner, N. (2015, December). Is Islam in Western Europe Like Race in the United States?. In *Sociological Forum* (Vol. 30, No. 4, pp. 885-899).
- Foucault, M. (2007). *Discipline and punish: The birth of the prison* (pp. 445-471). Duke University Press.

Francis, M. M. (2018). The Strange Fruit of American Political Development. *Politics, Groups, and Identities*, 6(1), 128-137.

Frase, R. S., & Weigend, T. (1995). German criminal justice as a guide to American law reform: Similar problems, better solutions. *BC Int'l & Comp. L. Rev.*, 18, 317.

Garland, D. (2012). *The culture of control: Crime and social order in contemporary society*. University of Chicago Press.

Glynn, Martin. (2013). *Black men, invisibility and crime: Towards a critical race theory of desistance*. Routledge.

Gottschalk, M. (2011). The Past, Present and Future of Mass Incarceration in the United States. *Criminology & Pub. Pol'y*, 10, 483.

Hadden, S. E. (2003). *Slave patrols: Law and violence in Virginia and the Carolinas*. Harvard University Press.

Harriss-White, B., & Prakash, A. (2010). Social discrimination in India: A case for economic citizenship.

Harrell, Erika. (2011). *Black victims of violent crime*. DIANE Publishing.

Hartney, C. (2006). US rates of incarceration: A global perspective. *Research from the National Council on Crime and Delinquency*, 1-8.

Herbert, S. (1996). Morality in law enforcement: Chasing” bad guys” with the Los Angeles Police Department. *Law and society review*, 799-818.

Hinton, E. (2017). *From the War on Poverty to the War on Crime*. Harvard University Press.

Holder, Sarah. (2020). “The Cities Taking Up Calls to Defund the Police”. *Bloomberg Citylab*. <https://www.bloomberg.com/news/articles/2020-06-09/the-cities-taking-up-calls-to-defund-the-police>

Islas, P. (2019, April 17). Why most of Switzerland’s prisoners are not Swiss. Retrieved May 13, 2020, from [https://www.swissinfo.ch/eng/crime-statistics\\_why-are-most-of-switzerland-s-prisoners-foreign-/44897698](https://www.swissinfo.ch/eng/crime-statistics_why-are-most-of-switzerland-s-prisoners-foreign-/44897698)

Jefferson-Bullock, Jalila, and Jelani Jefferson Exum. (2020). “That is Enough Punishment: Situating Defunding the Police Within Antiracist Sentencing Reform.” *Fordham Urb. LJ* 48, 625.

Jaffrelot, C. (2010). *Religion, caste, and politics in India*. Primus Books.

- Johnsen, B., Granheim, P. K., & Helgesen, J. (2011). Exceptional prison conditions and the quality of prison life: Prison size and prison culture in Norwegian closed prisons. *European Journal of Criminology*, 8(6), 515-529.
- Kaba, M. (2020). *Yes, we mean literally abolish the police*. Abolition Library Commons.
- Labutta, E. (2016). The prisoner as one of us: Norwegian Wisdom for American Penal Practice. *Emory Int'l L. Rev.*, 31, 329.
- Klaiber, Sussane. (2018). "Warum in deutschen Gefängnissen so viele Muslime sitzen". *Huffington Post*. Available from: [https://www.huffingtonpost.de/entry/muslime-haft\\_de\\_5a2a8c24e4b073789f6910f2](https://www.huffingtonpost.de/entry/muslime-haft_de_5a2a8c24e4b073789f6910f2)
- Labutta, E. (2016). The prisoner as one of us: Norwegian Wisdom for American Penal Practice. *Emory Int'l L. Rev.*, 31, 329.
- Lebron, C. J. (2018). The Making of Black Lives Matter: a response. *Ethnic and Racial Studies*, 41(8), 1447-1452.
- Loury, G. C., Modood, T., & Teles, S. M. (Eds.). (2005). *Ethnicity, social mobility, and public policy: Comparing the USA and UK*. Cambridge University Press.
- Maguire, Edward R., and David E. Duffee, eds. (2015). *Criminal justice theory: Explaining the nature and behavior of criminal justice*. Routledge.
- Massey, Douglas S., and Nancy A. Denton. (2018). *American apartheid: Segregation and the making of the underclass*. Routledge.
- Mathiesen, T. (2014). *The politics of abolition revisited*. Routledge.
- Mauer, M., & King, R. S. (2011). *Uneven justice: State rates of incarceration by race and ethnicity*.
- Maynard, Robyn. (2020). "Police Abolition/Black Revolt." *TOPIA: Canadian Journal of Cultural Studies* 41, 70-78.
- McCann, M. W., & Lovell, G. I. (2020). *Union by Law: Filipino American Labor Activists, Rights Radicalism, and Racial Capitalism*. University of Chicago Press.
- McDowell, M. G., & Fernandez, L. A. (2018). 'Disband, Disempower, and Disarm': Amplifying the Theory and Practice of Police Abolition. *Critical Criminology*, 26(3), 373-391.
- Mills, C. W. (2014). *The racial contract*. Cornell University Press.
- Mills, C. W. (2013). "Retrieving Rawls for racial justice? A critique of Tommie Shelby." *Critical Philosophy of Race* 1, no. 1, 1-27.

Murakawa, N. (2014). *The first civil right: How liberals built prison America*. Oxford University Press.

Murakawa, Naomi, and Katherine Beckett. (2010). "The penology of racial innocence: The erasure of racism in the study and practice of punishment." *Law & Society Review* 44, no. 3-4, 695-730.

Murphy, Stephen. (2021). *George Nkencho: Family of black man shot dead by Irish police at family home call for unity after protests*. News.Sky.Com. <https://news.sky.com/story/210pprox-nkencho-family-of-black-man-shot-dead-by-irish-police-at-family-home-call-for-unity-after-protests-12202499>

Nagda, P. (2016). *A socio-legal study of prison system and its reforms in India* (Doctoral dissertation, Ph. D).

Nellis, Ashley. (2016). "The color of justice: Racial and ethnic disparity in state prisons." <http://arks.princeton.edu/ark:/88435/dsp01bz60d032q>

O'Connell, J. (1997). *Travellers in Ireland: an examination of discrimination and racism: a report from the Irish National Co-ordinating Committee for the European Year against Racism*.

Ostler, Jeffrey. (2019). *Surviving Genocide: Native Nations and the United States from the American Revolution to Bleeding Kansas*. Yale University Press.

Pate, M. (2014). Race, Ethnicity, and Crime. *The Encyclopedia of Theoretical Criminology*, 1-7.

Perry, K. K. Y., Reiter, B., & Mitchell, G. L. (2009). *Brazil's New Racial Politics*.

Piquero, A. R. (2008). Disproportionate minority contact. *The future of children*, 59-79.

Perkinson, R. (2010). *Texas tough: The rise of America's prison empire*. Metropolitan Books.

Pew Research Center. (2017). "Europe's Growing Muslim Population". Washington, D.C. <https://www.pewforum.org/2017/11/29/europes-growing-muslim-population>.

Pratt, J., & Eriksson, A. (2014). *Contrasts in Punishment: An Explanation of Anglophone Excess and Nordic exceptionalism*. Routledge.

Radebe, P. (2021). Derek Chauvin: Racist Cop or Product of a Racist Police Academy?. *Journal of Black Studies*, 52(3), 231-247.

Ramos, Santos F. (2016). "Building a Culture of Solidarity: Racial Discourse, Black Lives Matter, and Indigenous Social Justice." *Enculturation* 21, 1-6.

Raphael, S. (2009). Explaining the rise in US incarceration rates. *Criminology & Pub. Pol'y*, 8, 87.

- Rawls, John. (2020). *A theory of justice*. Harvard university press.
- Reiman, J., & Leighton, P. (2016). *The rich get richer and the poor get prison: Ideology, class, and criminal justice*. Routledge.
- Rosich, Katherine J. (2007). *Race, ethnicity, and the criminal justice system*. ASA.
- Ruddell, R., & Urbina, M. G. (2004). Minority threat and punishment: A cross-national analysis. *Justice Quarterly*, 21(4), 903-931.
- Sampson, R. J., & Lauritsen, J. L. (1997). Racial and ethnic disparities in crime and criminal justice in the United States. *Crime and justice*, 21, 311-374.
- Shahidullah, S. M. (2012). *Comparative criminal justice systems: Global and local perspectives*. Jones & Bartlett Publishers.
- Showail, S. J., McLean Parks, J., & Smith, F. L. (2013). Foreign workers in Saudi Arabia: a field study of role ambiguity, identification, information-seeking, organizational support and performance. *The International Journal of Human Resource Management*, 24(21), 3957-3979.
- Simon, Jonathan. (2012). "Mass incarceration: From social policy to social problem." *The Oxford handbook of sentencing and corrections*, 23-52.
- Skolnick, J. H. (2010). A sketch of the policeman's working personality. *Race, ethnicity and policing: New and essential readings*, 15-32.
- Soss, J., & Weaver, V. (2016). Learning from Ferguson: welfare, criminal justice, and the political science of race and class. *The Double Bind: The Politics of Racial and Class Inequalities in the Americas*, 73-99
- Soss, Joe, and Vesla Weaver. (2017) "Police are our government: Politics, political science, and the policing of race–class subjugated communities." *Annual Review of Political Science* 20, 565-591.
- Spruill, L. H. (2016). Slave patrols, 'packs of Negro dogs' and policing black communities. *Phylon*, 53(1), 42-66.
- Stanton, David. (2017). "Speech by Mr. David Stanton, T.D., Minister for State at the Department of Justice and Equality, with special responsibility for Equality, Immigration & Integration St Stephen's Green Trust Travellers in Prison Initiative - National Conference". Department of Justice, Ireland. Available from: <http://www.justice.ie/en/JELR/Pages/SP17000355>
- Taylor, Keeanga-Yamahtta. (2016). *From# BlackLivesMatter to black liberation*. Haymarket Books.

- Toivanen, R. (2017). The Saami people and Nordic civil societies. In *Civil society in the Baltic Sea region* (pp. 205-216). Routledge.
- Tonry, M. (1994). Racial disproportion in US prisons. *Brit. J. Criminology*, 34, 97.
- Tonry, M. (1997). "Ethnicity, crime, and immigration." *Crime and justice* 21, 1-29.
- Tonry, M. (1999). Why are US incarceration rates so high?. *Crime & Delinquency*, 45(4), 419-437.
- Tonry, M. (2011). *Punishing race: A continuing American dilemma*. Oxford University Press.
- Tonry, M. (2015). Is cross-national and comparative research on the criminal justice system useful? *European journal of criminology*, 12(4), 505-516.
- Ugelvik, T., & Dullum, J. (Eds.). (2011). *Nordic Prison Practice and Policy-Exceptional Or Not?: Nordic Prison Policy and Practice*. Routledge.
- Ugelvik, T. (2017). The incarceration of foreigners in European prisons. In *The Routledge handbook on crime and international migration* (pp. 107-120). Routledge.
- United Nations Office on Drugs and Crime (2021). "United Nations System Common Position on Incarceration". Available from [https://www.unodc.org/res/justice-and-prison-reform/nelsonmandelarules-GoF/UN\\_System\\_Common\\_Position\\_on\\_Incarceration.pdf](https://www.unodc.org/res/justice-and-prison-reform/nelsonmandelarules-GoF/UN_System_Common_Position_on_Incarceration.pdf)
- Van Cleve, Nicole Gonzalez, and Lauren Mayes. (2015). "Criminal justice through "colorblind" lenses: A call to examine the mutual constitution of race and criminal justice." *Law & Social Inquiry* 40, no. 2, 406-432.
- Wacquant, L. (2001). Deadly symbiosis: When ghetto and prison meet and mesh. *Punishment & Society*, 3(1), 95-133.
- Walker, J., & McDonald, D. N. (1995). *The over-representation of Indigenous people in custody in Australia* (p. 2). Canberra: Australian Institute of Criminology.
- Weaver, Vesla M. (2007). "Frontlash: Race and the development of punitive crime policy." *Studies in American political development* 21, no. 2, 230-265.
- Weine, S., Kohrt, B. A., Collins, P. Y., Cooper, J., Lewis-Fernandez, R., Okpaku, S., & Wainberg, M. L. (2020). Justice for George Floyd and a reckoning for global mental health. *Global Mental Health*, 7.
- Western B. (2014). Incarceration, Inequality, and Imagining Alternatives. *Annals of the American Academy of Political and Social Science*. 651 (1) :302-306.
- Whitman, J. Q. (2003). *Harsh justice: Criminal punishment and the widening divide between America and Europe*. Oxford University Press, USA.

Williams, E. J., & Robinson, M. (2004). Ideology and criminal justice: Suggestions for a pedagogical model. *Journal of Criminal Justice Education*, 15(2), 373-392.

Wilson, William Julius. (2012). *The truly disadvantaged: The inner city, the underclass, and public policy*. University of Chicago Press.

### **Chapter 3: Prison Disproportionality: Liberal and Conflict Theory Lenses**

Agnew, R. (2007). *Pressured into crime: An overview of general strain theory*. Oxford University Press.

Alexander, M. (2020). *The New Jim Crow: Mass-Incarceration in the Age of Colorblindness*. The New Press.

Allen, R. L. (2009). What about poor White people?. In *Handbook of social justice in education* (pp. 227-248). Routledge.

Amatrudo, A. (2009). *Criminology and political theory*. Sage.

American Friends Service Committee. (1971). *Struggle for Justice: A Report on Crime and Punishment in America, Prepared for the American Friends Service Committee*. New York: Hill & Wang.

Banfield, E. C. (1974). *The unheavenly city revisited*. Little, Brown.

Beck, A. J., & Blumstein, A. (2018). Racial disproportionality in US state prisons: Accounting for the effects of racial and ethnic differences in criminal involvement, arrests, sentencing, and time served. *Journal of Quantitative Criminology*, 34(3), 853-883.

Bell, E. (2011). *Criminal justice and neoliberalism*. Springer.

Bernburg, J. G. (2002). Anomie, social change and crime. A theoretical examination of institutional-anomie theory. *British Journal of Criminology*, 42(4), 729-742.

Blumstein, A. (1982). On the racial disproportionality of United States' prison populations. *J. Crim. l. & Criminology*, 73, 1259.

Blumstein, A. (2001). Race and criminal justice. *America becoming: Racial trends and their consequences*, 2, 21-31.

Blumstein, A. (2009). Race and the criminal justice system. *Race and Social Problems*, 1(4), 183-186.

Bowling, B. (2019). *The politics of the police*. Oxford University Press, USA.

- Brewer, R. M., & Heitzeg, N. A. (2008). The racialization of crime and punishment: Criminal justice, color-blind racism, and the political economy of the prison industrial complex. *American Behavioral Scientist*, 51(5), 625-644.
- Brodeur, J. P. (2010). *The policing web*. Oxford University Press.
- Brucato, B. (2014). Fabricating the color line in a white democracy: From slave catchers to petty sovereigns. *Theoria*, 61(141), 30-54.
- Buonanno, P. (2003). The socioeconomic determinants of crime. A review of the literature.
- Butler, Judith (2004) *Precarious Life: The Powers of Mourning and Violence*. London: Verso.
- Cahill, M. E., & Mulligan, G. F. (2003). The determinants of crime in Tucson, Arizona. *Urban Geography*, 24(7), 582-610.
- Calathes, W. (2017). Racial capitalism and punishment philosophy and practices: What really stands in the way of prison abolition. *Contemporary Justice Review*, 20(4), 442-455.
- Caney, S. (1992). Liberalism and communitarianism: a misconceived debate. *Political Studies*, 40(2), 273-289.
- Canton, R. (2017). *Why Punish?: An Introduction to the Philosophy of Punishment*. Macmillan International Higher Education.
- Cavadino, M., & Dignan, J. (2006). Penal policy and political economy. *Criminology & Criminal Justice*, 6(4), 435-456.
- Chambliss, W. J., & Seidman, R. B. (1971). *Law, order, and power* (p. 3). Reading, MA: Addison-Wesley.
- Cloward, R. A., & Ohlin, L. E. (1960). Illegitimate means and delinquent subcultures. *Social Deviance: Readings in Theory & Research, 5th ed., Upper Saddle River, NJ: Pearson/Prentice Hall*, 45-49.
- Cohen, D. (1996). Law, social policy, and violence: The impact of regional cultures. *Journal of personality and Social Psychology*, 70(5), 961.
- Crutchfield, R. D., & Pettinicchio, D. (2009). "Cultures of inequality": Ethnicity, immigration, social welfare, and imprisonment. *The Annals of the American Academy of Political and Social Science*, 623(1), 134-147.
- Davis, A. Y. (2011). *Are prisons obsolete?*. Seven Stories Press.
- Dias, C. F., & Vaughn, M. S. (2006). Bureaucracy, managerial disorganization, and administrative breakdown in criminal justice agencies. *Journal of Criminal Justice*, 34(5), 543-555.

- Dilts, A. (2012). To kill a thief: Punishment, proportionality, and criminal subjectivity in Locke's Second Treatise. *Political Theory*, 40(1), 58-83.
- Dobbin, F., Simmons, B., & Garrett, G. (2007). The global diffusion of public policies: Social construction, coercion, competition, or learning?. *Annu. Rev. Sociol.*, 33, 449-472.
- Downes, D., & Garland, D. (2001). Mass incarceration in the United States—A European perspective. *Mass imprisonment in the United States*, 51-69.
- Ehlers, C. L., Gizer, I. R., Gilder, D. A., Ellingson, J. M., & Yehuda, R. (2013). Measuring historical trauma in an American Indian community sample: Contributions of substance dependence, affective disorder, conduct disorder and PTSD. *Drug and alcohol dependence*, 133(1), 180-187.
- Epp, C. R., Maynard-Moody, S., & Haider-Markel, D. P. (2014). *Pulled over: How police stops define race and citizenship*. University of Chicago Press.
- Fagan, J. (2008). Legitimacy and criminal justice-introduction. *Ohio St. J. Crim. L.*, 6, 123.
- Feeley, M. M. (2017). Two models of the criminal justice system: An organizational perspective. In *Crime, Law and Society* (pp. 119-137). Routledge.
- Fleury-Steiner, B. D., Dunn, K., & Fleury-Steiner, R. (2009). Governing through crime as commonsense racism: Race, space, and death penaltyreform'in Delaware. *Punishment & Society*, 11(1), 5-24.
- Foley, N. (1998). *The white scourge: Mexicans, blacks, and poor whites in Texas cotton culture* (Vol. 2). Univ of California Press.
- Foucault, M., & Ewald, F. (2003). "*Society Must Be Defended*": *Lectures at the Collège de France, 1975-1976* (Vol. 1). Macmillan.
- Garland, D. (2012). Criminology, culture, critique: A review of Jock Young, *The criminological imagination* (Cambridge: Polity, 2011). *The British Journal of Criminology*, 52(2), 417-425.
- Garland, D. (2012). *The culture of control: Crime and social order in contemporary society*. University of Chicago Press.
- Garland, D. (2012). *The culture of control: Crime and social order in contemporary society*. University of Chicago Press.
- Glenn, E. N. (2015). Settler colonialism as structure: A framework for comparative studies of US race and gender formation. *Sociology of Race and Ethnicity*, 1(1), 52-72.
- Goldfield, D. (1997). The Urban Crusade: Race, Culture and Power in the American South since 1945. *Amerikastudien/American Studies*, 181-195.

- Gottschalk, M. (2016). *Caught: The prison state and the lockdown of American politics*. Princeton University Press.
- Greenberg, D. (Ed.). (2010). *Crime And Capitalism: Readings in Marxist Crimonology*. Temple University Press.
- Harris, A. L. (1942). Sombart and German (National) Socialism. *Journal of Political Economy*, 50(6), 805-835.
- Hindelang, M. J. (1978). Race and involvement in common law personal crimes. *American sociological review*, 93-109.
- Holmes, Stephen (2000). The Liberal Idea. *The American Prospect*. Available from: <https://prospect.org/power/liberal-idea/>
- Howard, L. M. (2012). The Ethnocracy Trap. *Journal of Democracy*, 23(4), 155-169.
- Husak, D. N. (1992). *Drugs and rights*. Cambridge University Press.
- Jeffery, C. R. (1959). Pioneers in criminology: The historical development of criminology. *The Journal of Criminal Law, Criminology, and Police Science*, 50(1), 3-19.
- Kagan, R. A. (2006). American and European ways of law: Six entrenched differences.
- Kupers, T. A. (2017). *Solitary: The inside story of supermax isolation and how we can abolish it*. Univ of California Press.
- Lipsky, M., & Hill, M. (1993). Street-level bureaucracy: An introduction. *The policy process: A reader*, 381-385.
- Locke, J. (2015). *The second treatise of civil government*. Broadview Press.
- Lorca, R. (2016). The presumption of punishment: A critical review of its early modern origins. *Can. JL & Jurisprudence*, 29, 385.
- Lynch, M. J. (2019). Class, Race, Gender and Criminology: Structured Choices and the Life Course. In *Race, Gender, and Class in Criminology the Intersections* (pp. 3-28). Routledge.
- McCann, M. W., & Lovell, G. I. (2020). *Union by Law: Filipino American Labor Activists, Rights Radicalism, and Racial Capitalism*. University of Chicago Press.
- McCold, P. (2004). Paradigm muddle: The threat to restorative justice posed by its merger with community justice. *Contemporary Justice Review*, 7(1), 13-35.

- McLeod, A. M. (2008). *Exporting US criminal justice: Crime, development, and empire after the Cold War*. Stanford University.
- Melamed, J. (2015). Racial capitalism. *Critical Ethnic Studies*, 1(1), 76-85.
- Michalowski, R. (2009). Power, crime and criminology in the new imperial age. *Crime, law and social change*, 51(3-4), 303-325.
- Miller, L. (2004). Good cop—Bad cop: Problem officers, law enforcement culture, and strategies for success. *Journal of Police and Criminal Psychology*, 19(2), 30-48.
- Murakawa, N. (2014). *The first civil right: How liberals built prison America*. Oxford University Press.
- Murphy, J. C. (2014). *Marxism and retribution* (pp. 158-184). Princeton University Press.
- Murray, C. (2008). *Losing ground: American social policy, 1950-1980*. Basic books.
- Neocleous, M. (2000). *The fabrication of social order: A critical theory of police power*. Pluto Press.
- Norrie, A. W. (1982). Marxism and the critique of criminal justice. *Contemporary Crises*, 6(1), 59-73.
- Pashukanis, E. (2017). *The general theory of law and Marxism*. Routledge.
- Pettit, B., & Western, B. (2004). Mass imprisonment and the life course: Race and class inequality in US incarceration. *American sociological review*, 69(2), 151-169.
- Pihlajamäki, H. (2020). Christianity and the liberal enlightenment reforms of criminal law. In *Christianity and Criminal Law* (pp. 80-96). Routledge.
- Piquero, A. R. (2008). Disproportionate minority contact. *The future of children*, 59-79.
- Platt, T. (1974). Prospects for a radical criminology in the United States. *Crime and Social Justice*, (1), 2-10.
- Platt, T. (1982). Crime and punishment in the United States: Immediate and long-term reforms from a Marxist perspective. *Crime and Social Justice*, (18), 38-45.
- Potter, H. (2013). Intersectional criminology: Interrogating identity and power in criminological research and theory. *Critical Criminology*, 21(3), 305-318.
- Pratt, J. (2007). *Penal populism*. Routledge.
- Quinney, R. (1970). *The social reality of crime*. Transaction publishers.

- Ralph, M., & Singhal, M. (2019). Racial capitalism. *Theory and Society*, 48(6), 851-881.
- Weitzer, R., & Tuch, S. A. (1999). Race, class, and perceptions of discrimination by the police. *Crime & delinquency*, 45(4), 494-507.
- Reddaway, W. F. (Ed.). (2012). *Documents of Catherine the Great: The Correspondence with Voltaire and the Instruction of 1767 in the English Text of 1768*. Cambridge University Press.
- Reddy, C. (2011). *Freedom with violence*. Durham, NC: Duke University Press.
- Reiman, J. (1987). The Marxian critique of criminal justice. *Criminal Justice Ethics*, 6(1), 30-50.
- Reiner, R. (2007). *Law and order: an honest citizen's guide to crime and control*. Polity.
- Robinson, C. J. (2021). *Black Marxism: The making of the Black radical tradition*. Penguin UK.
- Rosenfeld, R., & Messner, S. F. (2020). Crime and the American dream: An institutional analysis. In *The legacy of anomie theory* (pp. 159-181). Routledge.
- Russell, S. (2002). The continuing relevance of Marxism to critical criminology. *Critical Criminology*, 11(2), 113-135.
- Sampson, R. J., & Lauritsen, J. L. (1997). Racial and ethnic disparities in crime and criminal justice in the United States. *Crime and justice*, 21, 311-374.
- Santos, B. D. S. (1980). Law and community: the changing nature of State power in late capitalism. *International Journal of the Sociology of Law*, 8, 379-397.
- Scheingold, S. A. (2011). *The politics of law and order: Street crime and public policy*. Quid Pro Books.
- Schulhofer, S. J. (1988). Criminal justice discretion as a regulatory system. *The Journal of Legal Studies*, 17(1), 43-82.
- Simon, J., & Silvestre, G. (2017). *Governing through crime* (pp. 73-91). Routledge.
- Smith, Andrea. (2012). Indigeneity, settler colonialism, white supremacy. *Racial formation in the twenty-first century*, 66.
- Smith, M. R., & Alpert, G. P. (2007). Explaining police bias: A theory of social conditioning and illusory correlation. *Criminal justice and behavior*, 34(10), 1262-1283.
- Smith, R. M. (1997). *Civic ideals: Conflicting visions of citizenship in US history*. Yale University Press.
- Solum, L. B. (2004). Procedural justice. *S. CAL. I. REV.*, 78, 181.
- Sombart, W. (1932). *Die Zukunft des Kapitalismus*. Buchholz & Weißwange.

- Sommers, S. R., & Ellsworth, P. C. (2000). Race in the courtroom: Perceptions of guilt and dispositional attributions. *Personality and Social Psychology Bulletin*, 26(11), 1367-1379.
- Soss, J., & Weaver, V. (2017). Police are our government: Politics, political science, and the policing of race–class subjugated communities. *Annual Review of Political Science*, 20, 565-591.
- Stuntz, W. J. (2011). *The collapse of American criminal justice*. Harvard University Press.
- Tamanaha, B. Z. (2004). *On the rule of law: History, politics, theory*. Cambridge University Press.
- Tankebe, J. (2014). Police legitimacy. *The Oxford handbook of police and policing*, 238-259.
- Terrill, W., & Paoline III, E. A. (2015). Citizen complaints as threats to police legitimacy: The role of officers' occupational attitudes. *Journal of Contemporary Criminal Justice*, 31(2), 192-211.
- Tonry, M. (2015). Is cross-national and comparative research on the criminal justice system useful?. *European Journal of Criminology*, 12(4), 505-516.
- Tonry, M. H. (2011). *Punishing race: A continuing American dilemma*. Oxford University Press.
- Tuhiwai-Smith, L. (2021). *Decolonizing methodologies: Research and indigenous peoples*. Zed Books Ltd..
- Ugwudike, P. (2015). *An introduction to critical criminology*. Policy Press.
- Vila, B., & Morris, C. (Eds.). (1999). *The role of police in American society: A documentary history*. Westport, CT: Greenwood Press.
- Vogel, R. D. (1983). Capitalism and incarceration. *Monthly Review*, 34(10), 30-41.
- Wacquant, L. (1999). Suitable enemies' foreigners and immigrants in the prisons of Europe. *Punishment & society*, 1(2), 215-222.
- Wacquant, L. (2009). *Punishing the poor: The neoliberal government of social insecurity*. duke university Press.
- Wacquant, L. (2009). *Punishing the poor: The neoliberal government of social insecurity*. duke university Press.
- Walker, S., & Katz, C. (2011). *The police in America an introduction* 7th edition.
- Wallace, D., & Humphries, D. (1981). Urban Crime and Capitalist Accumulation-1950-1971 (From Crime and Capitalism, P 140-156, 1981, David F Greenberg, ed.-See NCJ-76520).
- Western, B., & Beckett, K. (1999). How unregulated is the US labor market? The penal system as a labor market institution. *American Journal of Sociology*, 104(4), 1030-60.

Winlow, S., Hall, S., & Treadwell, J. (2017). *The rise of the Right: English nationalism and the transformation of working-class politics*. Policy Press.

Wolfe, P. (2006). Settler Colonialism and the Elimination of the Native. *Journal of genocide research*, 8(4), 387-409.

Wolfgang, M. E., Ferracuti, F., & Mannheim, H. (1967). *The subculture of violence: Towards an integrated theory in criminology* (Vol. 16). London: Tavistock Publications.

Young, J. (1999). *The exclusive society: Social exclusion, crime and difference in late modernity*. Sage.

#### **Chapter 4: A General Theory of Prison Disproportionalities**

Agamben, G. (2020). *I. HOMO SACER: Sovereign Power and Bare Life* (pp. 1-160). stanford university Press.

Alberta, A. J., & Wood, A. H. (2009). A practical skills model for effectively engaging clients in multicultural settings. *The Counseling Psychologist*, 37(4), 564-579.

Alpert, G <https://dataunodc.un.org/data/crime/Police%20personnel>. P., & Smith, W. C. (1994). How reasonable is the reasonable man: Police and excessive force. *J. Crim. L. & Criminology*, 85, 481.

Amar, A. R. (2008). 1. Fourth Amendment First Principles. In *The Constitution and Criminal Procedure* (pp. 1-45). Yale University Press.

Axinn, S. (1971). Kant, authority, and the French revolution. *Journal of the History of Ideas*, 32(3), 423-432.

Baldwin, J. (2013). *The fire next time*. Vintage.

Bancroft, A. (2005). Roma and Gypsy-Travellers in Europe: modernity, race, space and exclusion.

Barnett, R. E. (1977). Restitution: A new paradigm of criminal justice. *Ethics*, 87(4), 279-301.

Barton, C. (1999). Empowerment and retribution in criminal justice. *Professional Ethics, A Multidisciplinary Journal*, 7(3/4), 111-135.

Beccaria, C., Newman, G. R., & Marongiu, P. (2017). *On crimes and punishments*. Routledge.

Bohm, R. M. (1986). Crime, criminal and crime control policy myths. *Justice Quarterly*, 3(2), 193-214.

- Bonilla-Silva, E. (2006). *Racism without racists: Color-blind racism and the persistence of racial inequality in the United States*. Rowman & Littlefield Publishers.
- Booker, M. (1987). *Twentieth Century Europe*.
- Braithwaite, J. (2002). *Restorative justice & responsive regulation*. Oxford University press on demand.
- Braithwaite, J. (2003). Principles of restorative justice. *Restorative justice and criminal justice: competing or reconcilable paradigms, 1*, 5-6.
- Braithwaite, J., Ahmed, E., & Braithwaite, V. (2017). Shame, restorative justice, and crime. In *Taking Stock* (pp. 397-417). Routledge.
- Brubaker, W. R. (1990). Immigration, citizenship, and the nation-state in France and Germany: A comparative historical analysis. *International sociology, 5*(4), 379-407.
- Cahn, C. (2002). Extreme poverty, human rights and Roma. *Roma Rights Quarterly (1)*, 5-6.
- Chartrand, V. (2019). Unsettled times: Indigenous incarceration and the links between colonialism and the penitentiary in Canada. *Canadian Journal of Criminology and Criminal Justice, 61*(3), 67-89.
- Chazan, R. (1980). A Medieval Hebrew Polemical Mélange. *Hebrew Union College Annual, 89-110*.
- Chin, G. J., & Vernon, C. J. (2014). Reasonable but unconstitutional: Racial profiling and the radical objectivity of *Whren v. United States*. *Geo. Wash. L. Rev.*, 83, 882.
- Cover, R. M. (1986). Violence and the word. Faculty Scholarship Series. Paper 2708
- Coyle, M. J. (2010). Notes on the study of language: Towards critical race criminology. *W. Criminology Rev.*, 11, 11.
- Coyle, M. J. (2010). Notes on the study of language: Towards critical race criminology. *W. Criminology Rev.*, 11, 11.
- Coyle, M. J., & Schept, J. (2017). Penal abolition and the state: colonial, racial and gender violences.
- Cunneen, C. (2006). Racism, discrimination and the over-representation of Indigenous people in the criminal justice system: Some conceptual and explanatory issues. *Current issues in criminal justice, 17*(3), 329-346.
- Cunneen, C. (2011). Indigenous anger and the criminogenic effects of the criminal justice system. *Anger and Indigenous men, 37-46*.

Cunneen, C., & Rowe, S. (2015). Decolonising indigenous victimisation. In *Crime, victims and policy* (pp. 10-32). Palgrave Macmillan, London.

Cunneen, C., & Tauri, J. (2016). *Indigenous criminology*. Policy Press.

Delgado, R., & Stefancic, J. (2007). Critical race theory and criminal justice. *Humanity & Society*, 31(2-3), 133-145.

Devery, C. (2010). Criminal profiling and criminal investigation. *Journal of Contemporary Criminal Justice*, 26(4), 393-409.

Duneier, M. (2016). *Ghetto: The invention of a place, the history of an idea*. Macmillan.

Durkheim, E. (1985). *Las reglas del método sociológico* (Vol. 86). Ediciones Akal.

Federal Bureau of Investigation (2018). Crime in the United States; Police Employee Data. Available from: <https://ucr.fbi.gov/crime-in-the-u.s/2018/crime-in-the-u.s.-2018/topic-pages/police-employee-data>

Fekete, L. (2014). Europe against the Roma. *Race & Class*, 55(3), 60-70.

Findley, K. A. (2008). Toward a new paradigm of criminal justice: how the innocence movement merges crime control and due process. *Tex. Tech L. Rev.*, 41, 133.

Fleetwood, J. (2014). *Drug mules: Women in the international cocaine trade*. Springer.

Flin, R., Pender, Z., Wujec, L., Grant, V., & Stewart, E. (2007). Police officers' assessment of operational situations. *Policing: an international journal of police strategies & management*.

Fogelman, E. (2011). *Conscience and courage: Rescuers of Jews during the Holocaust*. Anchor.

Foucault, M., & Ewald, F. (2003). "*Society Must Be Defended*": *Lectures at the Collège de France, 1975-1976* (Vol. 1). Macmillan.

Foucault, M., & Ewald, F. (2003). "*Society Must Be Defended*": *Lectures at the Collège de France, 1975-1976* (Vol. 1). Macmillan.

Foucault, M. (1975). *Discipline and punish*. A. Sheridan, Tr., Paris, FR, Gallimard.

Freeden, M. (1998). Is nationalism a distinct ideology?. *Political studies*, 46(4), 748-765.

Fussell, P. (2009). *The Great War and modern memory*. Sterling Publishing Company, Inc..

Garland, D. (1996). THE LIMITS OF THE SOVEREIGN STATE Strategies of Crime Control in Contemporary Society. *The british journal of criminology*, 36(4), 445-471.

- Garland, D. (2012). Criminology, culture, critique: A review of Jock Young, *The criminological imagination* (Cambridge: Polity, 2011). *The British Journal of Criminology*, 52(2), 417-425.
- Geertz, C. (1975). Common sense as a cultural system. *The Antioch Review*, 33(1), 5-26.
- Genty, P. M. (2002). Damage to family relationships as a collateral consequence of parental incarceration. *Fordham Urb. LJ*, 30, 1671.
- Goldstein, A. S., & Marcus, M. (1977). The myth of judicial supervision in three "inquisitorial" systems: France, Italy, and Germany. *The Yale Law Journal*, 87(2), 240-283.
- Gorski, P. S. (2000). The mosaic moment: An early modernist critique of modernist theories of nationalism. *American Journal of Sociology*, 105(5), 1428-1468.
- Gray, G. C., & Salole, A. T. (2006). The local culture of punishment: An ethnography of criminal justice worker discourse. *British Journal of Criminology*, 46(4), 661-679.
- Haebich, A. (2000). *Broken circles*. Fremantle Press.
- Hand, C. A., Hankes, J., & House, T. (2012). Restorative justice: The indigenous justice system. *Contemporary Justice Review*, 15(4), 449-467.
- Haney, L. (2016). Prisons of the past: Penal nationalism and the politics of punishment in Central Europe. *Punishment & Society*, 18(3), 346-368.
- Ho, H. L. (2015). The legal concept of evidence.
- Hobbes, T., & Missner, M. (2016). *Thomas Hobbes: Leviathan (Longman Library of Primary Sources in Philosophy)*. Routledge.
- Hulsman, L. (1997). Themes and concepts in an abolitionist approach to criminal justice. Retrieved from [loukhulsman.org/Publication](http://loukhulsman.org/Publication).
- Hulsman, L. H. (1986). Critical criminology and the concept of crime. *Contemporary Crises*, 10(1), 63-80.
- Husak, D. (2008). *Overcriminalization: The limits of the criminal law*. Oxford University Press.
- John R. Gillis (Ed.). (1994). *Commemorations: The politics of national identity*. Princeton University Press.
- Johnstone, G. (2013). *Restorative justice: Ideas, values, debates*. Routledge.
- Kamenska, A., Pūce, I., & Laganovska, K. (2013). Prison conditions in Latvia. *Rome: Antigone*
- Kanapeckienė, V., Valintėlienė, R., Beržanskytė, A., Kėvalas, R., & Supranowicz, P. (2009).

- Health of Roma children in Vilnius and Ventspils. *Medicina*, 45(2), 153.
- Klaits, J. (2015). *Printed propaganda under Louis XIV*. Princeton University Press.
- Kluger, R. (2011). *Simple justice: The history of Brown v. Board of Education and Black America's struggle for equality*. Vintage.
- Kuhn, T. (2021). *The structure of scientific revolutions* (pp. 176-177). Princeton University Press.
- Langbein, J. H. (1978). Torture and plea bargaining. *The University of Chicago Law Review*, 46(1), 3-22.
- Manning, P. K. (2005). The study of policing. *Police quarterly*, 8(1), 23-43.
- Mathiesen, T. (2014). *The politics of abolition revisited*. Routledge.
- McCann, M. W., & Lovell, G. I. (2020). *Union by Law: Filipino American Labor Activists, Rights Radicalism, and Racial Capitalism*. University of Chicago Press.
- McCold, P., & Wachtel, T. (2003, August). In pursuit of paradigm: A theory of restorative justice. In *XIII World Congress of Criminology* (Vol. 10, p. 15).
- McEvoy, K., & Newburn, T. (Eds.). (2003). *Criminology, conflict resolution and restorative justice*. New York: Palgrave Macmillan.
- Melamed, J. (2011). *Represent and destroy: Rationalizing violence in the new racial capitalism*. U of Minnesota Press.
- Melamed, J. (2015). Racial capitalism. *Critical Ethnic Studies*, 1(1), 76-85.
- Merback, M. B., & Merback, M. B. (1999). *The thief, the cross, and the wheel: Pain and the spectacle of punishment in medieval and Renaissance Europe*. University of Chicago Press.
- Merton, R. K. (1938). Social structure and anomie. *American sociological review*, 3(5), 672-682.
- Miethe, T. D., & Meier, R. F. (1994). *Crime and its social context: Toward an integrated theory of offenders, victims, and situations*. Suny Press.
- Mill, J. S. (2008). *Utilitarianism and on liberty: Including Mill's' Essay on Bentham'and selections from the writings of Jeremy Bentham and John Austin*. John Wiley & Sons.
- Navarro, J., & Robertson, K. (2020). CHAPTER SIXTEEN. Mass Incarceration since 1492. In *Otherwise Worlds* (pp. 322-329). Duke University Press.
- Neocleous, M. (2014). *War power, police power*. Edinburgh University Press.

- Nunn, K. B. (1997). Law as a Eurocentric enterprise. *Law & Ineq.*, 15, 323.
- O'Malley, P. (2001). Risk, crime and prudentialism revisited. *Crime, risk and justice: The politics of crime control in liberal democracies*, 89-103.
- O'Donnell, R. M. (2019). Challenging racist predictive policing algorithms under the equal protection clause. *NYUL Rev.*, 94, 544.
- Olomofofe, L. (2005). European Roma Rights Centre Roma Rights Summer Workshop 2005. *Roma Rights Quarterly*, (3-4), 87-90.
- Omi, M., & Winant, H. (2020). *Racial formation* (pp. 405-415). Routledge.
- Parkin, J. (2007). *Taming the Leviathan: The reception of the political and religious ideas of Thomas Hobbes in England 1640–1700* (Vol. 82). Cambridge University Press.
- Patrinos, H. A., & Hall, G. (Eds.). (2012). *Indigenous peoples, poverty, and development*. Cambridge University Press.
- Payne, M. (2017). The inclusion of Slovak Roma pupils in secondary school: contexts of language policy and planning. *Current Issues in Language Planning*, 18(2), 161-180.
- Revenge, A., Ringold, D., & Tracy, W. M. (2002). *Poverty and ethnicity: A cross-country study of Roma poverty in Central Europe* (Vol. 531). World Bank Publications.
- Riley, P. F. (1983). Hard times, police and the making of public policy in the Paris of Louis XIV. *Historical Reflections/Réflexions Historiques*, 313-334.
- Rule, J. C., & Trotter, B. S. (2014). *A world of paper: Louis XIV, Colbert de Torcy, and the rise of the information state*. McGill-Queen's Press-MQUP.
- Russell, E. K. (2017). Queer penalties: The criminal justice paradigm in lesbian and gay anti-violence politics. *Critical criminology*, 25(1), 21-35.
- Schafer, J. A., Carter, D. L., Katz-Bannister, A. J., & Wells, W. M. (2006). Decision making in traffic stop encounters: A multivariate analysis of police behavior. *Police quarterly*, 9(2), 184-209.
- Smith, A. D. (1996). Culture, community and territory: the politics of ethnicity and nationalism. *International Affairs*, 72(3), 445-458.
- Smith, M. R., & Alpert, G. P. (2007). Explaining police bias: A theory of social conditioning and illusory correlation. *Criminal justice and behavior*, 34(10), 1262-1283.
- Stephan, W. G., & Rosenfield, D. (1978). Effects of desegregation on racial attitudes. *Journal of Personality and Social Psychology*, 36(8), 795.

- Tauri, J. M. (2013). Indigenous critique of authoritarian criminology. In *Crime, justice and social democracy* (pp. 217-233). Palgrave Macmillan, London.
- Trevaskes, S. (2016). Using mao to package criminal justice discourse in 21st-century China. *The China Quarterly*, 226, 299-318.
- Tumalavičius, V., Veikša, I., Načisčionis, J., Zahars, V., & Draskovic, V. (2017). ISSUES OF THE STATE AND SOCIETY SECURITY (Part I): ENSURING PUBLIC SECURITY IN THE FIGHT AGAINST CRIME. *Journal of Security & Sustainability Issues*, 6(3).
- Turner, J. (2012). *Awakening to race: Individualism and social consciousness in America*. University of Chicago Press.
- Tyler, T., & Jackson, J. (2013). Future challenges in the study of legitimacy and criminal justice. *Yale Law School, Public Law Working Paper*, (264).
- United Nations (2010). Police Per Capita, Decennial Report. <https://dataunodc.un.org/data/crime/Police%20personnel>
- Vogler, J. P. (2018). *The Complex Imprint of Foreign Rule: Tracking Differential Legacies Along the Administrative Hierarchy*. Working Paper, [http://www.janvogler.net/Imperial Differential Effects. pdf](http://www.janvogler.net/Imperial%20Differential%20Effects.pdf), Accessed July 16.
- Walker, H. L. (2020). *Mobilized by Injustice: Criminal Justice Contact, Political Participation, and Race*. Oxford University Press.
- Walker, S. (1992). Origins of the contemporary criminal justice paradigm: The American Bar Foundation Survey, 1953–1969. *Justice Quarterly*, 9(1), 47-76.
- Walton, F. E. (1958). " Selective Distribution" of Police Patrol Force. History, Current Practices, Recommendations. *The Journal of Criminal Law, Criminology, and Police Science*, 49(2), 165-171.
- Waluszko, M. W. (2020). The Roma Genocide. The Roma Pariahs before, during, and after the Second World War. *Narracje o Zagładzie*, (6), 140-164.
- Walzak, J., Chouhy, C., Singer, A., Lehmann, P. S., & Gertz, M. (2020). The Blurred ‘Blue line’: a cross-national comparison of the sources of public support for extralegal policing. *Policing and Society*, 1-17.
- Warren, C. J. E. (1954). Brown v. board of education. *United States Reports*, 347(1954), 483.
- Warren, P. Y., & Farrell, A. (2009). The environmental context of racial profiling. *The Annals of the American Academy of Political and Social Science*, 623(1), 52-63.
- Western, B., & Pettit, B. (2002). Beyond crime and punishment: Prisons and inequality. *Contexts*, 1(3), 37-43.

Whitehorn, L. (2014). Black power incarcerated: Political prisoners, genocide, and the State. *Socialism and Democracy*, 28(3), 101-117.

Wimmer, A. (2012). *Waves of war: Nationalism, state formation, and ethnic exclusion in the modern world*. Cambridge University Press.

Wollin, S. S. (1960). *Politics and Vision*. Boston: Little.

Zehr, H. (1994). Justice paradigm shift: Values and visions in the reform process. *Mediation Q.*, 12, 207.

## **Chapter 5: Reducing Harm And Redefining ‘Crime’**

Aertsen, I., Bolívar, D., & Lauwers, N. (2011). Restorative justice and the active victim: Exploring the concept of empowerment. *Temida*, 14(1), 5-19.

Alberton, A. M., & Gorey, K. M. (2018). Contact is a stronger predictor of attitudes toward police than race: A state-of-the-art review. *Policing: An International Journal*.

Annan, K. (1998). The quiet revolution. *Global Governance*, 4, 123.

Arrigo, B. A., & Bullock, J. L. (2008). The psychological effects of solitary confinement on prisoners in supermax units: Reviewing what we know and recommending what should change.

*International journal of offender therapy and comparative criminology*, 52(6), 622-640.

Ben-Moshe, L. (2013). The tension between abolition and reform. In *The End of Prisons* (pp. 83-92). Brill.

Braithwaite, J. (2002). *Restorative justice & responsive regulation*. Oxford University press on demand.

Braithwaite, J. (2007). Encourage restorative justice. *Criminology & Pub. Pol'y*, 6, 689.

Butorac, S. K. (2018). Hannah Arendt, James Baldwin, and the politics of love. *Political Research Quarterly*, 71(3), 710-721.

Chesney-Lind, M., & Mauer, M. (Eds.). (2003). *Invisible punishment: The collateral consequences of mass imprisonment*. New Press, The.

Cohen, A. J. (2019). Moral Restorative Justice: A Political Genealogy of Activism and Neoliberalism in the United States. *Minn. L. Rev.*, 104, 889.

- Collins, J. (2015). Restorative justice in England and Wales: From the margins to the mainstream. *Restorative Justice*, 3(1), 129-134.
- Cover, R. M. (1992). *Narrative, violence, and the law: the essays of Robert Cover*. University of Michigan Press.
- Cunneen, C. (2008). Understanding restorative justice through the lens of critical criminology. *The critical criminology companion*, 290-302.
- Daly, E. (2001). Transformative justice: Charting a path to reconciliation. *Int'l Legal Persp.*, 12, 73.
- Daly, K. (2006). The limits of restorative justice. *Handbook of restorative justice: A global perspective*, 134-145.
- Davis, F. E. (2019). *The little book of race and restorative justice: Black lives, healing, and US social transformation*. Simon and Schuster.
- Dorf, M. C. (2003). Legal indeterminacy and institutional design. *NYUL Rev.*, 78, 875.
- Dubber, M. D. (2006). Legitimizing Penal Law. *Cardozo L. Rev.*, 28, 2597.
- Elliott, L. (2002). Con Game and restorative justice: Inventing the truth about Canada's prisons. *Canadian Journal of Criminology*, 44(4), 459-474.
- Elliott, R., Bohart, A. C., Watson, J. C., & Greenberg, L. S. (2011). Empathy. *Psychotherapy*, 48(1), 43.
- Epp, C. R., Maynard-Moody, S., & Haider-Markel, D. P. (2014). *Pulled over: How police stops define race and citizenship*. University of Chicago Press.
- Etzioni-Halevy, E. (2013). *Bureaucracy and democracy*. Routledge.
- Feeley, M. M. (2017). The Process is the Punishment. In *Crime, Law and Society* (pp. 139-188). Routledge.
- Froestad, J., & Shearing, C. (2007). 'Effecting Security and Deepening Democracy through PeaceMaking and PeaceBuilding Forums: A South African Rural Experiment. *Conflict and governance in South Africa: Moving towards a more just and peaceful society*.
- Gavrielides, T. (2014). Bringing race relations into the restorative justice debate: An alternative and personalized vision of "the other". *Journal of Black Studies*, 45(3), 216-246.
- Gergen, K. (2011). The mythic reality of the autonomous individual. *Zygon*, 46(1), 204-223.
- Glendinning, S. (2016). Derrida and the Philosophy of Law and Justice. *Law and Critique*, 27(2), 187-203.

- Goldin, C. (2006). The quiet revolution that transformed women's employment, education, and family. *American economic review*, 96(2), 1-21.
- González, T. (2019). The legalization of restorative justice: A fifty-state empirical analysis. *Utah L. Rev.*, 1027.
- Hakken, D. (1993). Computing and social change: New technology and workplace transformation, 1980-1990. *Annual Review of Anthropology*, 22(1), 107-132.
- Heffner, J., & FeldmanHall, O. (2019). Why we don't always punish: Preferences for non-punitive responses to moral violations. *Scientific reports*, 9(1), 1-13.
- Henwood, B. F., Padgett, D. K., & Tiderington, E. (2014). Provider views of harm reduction versus abstinence policies within homeless services for dually diagnosed adults. *The journal of behavioral health services & research*, 41(1), 80-89.
- Herbert, S. (1998). Police subculture reconsidered. *Criminology*, 36(2), 343-370.
- Inciardi, J. A., & Harrison, L. D. (Eds.). (1999). *Harm reduction: National and international perspectives*. Sage Publications.
- Jones, E. (2020). Gender and Reparations: Seeking Transformative Justice. In *Reparations for Victims of Genocide, War Crimes and Crimes against Humanity* (pp. 86-118). Brill Nijhoff.
- Keenan, M. (2017). Criminal justice, restorative justice, sexual violence and the rule of law. In *Restorative Responses to Sexual Violence* (pp. 44-68). Routledge.
- King Jr, M. L. (2019). *Strength to love*. Beacon Press.
- King, M. S. (2008). Restorative justice, therapeutic jurisprudence and the rise of emotionally intelligent justice. *Melb. UL Rev.*, 32, 1096.
- King, R. D., & Wheelock, D. (2007). Group threat and social control: Race, perceptions of minorities and the desire to punish. *Social forces*, 85(3), 1255-1280.
- Kubany, E. S., Hill, E. E., & Owens, J. A. (2003). Cognitive trauma therapy for battered women with PTSD: Preliminary findings. *Journal of traumatic stress*, 16(1), 81-91.
- Mabit, J. (2002). Blending traditions: Using indigenous medicinal knowledge to treat drug addiction. *Maps Bulletin*, 12(2), 25-32.
- Marlatt, G. A. (1996). Harm reduction: Come as you are. *Addictive behaviors*, 21(6), 779-788.
- Marshall, T. F. (1999). *Restorative justice: An overview*. London: Home Office.
- McAlinden, A. M. (2011). 'Transforming justice': challenges for restorative justice in an era of punishment-based corrections. *Contemporary Justice Review*, 14(4), 383-406.

- McCold, P. (1998). Restorative justice: variations on a theme. *Restorative justice for juveniles: Potentialities, risks and problems for research*, 19-53.
- McCold, P. (1999). Restorative justice practice: The state of the field 1999. *Retrieved on March, 7, 2002*.
- McCold, P., & Wachtel, T. (2003, August). In pursuit of paradigm: A theory of restorative justice. In *XIII World Congress of Criminology* (Vol. 10, p. 15).
- McLellan, A. T., Kushner, H., Metzger, D., Peters, R., Smith, I., Grissom, G., ... & Argeriou, M. (1992). The fifth edition of the Addiction Severity Index. *Journal of substance abuse treatment*, 9(3), 199-213.
- Patterson, E. J. (2013). The dose–response of time served in prison on mortality: New York State, 1989–2003. *American Journal of Public Health*, 103(3), 523-528.
- Rose, T., & Unnithan, P. (2015). In or out of the group? Police subculture and occupational stress. *Policing: An International Journal of Police Strategies & Management*.
- Sakala, L. (2014). Breaking down mass incarceration in the 2010 census: State-by-state incarceration rates by race/ethnicity. *Prison Policy Initiative*, 28.
- Sawatsky, J. (2010). *Restorative justice and practices in New Zealand: Towards a restorative society*. Wipf and Stock Publishers.
- Sered, D. (2011). A new approach to victim services: The Common Justice Demonstration Project.
- Sered, D. (2019). *Until we reckon: Violence, mass incarceration, and a road to repair*. The New Press.
- Shdaimah, C. S., & Leon, C. (2015). “First and foremost they’re survivors” selective manipulation, resilience, and assertion among prostitute women. *Feminist Criminology*, 10(4), 326-347.
- Shearing, C. (2001). Punishment and the changing face of the governance. *Punishment & Society*, 3(2), 203-220.
- Sherman, L. W., Strang, H., Mayo-Wilson, E., Woods, D. J., & Ariel, B. (2015). Are restorative justice conferences effective in reducing repeat offending? Findings from a Campbell systematic review. *Journal of quantitative criminology*, 31(1), 1-24.
- Sherman, N. (1998). Empathy and imagination. *Midwest studies in philosophy*, 22, 82-119.
- Sokol, J. (2018). *The Heavens Might Crack: The Death and Legacy of Martin Luther King Jr*. Hachette UK.

Sugie, N. F., & Turney, K. (2017). Beyond incarceration: Criminal justice contact and mental health. *American Sociological Review*, 82(4), 719-743.

Umbreit, M. S. (2000). *Multicultural implications of restorative justice: Potential pitfalls and dangers*. US Department of Justice, Office of Justice Programs, Office for Victims of Crime.

Van Ness, D., & Strong, K. H. (2014). *Restoring justice: An introduction to restorative justice*. Routledge.

Volkow, N. D. (2010). Drugs, brains, and behavior: The science of addiction. Retrieved on March, 23, 2011.

Walgrave, L. (2003). Restorative justice for juveniles: just a technique or a fully fledged alternative?. *Johnstone, Gerry, A Restorative Justice Reader: Texts, sources, context, Willan Publishing, Portland, Oregon*, 255-169.

Walgrave, L. (2013). Integrating criminal justice and restorative justice. In *Handbook of restorative justice* (pp. 581-601). Willan.

Wallis, P. (2014). *Understanding restorative justice: How empathy can close the gap created by crime*. Policy Press.

Wood, W. R. (2015). Why restorative justice will not reduce incarceration. *British Journal of Criminology*, 55(5), 883-900.

Zehr, H. (1985). Restorative justice.

Zehr, H. (2015). *The little book of restorative justice: Revised and updated*. Simon and Schuster.

Zernova, M., & Wright, M. (2013). Alternative visions of restorative justice. In *Handbook of restorative justice* (pp. 113-130). Willan.

## **Chapter 6: Conclusion: Confronting Faith in Violence**

Gould, R. V. (1999). Collective violence and group solidarity: Evidence from a feuding society. *American Sociological Review*, 356-380.

Kateb, G. (2008). *Patriotism and other mistakes*. Yale University Press.

King, T. (2003). *The truth about stories: A native narrative*. House of Anansi.

## Appendix

### Definitions:

( $d_c$ ): Disproportionality Index. Formula:

$$d_c = \frac{\sum_{i \in N} \left| 1 - \left( \frac{P_i^I}{P_i^T} \right) \right|}{n_c}$$

( $r_c$ ): Range of Representation from the most underrepresented  $\left( \frac{P_u^I}{P_u^T} \right)$  to the most overrepresented  $\left( \frac{P_o^I}{P_o^T} \right)$  categories.  
Defined as:

$$r_c = \left[ \left( \frac{P_u^I}{P_u^T} \right), \left( \frac{P_o^I}{P_o^T} \right) \right]$$

P<sup>T</sup>: Percent of total population

P<sup>I</sup>: Percent of incarcerated population

Country	data year	( $d_c$ )	( $r_c$ )	Hom. Rate	Incar. Rate	Incar. Pop	GINI	HDI	WHR	DEM
Ireland	2017	6.4	[0.73, 19]	0.80	78	3718	31.90	0.94	6.98	9.15
Switzerland	2017	5.3	[0.56, 14]	0.54	82	6912	32.50	0.94	7.49	9.09
Australia	2016	4.5	[0.75, 9.7]	0.94	161	38845	34.70	0.94	7.27	9.01
Greece	2011	3.7	[0.39, 7]	0.75	89	12479	35.80	0.87	5.36	7.23
Finland	2017	3.3	[0.87, 8.5]	1.42	57	3120	26.80	0.92	7.63	9.03
Norway	2012	2.5	[0.75, 5.83]	0.51	72	3591	26.80	0.95	7.59	9.93
Latvia	2012	2.4	[0.71, 13.9]	3.36	321	6561	35.10	0.85	5.93	7.31
Canada	2016	1.9	[0.33, 5.7]	1.68	114	40663	34.00	0.93	7.33	9.15
Italy	2014	1.6	[0.73, 4]	0.67	88	53263	34.70	0.88	6.00	7.98
France	2013	1.4	[0.82, 3.6]	1.35	110	7190	32.30	0.90	6.49	7.92
England and Wales	2018	.82	[0.85, 3.75]	1.22	146	85348	34.10	0.92	6.81	8.36
New Zealand	2013	1	[0.45, 3.38]	0.94	190	8571	35.00	0.92	7.32	9.26
United States	2016	.73	[0.49, 2.5]	5.35	450	1506800	41.50	0.92	6.89	7.98
Spain	2018	.68	[0.82, 2.18]	0.63	133	61526	36.00	0.89	6.31	8.3
South Africa	2016	.69	[0.19, 2]	33.97	291	161984	63.00	0.70	4.72	7.41
Brazil	2016	.33	[0.64, 1.3]	29.35	347	726712	53.30	0.76	6.42	6.9
Germany	2017	.3 (1.1)	[0.9, 1.5] ([.86, 3.1])	1.18	76	62865	31.40	0.94	6.97	8.63
Saudi Arabia	2017	.26	[0.8, 1.32]	1.50	176	49000	45.90	0.85	6.37	1.93
India	2015	.25	[0.75, 1.64]	3.22	33	418536	35.70	0.64	4.19	7.81

**Table 1.** In order from left to right, for each country: Census data year, disproportionality index, ratio, homicide rate, incarceration rate, total incarcerated population, GINI index score (<https://data.worldbank.org/indicator/SI.POV.GINI>), Human Development Index Score (<http://hdr.undp.org/en/data>), World Happiness Report score (<https://worldhappiness.report/ed/2016>), Democracy Index score (<http://democracyranking.org/wordpress/rank/democracy-ranking-2016>).

Australia	
Disproportionality Index ( $d_c = \dots$ )	<b>4.5</b>
Range of Disproportion ( $r_c = \dots$ )	<b>[0.75, 9.7]</b>

Census Category	$p^T$	$p^I$	$\left(\frac{p^I}{p^T}\right)$	$\left 1 - \left(\frac{p^I}{p^T}\right)\right $
White and Other	97%	72%	<b>0.75</b>	<b>.25</b>
Aboriginal/Torres Isldr.	2.8%	27%	<b>9.7</b>	<b>8.7</b>

**Table 2.** Data and calculation for **Australia**, 2016.

Source for total population statistics:

<https://www.abs.gov.au/ausstats/abs@.nsf/mediareleasesbyReleaseDate/02D50FAA9987D6B7CA25814800087E03?OpenDocument>

Source for incarcerated population statistics: Australian Bureau of Statistics (2016). 45170DO001\_2016 Prisoners in Australia, Table 2.

2016 <https://www.abs.gov.au/ausstats/abs@.nsf/Lookup/by%20Subject/4517.0~2016~Main%20Features~Aboriginal%20and%20Torres%20Strait%20Islander%20prisoner%20characteristics~5>

<b>Brazil</b>	
<b>Disproportionality Index</b> ( $d_c = \dots$ )	<b>.33</b>
<b>Range of Disproportion</b> ( $r_c = \dots$ )	<b>[0.64, 1.3]</b>

Census Category	$p^T$	$p^I$	$\left(\frac{p^I}{p^T}\right)$	$\left 1 - \left(\frac{p^I}{p^T}\right)\right $
White	48%	31%	<b>0.64</b>	<b>.36</b>
Black	51%	67%	<b>1.3</b>	<b>.3</b>

**Table 3.** Data and calculation for **Brazil**, 2016.

Source for total and prison population statistics: Ministério da Justiça (MJ). Levantamento Nacional de Informações Penitenciárias – INFOPEN 2014. Brasília: MJ; 2015. P. 50 <https://www.justica.gov.br/news/mj-divulgara-novo-relatorio-do-infopen-nesta-terca-feira/relatorio-depen-versao-web.pdf>

<b>Canada</b>	
<b>Disproportionality Index</b> ( $d_c = \dots$ )	<b>1.9</b>
<b>Range of Disproportion</b> ( $r_c = \dots$ )	<b>[0.33, 5.7]</b>

Census Category	$p^T$	$p^I$	$\left(\frac{p^I}{p^T}\right)$	$\left 1 - \left(\frac{p^I}{p^T}\right)\right $
Caucasian	73%	55%	<b>.75</b>	<b>.25</b>
Aboriginal	4.9%	26%	<b>5.3</b>	<b>4.3</b>
Black	3.5%	9%	<b>2.6</b>	<b>1.6</b>
Asian	15%	5%	<b>.33</b>	<b>.67</b>
Hispanic	1.3%	1%	<b>.76</b>	<b>.23</b>
Multi-Racial	0.7%	4%	<b>5.7</b>	<b>4.7</b>

**Table 4.** Data and calculation for **Canada**, 2016.

Source for total population statistics: <https://www12.statcan.gc.ca/census-recensement/2016/dp-pd/prof/details/page.cfm?Lang=E&Geo1=PR&Code1=01&Geo2=PR&Code2=01&Data=Count&SearchText=canada&SearchType=Begins&SearchPR=01&B1=All&TABID=1>

Source for incarcerated population statistics: <https://www150.statcan.gc.ca/n1/pub/85-002-x/2018001/article/54972-eng.htm>

<b>England and Wales</b>	
<b>Disproportionality Index</b> ( $d_c = \dots$ )	<b>.82</b>
<b>Range of Disproportion</b> ( $r_c = \dots$ )	<b>[0.85, 3.75]</b>

Census Category	$P^T$	$P^I$	$\left(\frac{P^I}{P^T}\right)$	$\left 1 - \left(\frac{P^I}{P^T}\right)\right $
White	86%	73.25%	<b>.85</b>	<b>.15</b>
Mixed	2.2%	4.26%	<b>1.93</b>	<b>.93</b>
Asian	7.5%	8.16%	<b>1</b>	<b>.08</b>
Black	3.3%	12.4%	<b>3.75</b>	<b>2.75</b>
Other	1%	1.2%	<b>1.2</b>	<b>.2</b>

**Table 5.** Data and calculation for **England and Wales**, 2018. \*Total population statistics are only available for 2011.

Source for total population Statistics: <https://www.ethnicity-facts-figures.service.gov.uk/british-population/national-and-regional-populations/population-of-england-and-wales/latest>

Source for incarcerated population statistics (2018): <https://www.gov.uk/government/statistics/offender-management-statistics-quarterly-january-to-march-2018>

<b>Finland</b>	
<b>Disproportionality Index</b> ( $d_c = \dots$ )	<b>3.3</b>
<b>Range of Disproportion</b> ( $r_c = \dots$ )	<b>[0.87, 8.5]</b>

Census Category	$P^T$	$P^I$	$\left(\frac{P^I}{P^T}\right)$	$\left 1 - \left(\frac{P^I}{P^T}\right)\right $
Fins	95%	83%	<b>.87</b>	<b>.13</b>
Estonians	0.9%	4%	<b>4.4</b>	<b>3.4</b>
Iraqis	0.2%	1.7%	<b>8.5</b>	<b>7.5</b>
Foreign other	3.5%	11%	<b>3.1</b>	<b>2.1</b>

**Table 6.** Data and calculation for **Finland**, 2016.

Source for total population Statistics (2017): [https://www.stat.fi/tup/suoluk/suoluk\\_vaesto\\_en.html](https://www.stat.fi/tup/suoluk/suoluk_vaesto_en.html)

Source for incarcerated population statistics: [https://www.rikosseuraamus.fi/material/attachments/rise/julkaisut-tilastollinenvuosikirja/oBJJPSYJ/RISE\\_Statistical\\_Yearbook\\_2016.pdf](https://www.rikosseuraamus.fi/material/attachments/rise/julkaisut-tilastollinenvuosikirja/oBJJPSYJ/RISE_Statistical_Yearbook_2016.pdf)

<b>France</b>	
<b>Disproportionality Index</b> ( $d_c = \dots$ )	<b>1.4</b>
<b>Range of Disproportion</b> ( $r_c = \dots$ )	<b>[0.82, 3.6]</b>

Census Category	$p^T$	$p^I$	$\left(\frac{p_i^I}{p_i^T}\right)$	$\left 1 - \left(\frac{p_i^I}{p_i^T}\right)\right $
Citizen	94%	78%	<b>.82</b>	<b>.18</b>
Foreigner*	6%	22%	<b>3.6</b>	<b>2.6</b>

**Table 7.** Data and calculation for **France**, 2018.

Source for total population Statistics (2018): <https://www.insee.fr/en/statistiques/2382601?sommaire=2382613>

Source for incarcerated population statistics: <https://www.prisonstudies.org/country/france>

\*Estimates place the representation of Muslims in French prisons at between 40% to 60%. See: Beckford, J., Joly, D., & Khosrokhavar, F. (2016). Muslims in prison: Challenge and change in Britain and France. Springer.

<b>Germany</b>	
<b>Disproportionality Index</b> ( $d_c = \dots$ )	<b>.3 (1.1)</b>
<b>Range of Disproportion</b> ( $r_c = \dots$ )	<b>[0.9, 1.5] ([.86, 3.1])</b>

Census Category	$p^T$	$p^I$	$\left(\frac{p_i^I}{p_i^T}\right)$	$\left 1 - \left(\frac{p_i^I}{p_i^T}\right)\right $
German	84%	76%	<b>.9</b>	<b>.1</b>
Foreigner*	16%	24%	<b>1.5</b>	<b>.5</b>
Religious Self-Identification	PT	PI	$\left(\frac{p_i^I}{p_i^T}\right)$	$\left 1 - \left(\frac{p_i^I}{p_i^T}\right)\right $
Christian	93%	80%	<b>.86</b>	<b>.14</b>
Muslim	6%	19%	<b>3.1</b>	<b>2.1</b>

**Table 8.** Data and calculation for **Germany**, 2017.

Source for total population Statistics (2015): <https://data.oecd.org/migration/foreign-born-population.htm> Source for

incarcerated population statistics (2017): <https://www.prisonstudies.org/country/germany>

Source for incarcerated population by religion (2018):

[https://web.archive.org/web/20190213103811/https://www.huffingtonpost.de/entry/muslim-haft\\_de\\_5a2a8c24e4b073789f6910f2](https://web.archive.org/web/20190213103811/https://www.huffingtonpost.de/entry/muslim-haft_de_5a2a8c24e4b073789f6910f2)

Source for total population by religion: Pew Research Center (2017): <https://www.pewforum.org/essay/the-growth-of-germanys-muslim-population/>

<b>Greece</b>	
<b>Disproportionality Index</b> ( $d_c = \dots$ )	<b>3.7</b>
<b>Range of Disproportion</b> ( $r_c = \dots$ )	<b>[0.39, 7]</b>

Census Category	$P^T$	$P^I$	$\left(\frac{P^I}{P^T}\right)$	$\left 1 - \left(\frac{P^I}{P^T}\right)\right $
Greek	91%	36%	<b>.39</b>	<b>.61</b>
Foreign	9%	64%	<b>7</b>	<b>6</b>

**Table 9.** Data and calculation for **Greece**, 2011.

Source for total population statistics:

[https://www.statistics.gr/documents/20181/1215267/A1602\\_SAM07\\_DT\\_DC\\_00\\_2011\\_01\\_F\\_EN.pdf/fb71f487-c113-4f0e-8055-e301c68377b4](https://www.statistics.gr/documents/20181/1215267/A1602_SAM07_DT_DC_00_2011_01_F_EN.pdf/fb71f487-c113-4f0e-8055-e301c68377b4)

Source for prison population statistics: Hellenistic Statistical Authority. (2015). E28. Prisoners held in detention centers as of December 31<sup>st</sup>, by sex, nationality, age, sentenced-awaiting trial (2001 – 2015) (Version 1.0):

<https://www.statistics.gr/documents/20181/989564/E28.+Prisoners+held+in+detention+centers+as+at+31<sup>st</sup>+December%2C+by+sex%2C+nationality%2C+age%2C+sentenced-awaiting+trial+%28+2001+-+2015+%29.xlsx/3168c034-d7fe-945f-c213-eefe49556155?version=1.0&t=1572860790872&download=true>

<b>India</b>	
<b>Disproportionality Index</b> ( $d_c = \dots$ )	<b>.25</b>
<b>Range of Disproportion</b> ( $r_c = \dots$ )	<b>[0.75, 1.64]</b>

Census Category	$P^T$	$P^I$	$\left(\frac{P^I}{P^T}\right)$	$\left 1 - \left(\frac{P^I}{P^T}\right)\right $
General	30%	34%	<b>1.13</b>	<b>.13</b>
OBC	41%	31%	<b>.75</b>	<b>.25</b>
Scheduled Caste	20%	21%	<b>1.05</b>	<b>0</b>
Scheduled Tribes	8.5%	14%	<b>1.64</b>	<b>.64</b>

**Table 10.** Data and calculation for **India**, 2015.

Source for total population statistics: <https://secc.gov.in>

Source for incarcerated population statistics: National Crime Records Bureau (2015). Prison Statistics India 2015.

Chart 5.3: [https://ncrb.gov.in/sites/default/files/PSI-2015-%2018-11-2016\\_0.pdf](https://ncrb.gov.in/sites/default/files/PSI-2015-%2018-11-2016_0.pdf)

<b>Ireland</b>	
<b>Disproportionality Index</b> ( $d_c = \dots$ )	<b>6.4</b>
<b>Range of Disproportion</b> ( $r_c = \dots$ )	<b>[0.73, 19]</b>

Census Category	$P^T$	$P^I$	$\left(\frac{P_i^I}{P_i^T}\right)$	$\left 1 - \left(\frac{P_i^I}{P_i^T}\right)\right $
Irish	88%	65%	<b>.73</b>	<b>.27</b>
Travelers	0.6%	11.6%	<b>19</b>	<b>18</b>
Foreigners	12%	22.6%	<b>1.88</b>	<b>.88</b>

**Table 11.** Data and calculation for **Ireland**, 2017.

Source for total population statistics (2016): <https://www.cso.ie/en/releasesandpublications/ep/p-cp7md/p7md/p7anii/>

Source for Traveller Statistics: <http://www.justice.ie/en/JELR/Pages/SP17000355>

Source for incarcerated population statistics:

[http://www.justice.ie/en/JELR/Irish\\_Prison\\_Service\\_Annual\\_Report\\_2017.pdf/Files/Irish\\_Prison\\_Service\\_Annual\\_Report\\_2017.pdf](http://www.justice.ie/en/JELR/Irish_Prison_Service_Annual_Report_2017.pdf/Files/Irish_Prison_Service_Annual_Report_2017.pdf)

<b>Italy</b>	
<b>Disproportionality Index</b> ( $d_c = \dots$ )	<b>1.6</b>
<b>Range of Disproportion</b> ( $r_c = \dots$ )	<b>[0.73, 4]</b>

Census Category	$P^T$	$P^I$	$\left(\frac{P_i^I}{P_i^T}\right)$	$\left 1 - \left(\frac{P_i^I}{P_i^T}\right)\right $
Italian	92%	68%	<b>.73</b>	<b>.27</b>
Foreign	8%	32%	<b>4</b>	<b>3</b>

**Table 12.** Data and calculation for **Italy**, 2018.

Source for total population statistics (2018): <https://www.worldometers.info/world-population/italy-population/>

Source for foreign population statistics (2015): <https://www.istat.it/it/archivio/149003>

Source for incarcerated population statistics: <http://dati.istat.it/>

<b>Latvia</b>	
<b>Disproportionality Index</b> ( $d_c = \dots$ )	<b>2.4</b>
<b>Range of Disproportion</b> ( $r_c = \dots$ )	<b>[0.71, 13.9]</b>

<b>Ethnic Group*</b>	$P^T$	$P^I$	$\left(\frac{P^I}{P^T}\right)$	$\left 1 - \left(\frac{P^I}{P^T}\right)\right $
Latvian	62%	44.2%	<b>.71</b>	<b>.29</b>
Russian	27%	42.5%	<b>1.58</b>	<b>.58</b>
Roma	0.3%	4.17%	<b>13.9</b>	<b>12.9</b>
Belarussian	3.3%	2.8%	<b>.84</b>	<b>.16</b>
Ukrainian	2.2%	1.9%	<b>.86</b>	<b>.14</b>
Lithuanian	1.2%	1.65%	<b>1.38</b>	<b>.38</b>

**Table 13.** Data and calculation for **Latvia**, 2012. \*Data was available that broke down the Latvian prison population specifically by ethnic group from prisonobservatory.org.

Source for total population statistics:

<https://stat.gov.lv/lv/meklet?Search=%22%22&DataSource=%22data%22&Type=%5B%22table%22%2C%22other%22%22%5D> \*

Source for incarcerated population statistics (pp. 12 – 14):

[https://drive.google.com/file/d/1YELbBNVMb4SFt4G6yeic\\_pMWm58Yzb8u/view](https://drive.google.com/file/d/1YELbBNVMb4SFt4G6yeic_pMWm58Yzb8u/view)

\*Population statistics are not currently being archived by the Latvian Bureau of Statistics. Information for the years approximating 2012 were archived at: [https://en.wikipedia.org/wiki/Demographics\\_of\\_Latvia](https://en.wikipedia.org/wiki/Demographics_of_Latvia)

<b>New Zealand</b>	
<b>Disproportionality Index</b> ( $d_c = \dots$ )	<b>1</b>
<b>Range of Disproportion</b> ( $r_c = \dots$ )	<b>[0.45, 3.38]</b>

<b>Census Category</b>	$P^T$	$P^I$	$\left(\frac{P^I}{P^T}\right)$	$\left 1 - \left(\frac{P^I}{P^T}\right)\right $
European	74%	33.9%	<b>.45</b>	<b>.55</b>
Asian	11.8%	2.9%	<b>.24</b>	<b>.76</b>
Pacific Peoples	7.4%	11.4%	<b>1.54</b>	<b>.54</b>
Other	1.59%	0.8%	<b>.5</b>	<b>.95</b>
Maori	14.9%	50.3%	<b>3.38</b>	<b>2.38</b>

**Table 14.** Data and calculation for **New Zealand**, 2013.

Source for total population statistics: <https://www.stats.govt.nz/information-releases/national-ethnic-population-projections-2013base2038-update>

Source for incarcerated population statistics:

[https://www.corrections.govt.nz/resources/research\\_and\\_statistics/quarterly\\_prison\\_statistics/previous\\_years\\_prison\\_statistics/CP\\_December\\_2013.html](https://www.corrections.govt.nz/resources/research_and_statistics/quarterly_prison_statistics/previous_years_prison_statistics/CP_December_2013.html)

<b>Norway</b>	
<b>Disproportionality Index (<math>d_c = \dots</math>)</b>	<b>2.5</b>
<b>Range of Disproportion (<math>r_c = \dots</math>)</b>	<b>[0.75, 5.83]</b>

Census Category	$P^T$	$P^I$	$\left(\frac{P_i^I}{P_i^T}\right)$	$\left 1 - \left(\frac{P_i^I}{P_i^T}\right)\right $
Norwegian Citizen	94.14%	70.83%	<b>.75</b>	<b>.25</b>
Non-Citizen	5%	29.17%	<b>5.83</b>	<b>4.83</b>

**Table 15.** Data and calculation for **Norway**, 2012.

Source for total population statistics: <https://www.statista.com/statistics/586489/population-by-citizenship-in-norway/>

Source for incarcerated population statistics: <https://www.ssb.no/en/sosiale-forhold-og-kriminalitet/statistikker/fengsling/aar/2014-07-04>

<b>Saudi Arabia</b>	
<b>Disproportionality Index (<math>d_c = \dots</math>)</b>	<b>.26</b>
<b>Range of Disproportion (<math>r_c = \dots</math>)</b>	<b>[0.8, 1.32]</b>

Census Category	$P^T$	$P^I$	$\left(\frac{P_i^I}{P_i^T}\right)$	$\left 1 - \left(\frac{P_i^I}{P_i^T}\right)\right $
Saudi	63%	51%	<b>.8</b>	<b>.2</b>
Foreign	37%	49%	<b>1.32</b>	<b>.32</b>

**Table 16.** Data and calculation for **Saudi Arabia**, 2018.

Source for total population statistics: <https://www.statista.com/statistics/616737/saudi-arabia-population-by-gender-and-nationality/>

Source for incarcerated population statistics: <https://www.prisonstudies.org/country/saudi-arabia>

<b>South Africa</b>	
<b>Disproportionality Index (<math>d_c = \dots</math>)</b>	<b>.69</b>
<b>Range of Disproportion (<math>r_c = \dots</math>)</b>	<b>[0.19, 2]</b>

Census Category	$P^T$	$P^I$	$\left(\frac{P_i^I}{P_i^T}\right)$	$\left 1 - \left(\frac{P_i^I}{P_i^T}\right)\right $
Black	80.48%	79.6%	<b>.98</b>	<b>.2</b>
Colored	8.79%	18.2%	<b>2</b>	<b>1</b>
White	8.25%	1.6%	<b>.19</b>	<b>.81</b>
Asian/Indian	2.48%	0.6%	<b>.24</b>	<b>.76</b>

**Table 17.** Data and calculation for **South Africa**, 2016.

Source for total population statistics (2019): <https://www.statssa.gov.za/publications/P0302/P03022019.pdf>

Source for incarcerated population statistics: <https://africacheck.org/factsheets/factsheet-the-state-of-south-africas-prisons/>

<b>Spain</b>	
<b>Disproportionality Index</b> ( $d_c = \dots$ )	<b>.68</b>
<b>Range of Disproportion</b> ( $r_c = \dots$ )	<b>[0.82, 2.18]</b>

Census Category	$P^T$	$P^I$	$\left(\frac{P^I}{P^T}\right)$	$\left 1 - \left(\frac{P^I}{P^T}\right)\right $
Spanish	87.2%	72%	.82	.18
Foreign	12.8%	28%	<b>2.18</b>	1.18

**Table 18.** Data and calculation for **Spain**, 2018.

Source for total population statistics (2017):

<https://datosmacro.expansion.com/demografia/migracion/inmigracion/espana>

Source for incarcerated population statistics (2019): <https://www.prisonstudies.org/country/spain>

<b>Switzerland</b>	
<b>Disproportionality Index</b> ( $d_c = \dots$ )	<b>5.3</b>
<b>Range of Disproportion</b> ( $r_c = \dots$ )	<b>[0.56, 14]</b>

Census Category	$P^T$	$P^I$	$\left(\frac{P^I}{P^T}\right)$	$\left 1 - \left(\frac{P^I}{P^T}\right)\right $
Swiss	73.1%	32%	<b>.56</b>	<b>.44</b>
Foreign Residents	26.1%	22%	<b>.16</b>	<b>.84</b>
Asylum Seekers	0.8%	12%	<b>14</b>	<b>13</b>
Other foreigners/status unknown	3.7%	34%	<b>8</b>	<b>7</b>

**Table 19.** Data and calculation for **Switzerland**, 2017. \* Total population is over 100% because it includes approx. 300k cross-border workers who are counted as occupying more than one country.

Source for percent of total population by residency status:

<https://www.bfs.admin.ch/bfs/en/home/statistics/population/migration-integration/by-migration-status.html>

Source for percent of Asylum Seekers in total population:

<https://www.sem.admin.ch/dam/data/sem/publiservice/statistik/bestellung/auslaender-asylstatistik-2019-e.pdf> (Page 75)

Source for estimate of ‘Other Foreigners/status unknown’ category:

[https://www.swissinfo.ch/eng/employment\\_cross-border-workers-entering-switzerland-set-record-in-2019/45365250](https://www.swissinfo.ch/eng/employment_cross-border-workers-entering-switzerland-set-record-in-2019/45365250)

Source for incarcerated population statistics: <https://www.bfs.admin.ch/asset/de/je-d-19.04.01.28>

<b>United States</b>	
<b>Disproportionality Index</b> ( $d_c = \dots$ )	<b>.73</b>
<b>Range of Disproportion</b> ( $r_c = \dots$ )	<b>[0.49, 2.5]</b>

<b>Census Category</b>	$P^T$	$P^I$	$\left(\frac{P^I}{P^T}\right)$	$\left 1 - \left(\frac{P^I}{P^T}\right)\right $
White (non-Hispanic)	61%	30.2%	<b>.49</b>	<b>.51</b>
Black	13.4%	33.4%	<b>2.5</b>	<b>1.5</b>
Hispanic	18.5%	23.2%	<b>1.25</b>	<b>.25</b>
Other	8%	13.3%	<b>1.66</b>	<b>.66</b>

**Table 20.** Data and calculation for **United States**, 2016.

Source for total population statistics: United States Census Bureau (2016). American Community Survey: DEMOGRAPHIC AND HOUSING ESTIMATES, TableID: DP05.

<https://data.census.gov/cedsci/table?q=race%20ethnicity%202016&hidePreview=false&tid=ACSDP1Y2016.DP05&t=Race%20and%20Ethnicity&y=2016&vintage=2016>

Source for incarcerated population by race and ethnicity statistics: Carson (2018), Table 9:

<https://bjs.ojp.gov/content/pub/pdf/p16.pdf>