

Fairness in the Criminal Sentencing for African Americans: Fact or Myth?

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Abstract: *This paper focused on factors of fairness in criminal justice sentencing for African Americans. Many non-whites believe that the criminal justice system is unfair to African Americans. Review of the literature found race to be the most compelling factor in the measure of fairness in the criminal justice system. According to findings by the United States Sentencing Commission; African American men received 19.1 percent longer sentences than their White counterparts. (Sentencing Project, 2018). African Americans are being sentenced and imprisoned at higher rates than the general population. The researcher focused on exploring factors likely to explain major factors of fairness in sentencing by the criminal justice system in the United States of America. This article is a call for action for global citizens to become more aware of the history of African Americans and their significance in the ongoing struggle for the human development and liberation of all oppressed peoples.*

Keywords: Fairness in criminal justice, Sentencing policies, Mass incarceration, Jim crow

1. Introduction

Racial injustices and social inequalities are embedded within the sentencing policies within the criminal justice of the United States. Incarceration has increased by 500% in the last forty years, due changes in laws and public policies, and not because of changes in the USA crime rates (Sentencing Project, 2019). "Lifetime likelihood of imprisonment for U.S. residents born in 2001, revealed that only 1 in 17 White Men vs 1 in 3 Black Men will be incarcerated: and 1 in 111 White Women vs 1 in 18 Black Women" (Bureau of Justice Statistics, 2001, p. 4). Unfairness in sentencing by the criminal justice system is clearly reflected in racism and inequalities towards African Americans in this country. Systemic racism is embedded within the American culture which has turned a continuous blind eye to dehumanization of African Americans trapped in an unjust criminal justice system. Exploring racial injustices and social inequalities embedded within the sentencing policies is significant to understanding social factors impacting public systems, structures, policies, and programs within the justice system of the United States.

More needs to be known about factors of fairness in criminal sentencing policies in the United States and its application to African Americans. This research paper seeks to examine the effects whether there is fairness in the criminal sentencing for African Americans.

1.1 Problem Statement

In 2019, African Americans comprised approximately 13 percent of the total population in the United States, while whites comprised approximately 76 percent of the total population in the United States; yet blacks make up 67% of the prison population (United States Census Bureau, n.d.). s. According to findings by the United States Sentencing Commission; African American men received 19.1 percent longer sentences than their White counterparts. (Sentencing Project, 2018). Further, "sentencing policies, implicit racial

bias, and socioeconomic inequity contribute to racial disparities at every level of the criminal justice system" (Sentencing Project, 2019, p.5). Blacks are being arrested, convicted and sentenced at higher rates than any other racial groups in the United States.

2. Findings

This article explored perceptions of fairness and found an overarching linking to disproportionalities by race in criminal sentencing. Empirical evidence suggests that the disproportionalities in criminal justice sentencing and imprisonment between whites and African Americans may reflect race and racism across the dominant cultural systems in this country.

African Americans are almost undeniably more certain than whites to say the country's criminal justice system is racially one-sided and that its treatment of minorities is a genuine public issue. Blacks are much more likely than whites to say that a black faced unfair treatment in dealing with police or in the courts. One could argue that, given these viewed disproportionalities in the administration of justice, has motivated African Americans to collectively demand equity and fairness in how justice is administered in the United States. One prime example of this is the Black Lives Matter movement in 2020 following the death of George Floyd 46-year-old unarmed African American man killed by a white policeman in Minneapolis, Minnesota. Many of the BLM protesters were college aged individuals. College students can impact public policy and impact social change.

In all, relative to their representation in the general population in the United States, African Americans are experiencing higher rates of mass incarceration in the United States than any other population. Mass incarceration has many negative effects which includes prison overcrowding, increasing health risks and decreasing psychological well-being, all of which adversely impact the black community. As a result of this, African Americans are more likely to

view the justice system as an institution that works against their well-being and safety. In consequence, African Americans are likely to have strained relationships with agents of the criminal justice system, particularly law enforcement officials and the court system. Some research reveals the potential effect of implicit bias and racialized understandings of African American criminality as determinants of sentencing outcomes (Alexander, 2012).

2.1 Background and Justification

The first recorded sentencing of an African American man was in 1640 by the Virginia Courts. In this ruling, a black runaway servant name John Punch was sentenced a lifetime of servitude to his master under the Slave Law in Colonial Virginia. The phrase 'Law-and-Order' has its racism ties back to John Adams in the 1780's and 1790's as the first American prison was opening. Many college students hear elected officials talk about law and order but are unclear about of its origins. Law-and-Order refers to demands for a strict criminal justice system, especially in relation to violent and property crime, through stricter criminal penalties (Kilgore, 2020).

2.2 Law and Order

It is important to explore the notion of Law-and-Order in American politics when understanding Mass Incarceration of Blacks. Both the phrase and notion were significant buzz words with rich history going back to the days of slavery and Jim Crow. For African Americans, law-and-order usually means longer terms of imprisonment, mandatory sentencing, three strikes law, and in still cases, capital punishment, all in the name of maintaining social order and protecting the liberties and rights of the majority.

Slavery lasted in about half of U.S. states until 1865 however; in reality, it was largely replaced by sharecropping and convict leasing and today mass incarceration. The system of 'convict leasing' as a way of forced penal labor in the United States. Historically convict leasing began in the United States as early as 1844 in Louisiana, but it greatly expanded through- out the country after the end of the American Civil War and the emancipation of slaves in 1865. The death of slavery brought the birth of Jim Crow to Blacks.

Many African Americans were sentenced for violations of 'black codes' after the American Civil War. The black codes were several legislative enactments passed in 1865 and 1866 in former Confederacy states designed to continue white supremacy. Theoretically speaking, the black codes were laws 'designed to replace the social controls of slavery that had been removed by the Emancipation Proclamation and the Thirteenth Amendment. Life immediate after the abolishment of slavery bought a degree of freedom for some Blacks, with the passage of the Thirteenth, Fourteenth, and Fifteen Amendments to the U.S. Constitution and Civil Rights of 1866 and 1870. The Fifteen Amendment gave African American males the right to vote; and elect their first stateman. This period of Reconstruction was short lived; for Whites lost their free labor which was fueled by the institution of slavery. Southern whites resisted the new

advancements enjoyed by Blacks during this period of life after the Civil War; and sought to reinstate White supremacy and domination of Blacks. All of which gave rise to the myth of black criminality, increased convict leasing and imprisonment of African Americans. 'The backlash against the gains of African Americans in the Reconstruction Era was swift and severe' (Alexander, 2020 p. 30).

3. Criminalization of African Americans

The criminalization of African Americans, especially males has been long standing American practices which is supported by crime statistics falsely showing that Blacks were committing more violent crimes and therefore needed harsher criminal sentencing. Increased contact with the justice system via vagrancy laws, peonage laws, pig laws, etc. that fueled the convict lease system where Blacks were disproportionately leased to private companies as a form of punishment (Wood, 2020). The outlook for white people has always been to keep blacks from exercising political and economic power.

This author concurs with authors Hurwitz and Peffey that "no empirical study is necessary to document the magnitude of this race gap; for decades the polarized reactions to such incidents have been clear. What has not been clear I show these interpretative disagreements are fueled by more fundamental divisions in the way the races perceive the general fairness of the Criminal Justice System (CJS, 2005, p. 763)." There are fundamental differences in perceptions of fairness among blacks and whites. African Americans and Whites see the world of fairness through different lens of justice. "Blacks and whites interpret everyday interactions in the justice system in a way that is consistent with their general judgments of system fairness. Quite simply, most whites believe the CJS is fundamentally fair, and most African Americans do not believe it is fair (CJS, 2005, p. 763).

In capital sentencing cases between black and white defendants (Martin, et al, 2015) looked at the possibility of death sentence having divergent effect on verdicts for Black and White defendants. It was a descriptive study that used a national survey to see if defendants' race was the main factor in receiving the death penalty vs. life with no parole as the maximum sentence for their capital case. Purpose of their study was to use a national survey to see if defendants' race was the main factor in receiving the death penalty vs. life with no parole as the maximum sentence for their capital case the dependent variable (s) in this study were the number of respondents who were told life-without-parole and the independent variable: racial disparity sentencing between black and white.

Glaser, et al (2015) found that there is a lack of fairness in sentencing. Their findings were as follows: respondents who were told life-without-parole was the maximum sentence were not significantly more likely to convict Black (67.7%) than White (66.7%) defendants. However, when death was the maximum sentence, respondents presented with Black defendants were significantly more likely to convict (80.0%) than were those with White defendants (55.1%) (Glaser, 2015). This study further highlighted the lack of fairness

incorporated in our current sentencing practices towards those with prior experience in the justice system.

And finally, empirical research by Rocque found that there is legitimate relationship between perceptions of racial disparities in the criminal justice sentencing and Blacks based in the unlevel number arrest and sentencing. His research supports the theory that prior experience with criminal systems for African Americans is often viewed as a negative encounter. "Explanations of these findings range from those claiming that minorities differentially engage in deviant and criminal behavior, to those claiming that the criminal justice system (CJS) treats minorities differently" (Rocque, 2011, p.3).

4. Strengths and Weaknesses

Overall limitations of a body of research reveal lack of perceptions on sentencing on the age and populations most directly impacted by criminal sentencing decisions. Empirical evidence provided in the review themes showed relationship to the topics but more importantly the areas of limitation. The review of literature revealed that most available research literature only looks at perceptions of sentencing by the criminal justice system using community-based samples. Mostly, the review of the literature strongly suggest there is little to no fairness in criminal sentencing for African Americans.

Research also reveals public dissatisfaction with perceived leniency of the criminal justice system. However, when asked to sentence hypothetical offenders, members of the public tend to choose dispositions like what current court practices (Zamble, 1992). On the other hand, Bjerk (2005) concluded that 'while the judicial system has extensive details concerning each arrested individual's criminal history, the criminal history information captured by the data set include only the number of previous felony convictions, the number of previous violent-felony convictions, the number of previous misdemeanor convictions, and the number of previous jail or prison stays (p.3).'

In research by Fischman, & Schanzenbach, on racial disparities under the federal sentencing guidelines which revealed the role of judicial discretion and mandatory minimums; however, their research only looked at judicial discretion in mitigating disparities where they move away from the guidelines and found the racial disparities in sentencing did not contribute to disparate impact on minority offenders. Lastly, these findings support critical race theoretical foundation the criminal justice system is just fine and there are no racial disparities in sentencing of nonwhites; furthermore, the current system is too lenient.

Lastly, another significant research was on the role of prosecutorial discretion under mandatory minimum sentencing defendants who were impacted by the 'three-strikes' repeat offender laws and how prosecutorial discretion was often not on the side of blacks in sentencing. Study found that most prosecuting blacks went for the maximum sentencing. Their study showed 'defendants who were initially arrested for the crime targeted by the sentencing law for lesser crimes not covered by the law'

(Bjerk, 2005). Authors Crow and Bales (2006) used data from the state of Florida to reveal sentencing disparities in the criminal justice system. Their study included a variety of sentencing policies and guidelines throughout the United States, and they found effects of policy transformation and a need to reform the system on sentencing decisions. While these studies address the most available research literature, there is a need for further research on the issue of fairness in criminal sentencing.

5. Conclusion

Mostly, the review of the literature strongly suggested there is little to no fairness in criminal sentencing for African Americans. Now is the time to lead the discussion about social issues and the creation of continued public platforms to increase awareness about the lack of fairness in prison sentencing in the USA. Americans in prison or jail almost tripled between 1968 (604 of every 100,000 in the total he population) and 2016 (1,730 per 100,000). Law-and-Order has deep roots in racial and social injustices in sentencing For African Americans, law-and-order usually means longer terms of imprisonment, mandatory sentencing, three strikes law, and in still cases, capital punishment, all in the name of maintaining social order and protecting the liberties and rights of the majority.

Lind and Tyler (1988) have demonstrated that people who believe the justice system to be unfair tend to evaluate the entire political system as less legitimate. The justice system is as close as many come to the government; thus, low levels of confidence in the CJS can clearly undermine support for the broader system" (Hurwitz & Peffley, 2005, p. 764). In the past, resistance has resulted in unrest within African American communities across the United States. The most dynamic unrests were those during the 1960's and in 2020. Socially conscience people have led the charge for change in America.

Overall, the review of the literature revealed very limited information on factors of fairness sentencing of African Americans; however, few empirical findings were found useful for this article.

References

- [1] Albonetti, C. (1997). *Sentencing under the Federal Sentencing Guidelines: Effects of Defendant Characteristics, Guilty Pleas, and Departures on Sentence Outcomes for Drug Offenses, 1991-1992*. *Law & Society Review*, 31 (4), 789-822. Retrieved Oct 28, 2020. doi:10.2307/3053987.
- [2] Alexander, M. (2020). *The New Jim Crow: Mass Incarceration in the Age of Colorblindness*. The New Press.
- [3] Anderson, M. (2014). *Vast majority of blacks view the criminal justice system*, Retrieved from <https://www.pewresearch.org/fact-tank/2014/08/12/vast-majority-of-blacks-view-the-criminal-justice-system-as-unfair/>.
- [4] Auerhahn, K. (2007). *Just another crime? Examining disparity in homicide sentencing*. *Sociological Quarterly*, 48 (2), 277-316.

- [5] Bartleby (2020). Essay *-The Rebirth of Caste by Michelle Alexander*. Retrieved from <https://www.bartleby.com/essay/The-Rebirth-Of-Caste-By-Michelle-Alexander -pkt9ek4cpllx>.
- [6] Bell, D.A. (1995). Who's Afraid of Critical Race Theory? *University of Illinois Law Review* 4 (1995): 893-910
- [7] Biasco, F., Goodwin E.A., & Vitale, K.L. (2001). *College student attitudes discrimination in higher education, College Student Journal Dec 2001, Vol. 35 Issue 4, p.523*.
- [8] Bjerck, D. (2005). *Making the crime fit the penalty: The role of prosecutorial discretion under mandatory minimum sentencing Journal of Law and Economics, 48, 591-625*.
- [9] Britannica, T. Editors of Encyclopedia (2020). Retrieved from *Slave rebellions, Encyclopedia Britannica*, <https://www.britannica.com/topic/slave-rebellions>
- [10] Bureau of Justice Statistics (2019). The Sentencing Project.
- [11] Crow, M. S., & Bales, W. (2006). *Sentencing guidelines and focal concerns: The effects of sentencing policy as a practical constraint on sentencing decisions. American Journal of Criminal Justice, 30 (2), 285-304*.
- [12] Davila, M., Hartley, D., Kevin, B., & Wilson, S. (2011). *Personal and Vicarious Experience with the Criminal Justice System as a Predictor of Punitive Sentencing Attitudes, American Journal of Criminal Justice 36 (4), December 2011*. Retrieved from DOI: 10.1007/s12103-011-9120-8.
- [13] Delgado, R & Stefancic, J. (2007). *Critical Race Theory and Criminal Justice, Humanity & Society. Vol. 31 (May/August: 133-145)*.
- [14] Department of Justice (1994). *Crime Data Brief, National Crime Victimization Survey: Black Male Victims*, Bureau of Justice, December 1994.
- [15] Desilver, D., Lipka, M., Fahmy, D. (2020). *Race and policing in America: Pew Research Center*. Retrieved from <https://www.pewresearch.org/fact-tank/2020/06/03/10-things-we-know-about-race-and-policing-in-the-u-s/>
- [16] Du Bois, W.E.B. (1903). *The Souls of black Folk*. New York. Fischman, J., & Schanzenbach, M. (2012). *Racial disparities under the Federal Sentencing Guidelines: The role of judicial discretion and mandatory minimums. Journal of Empirical Legal Studies, 9 (4), 729-764*.
- [17] Gilberstadt, H. (2020). *Black Americans were far less confident in police than whites before Floyd's death / (June5, 2020)*. Pew Research Center.
- [18] Glaser, J., Martin, K. D., & Kahn, K. B. (2015). *Possibility of death sentence has divergent effect on verdicts for Black and White defendants. Law and Human Behavior, 39 (6), 539-546*. Retrieved from <https://doi.org/10.1037/lhb0000146>
- [19] Glaude, E. (2016) *Democracy in Black: How race still enslaves the American soul*. Random House LLC.
- [20] Govans H. (2018).1971: Nixon's War on Drugs. Retrieved from <https://govansheritage.org/history/nixons-war-on-drugs>
- [21] Gramlich, J. (2019). *How black, white Americans differ in widely. In their views of the criminal. justice system – Pew Research Center*. Retrieved from <https://www.pewresearch.org/fact-tank/2019/05/21/from-police-to-parole-black-and-white-americans-differ-widely-in-their-views-of-criminal-justice-system/>.
- [22] Gramlich, J. (2021). *Crime in the U.S. Key questions answered | Pew Research*. Retrieved from <https://www.pewresearch.org/fact-tank/2020/11/20/facts-about-crime-in-the-u-s/>.
- [23] Hagan, F. (2007). *Essentials of Research Methods in Criminal Justice and Criminology, 2 ed*, Pearson, Boston.
- [24] Hartley, R., Maddan, S., & Spohn, C. (2007). *Prosecutorial discretion: An examination of substantial assistance departures in federal crack-cocaine and powder cocaine cases. Justice Quarterly, 24, 382-407*.
- [25] Headley, A. & Wright, J. (2020). *Is Representation Enough? Racial Disparities in Levels of Force and Arrests by Police. Public Administration Review, November/December 2020, Vol. 80, No.6, Wiley Blackwell*. Retrieved from <https://www.epi.org/publication/50-years-after-the-kermer-commission/>
- [26] Hurwitz, J., & Peffley, M. (2005). *Explaining the Great Racial Divide: Perceptions of Fairness in the U.S. Criminal Justice System, The Journal of Politics, Vol. 67, No. 3, August 2005, Pp. 762-783*.
- [27] Johnson, H., Travis-Wolfe, N.,& Jones, M. (2011). *History of Criminal Justice*. New York: Routledge.
- [28] Kennedy, S. (2011). *Jim Crow Guide to the U. S. A.: The Laws, Customs and Etiquette Governing the Conduct of Nonwhites and Other Minorities as Second-Class Citizens*, University of Alabama Press.
- [29] Kilgore, Ed. (2020). *Trump revives 'Law-and-Order' politics of Nixon and Reagan*. New York Magazine. Retrieved from <https://nymag.com/intelligencer/2020/06/trump-law-and-order-politics-nixon-reagan.html>
- [30] Langley, B.M. (2014). *The Black Experience in the United States: An Examination of Lynching and Segregation as Instruments of Genocide*, University of South Florida, Retrieved Oct. 28, 2020. think.harder89@gmail.com.
- [31] Lynch, J.P., & Sabol, W.J. (2000). *Prison use and social control. In Policies, processes, and decisions of the criminal justice system: Criminal justice 2000*. Vol. 3. Edited by Julie Horney, 7-44. Washington, DC: National Institute of Justice.
- [32] Patrick-Stamp, L. (1995). *Numbers That Are Not New: African Americans in the Country's First Prison ,1790 - 1835*.The Pennsylvania Magazine of History and Biography Vol. 119, No. 1/2 (Jan. - Apr 1995), pp. 95-128 (34 pages) Published By: University of Pennsylvania Press, <https://www.jstor.org/stable/20092927>
- [33] Roberts, D.E. (2004). *The Social and Moral Cost of Mass Incarceration in African American Communities*. Faculty Scholarship at Penn Law. 583.
- [34] Retrieved from https://scholarship.law.upenn.edu/faculty_scholarship/5 Slavery in the United States - Wikipedia

- [35] Rocquel, M. (2011). Racial Disparities in the Criminal Justice System and Perceptions of Legitimacy: A Theoretical Linkage. *Race and Justice*, 1 (3) 292-315. sagepub.com/journalsPermissions.navDOI: 10.1177/2153368711409758
- [36] Sentencing Project. (2018). Report to the United Nations on Racial Disparities in the U.S. Criminal Justice System. Retrieved from <https://www.sentencingproject.org/publications/un-report-on-racial-disparities/>.
- [37] Sentencing Project. (2019). The Facts: Criminal Justice Facts. Retrieved April 24, 2021. <https://www.sentencingproject.org/criminal-justice-facts>
- [38] Starr, S. &Rehavi, M. (2013). *Mandatory Sentencing and Racial Disparity: Assessing the Role of Prosecutors and the Effects of Booker*. *Yale Law Journal*, Vol. 123 (1), 1-265. Retrieved from <https://www.yalelawjournal.org/article/mandatory-sentencing-and-racial-disparity-assessing-the-role-of-prosecutors-and-the-effects-of-booker>
- [39] Steffensmeier, D., & Demuth, S. (2000). *Ethnicity and sentencing outcomes in U.S. federal courts: Who is punished more harshly?* *American Sociological Review*, 65, 705–729
- [40] Van Cleve, N., & Mayes, L. (2018). *Criminal Justice Through “Colorblind” Lenses: A Call to Examine the Mutual Constitution of Race and Criminal Justice*. *Law & Social Inquiry*, 40 (2), 406–432.
- [41] Wood, Peter (2003). *The Birth of Race-Based Slavery*. *Slate*. (May 19, 2015): Reprinted from *Strange New Land: Africans in Colonial America* by Peter H. Wood with permission from Oxford University Press. ©1996, 2003.
- [42] Zamble, E., & Cumberland, J. (1992). *General and specific measures of public attitudes toward early release of criminal offenders*. *Canadian Journal of Behavioral Science*, 24 (4), 442-455. Retrieved from <https://doi.org/10.1037/h0078752>