LEARNING OBJECTIVES

1. To grasp the nature and extent of racial disparity in the criminal and juvenile justice systems.
2. To understand some of the historical roots of that disparity.
3. To be able to name several ways that race intersects with other key social factors.
4. To be able to explain the issue of disproportionate minority contact (DMC) in terms of relative incarceration rates.
5. To grasp the concept of accumulation of disproportion throughout the justice system process.
Sociologist Gunnar Myrdal wrote about the American dilemma—the extraordinary impact of race on American history and on all of our social institutions. In 1903, W. E. B. Du Bois suggested that the color line would be the greatest problem of the 20th century. In the new millennium, it is still the pivotal moral challenge facing our nation. The issue of race is central to understanding the corrections system, past and future. As was discussed in Chapter 2, the social institutions of punishment in the United States are derived from colonial practice and slavery. For example, the Thirteenth and Fourteenth Amendments to the U.S. Constitution extended citizenship rights to former slaves and abolished forced servitude. However, the amendments contain an exemption for persons convicted of crimes.

People of color are vastly overrepresented on probation, on parole, in prisons, and in jails. The U.S. rate of incarceration—the highest in the entire world—is mostly a function of how frequently we incarcerate people of color, especially African Americans. Most states have incarceration rates for Whites that are similar to those in nations that use prisons and jails very sparingly. It is estimated that over 30% of African American males will be imprisoned at some point during their lifetime. In some urban areas, the incarceration and jailing of African American males approaches 80%. Pettit and Western estimated that in the 1990s, African American men in their 30s who were not in college were almost twice as likely to have a prison record than a bachelor’s degree and more than twice as likely to be former inmates than to have served in the military.

These extreme rates of incarceration of people of color are often correlated with intersecting social factors, including gender, economic class, and immigration status. This “intersectionality” (as it is sometimes called) represents a compounding of disadvantages that can exert devastating effects on individuals and communities. For young people, even the likelihood of incarceration casts a shadow over their lives. The reality of incarceration can permanently disable them from ever successfully participating in normal social life. These adverse effects impact high numbers of children who have parents in prison and jail. They include poor health and mental health outcomes, diminished probability of marriage, and radically reduced income levels. Legal scholar Michelle Alexander has named this crisis the “New Jim Crow.” She notes that more African Americans are under some form of correctional supervision today than were slaves prior to the Civil War. There are more men of color behind bars than enrolled in four-year colleges. Further, the legal barriers imposed on former convicts—disqualification from voting, prohibition from employment, exclusion from student loan programs, denial of access to public housing and other public benefits, and diminished civil rights—are as onerous as the worst historic legal oppression of African Americans, Latinos, and Native Americans throughout our nation’s history.

These extreme racial disparities are socially unsustainable. The American Dilemma undermines faith in the justice system, and the collateral damage on children and other loved
Part III • Critical Issues and Policy Questions

One of the incarcerated creates a host of difficult and divisive social policy debates. High rates of racial disproportion worsen ethnic tensions, promote fear and suspicion, and tear at the social fabric of communities.

It is incumbent upon society to examine the magnitude of the disparate incarceration of racial minorities and the explanations that have been offered for this extreme disparity, in particular, the impact of the War on Drugs. This chapter also explores the challenges that racial tensions create within the corrections system and potential remedies for these issues.

Measuring the Extent of the Problem

Data on race, ethnicity, and incarceration can be obtained from a variety of federal and state sources. The accuracy and consistency of the data are problematic due to a variety of definitions for race and ethnicity and a basic misunderstanding of the difference between the two.

For example, Latinos are referred to as Hispanics, which is an ethnic category that can overlap with any racial group. Confusion about categories often results in imprecise counting from the start. Further, Native Americans are often merged with Pacific Islanders, Alaska Natives, Native Hawaiians, and other groups. The Asian American category contains a very wide range of ethnic groups, each of which may have a very low or very high rate of incarceration. The existing information on race and ethnicity cannot be analyzed alongside data on income level and social class. Plus, current data categories fail to consider the incarceration rates of persons of mixed racial ancestry. The data presented below are the best that we have, but must be viewed as incomplete and partially inaccurate (see “A Note About Race and Ethnicity” in the Preface).

The Relative Rate Index

At present, the best method of assessing racial or ethnic disparity is a statistic known as the Relative Rate Index (RRI). This statistic compares the rate of criminal justice involvement of one group to a baseline rate—usually that for Whites—and creates a ratio. For instance, an RRI of 1.0 means that a given group has the same incarceration rate as Whites; an RRI of 0.5 means that the group is incarcerated at half the rate of that for Whites, and an RRI of 3.0 denotes that the group is confined at three times the rate of that for Whites. This ratio allows more meaningful comparisons that take into account the relative size of each racial and ethnic group in the general population.

Let’s start the analysis by looking at racial disparity at the point of arrest. Whites accounted for 10.5 million arrests in 2006. Rates of arrest for African Americans were 2.5 times higher than those for Whites. Native Americans were arrested at 1.5 times the White...
The rate of arrest for a particular group may rise and fall according to a number of factors, such as the number of offenses committed by individuals within that group, law enforcement policies and practices, and changing definitions of what constitutes an arrestable offense. During this period, African Americans had the highest rates of arrest, followed by Native Americans, Whites, and Asian Pacific Islanders. After rising rapidly through the 1980s to a high in 1989 of just over 18,000, African American rates fell most years since. Native Americans had the second highest rates, with rates generally falling since 1980. Whites and Asian Pacific Islander rates stayed relatively level through this period, although both had an overall drop. Note: This is Federal Bureau of Investigation (FBI) data compiled by the Bureau of Justice Statistics. Ethnicity was not distinguished in the FBI data; each racial group includes some Hispanics. Also, multiracial individuals were assigned one racial category by the BJS compilers. An arrest could have been for any reason or offense.

Turning to data on felony convictions, it appears that Whites are convicted for violent crimes at a rate comparable to African Americans (17% versus 18% comparing the most serious conviction offense). Whites had higher conviction rates for property crimes, and African Americans were much more likely than Whites to be convicted of drug crimes (41% compared to 30%).
Part III • Critical Issues and Policy Questions

Race and Ethnicity Behind the Walls

Historically, most American prisons were segregated by race; African Americans were assigned to completely separate facilities or to separate living units within larger prisons. Continuing the legacy of slavery, southern states assigned African American inmates to chain gangs or work crews. Latino inmates were often assigned to farm labor in western states. All prison programs were segregated by race, and the few available education and treatment programs were assigned to Whites. Until the 1960s and afterward, almost all of the corrections line staff, wardens, and parole agents were White. Despite the images of prison life portrayed in Hollywood movies such as *The Shawshank Redemption*, most inmates did not interact across racial lines.

Prisons were (and still are) most often located in rural areas; however, the vast majority of inmates of color were from urban areas. Staff recruited from these rural communities tended to harbor not only the general social prejudice and hatred of people of color but an enhanced hatred of racial minorities prevalent in rural communities. In the South, it was not uncommon for a White prison guard to be a member of the Ku Klux Klan and to participate in lynching of his Black neighbors.

Despite institutionalized racial division, conflict and tension based on race were part of the prison reality. Violence among the races often broke out in exercise yards, open dorm living units, and other common areas. This situation worsened in the 1960s and 1970s as political activism engendered greater race conflicts and rioting in the community at large. Groups such as the Nation of Islam, the Young Lords, and the Black Panther Party were active in prisons and recruited inmates to their causes. These groups conflicted sharply with White corrections officials over the right to practice their own religions, the content of approved reading materials, the right to hold meetings, the right to accept visitors, and the right to disseminate newsletters. These developments mirrored conflicts outside the prison walls between Whites and people of color—race riots in the community and the brutal suppression by law enforcement agencies of demands for basic civil rights.

Gangs that formed inside prisons exploited the rhetoric of racial conflict as a way of organizing prisoners for the advancement of the gang agenda, such as the illegal prison marketplace in drugs, weapons, and other forbidden commodities. The most potent gangs among White inmates were persons who identified as neo-Nazis or the members of criminal motorcycle societies—groups whose fundamentally militant and overtly racist motives helped to push racial conflicts to explosive and lethal levels. Violent incidents were most often interpreted by prisoners and administrators alike in racial or ethnic terms. Attacks led to counterattacks and retaliations in a devolving cycle of racial hatred and recrimination. The inmates accurately perceived that prison officials were relatively powerless to maintain safety in prisons or to end the violence. The racially or ethnically organized prison gangs seemed like the only practical way to gain protection. Inmates joined gangs for self-preservation. The correctional staff understood that they exerted a very tenuous hold on prison order, especially in a situation where one or two corrections officers were assigned to police a prison yard with hundreds of convicts. The prison staff all too often made bargains with inmate gangs to maintain control, or the illusion of control. In some states, this literally meant turning over prison security to inmates (the “barn boss system”), with minimal oversight and accountability. This accommodation to the power of the prison gangs helped matters of race deteriorate even further.

Increasingly crowded prisons forced administrators to house many inmates in cells designed for single inmates. Inmates housed in double and triple bunks in rooms that were formerly gymnasiums, dining halls, or day rooms intensified racial pressures. The ability to avert racial or ethnic conflicts was minimal in these settings. In addition, budget cutbacks led to a decline in education and counseling programs and more idleness, an additional stressor for prisoners.

**Ku Klux Klan:** The Ku Klux Klan (KKK) is a White supremacist group founded in 1866. The secret fraternal organization is notorious for acts of terrorism—including murder, lynching, arson, rape, and bombing—to oppose civil rights or any other civic gains for African Americans.
Prison officials responded to this extremely volatile situation by expanded use of nonlethal and lethal weapons to quell riots and daily violence. They extensively used isolation, solitary confinement, and denial of basic privileges to attempt to maintain control. Prison bureaus designed and opened “supermax” facilities, intended to be “jails within jails.” (See Chapter 6.) Heightened tensions also led corrections officers to engage in torture of recalcitrant inmates and a “code of silence” among prison guards to cover up these horrible practices.\(^{13}\)

Racial and ethnic conflicts were treated as a problem of criminal prison gangs. Corrections officials responded to this definition by using techniques such as undercover intelligence, using prison snitches to gain information, gang identification as a method of assigning housing, warrantless searches for gang income and weapons, and tough punishments for alleged gang behavior. None of these strategies have made prisons safer, and many may have intensified racial and ethnic tensions and violence.\(^{14}\)

Most dramatically, prison officials reintroduced racial segregation as a formal policy in prison management. These practices were challenged before the U.S. Supreme Court in \textit{Johnson v. California}.\(^{16}\)

\section*{African American Disproportion in the Criminal Justice System}

Although disproportionate minority contact (DMC) affects most ethnic groups, it is only African Americans whose discrimination is rooted in the legacy of centuries of slavery, followed by Jim Crow laws, and the formation of urban ghettos. The incarceration rates for African Americans, both men and women, are dramatically higher, in general, than those for any other racial or ethnic group. An analysis by scholar Loïc Wacquant attests to the dual purpose of these social controls as the extraction of labor and the ostracization of the underclass.\(^{15}\) Wacquant contends that mass incarceration of African Americans is itself less than 30 years old but is the descendent of the other three devices.
Garrison S. Johnson, an inmate in the California Department of Corrections and Rehabilitation (CDCR), challenged the unwritten policy of the CDCR to segregate inmates by race in double cell assignments in its Reception Centers. Besides dividing prisoners by broad racial categories, the CDCR makes cell assignments within these groups so that Southern California Hispanics are not housed with Northern California Hispanics, Chinese are separated from Korean or Southeast Asian inmates, and so on.

The CDCR argued that this policy was necessary to avoid prison violence and that Reception Centers were especially dangerous, as they hold recently arrived inmates about whom little is initially known, such as their gang affiliations or propensity to attack other inmates. The CDCR maintained that all of its other living units were not intentionally segregated, although inmate requests to be housed with one group and not another were often honored in the classification process. The CDCR cited many examples of violence in its facilities that appeared to be motivated by racial or ethnic hostilities.

Mr. Johnson brought this action on his own behalf, without benefit of legal representation, and despite numerous appeals by the CDCR, prevailed in the U.S. Supreme Court. Johnson had been admitted to the CDCR on several occasions either by the courts or as a parole violator. He argued that the practice of assigning him to racially segregated cells was insulting and diminished his self-worth as an individual. The practice was in blatant violation of federal civil rights laws and long settled law in *Brown v. Board of Education*.¹

The CDCR countered that most inmates requested to be housed in racially separated settings. Furthermore, CDCR representatives argued that this segregation reduced prison violence. Johnson presented studies suggesting that racial segregation actually fueled inmate anger and generated more violence instead of preventing it.

The U.S. Supreme Court held that the CDCR practice of segregation was unconstitutional and not justified by a valid penological purpose. The court referred the matter back to the district court to enforce a remedy and warned the CDCR not to use surrogate criteria to mask the practice of racial segregation.

The attempts of the CDCR to comply with this order tested the limits of the concept of “all deliberate speed.” Five years after the *Johnson* decision, only one CDCR reception center allowed double celling for inmates of different racial or ethnic groups.

In 2011, the Prison Law Office and Bingham McCutchen LLP filed a class-action lawsuit alleging that the CDCR was utilizing racially discriminatory lockdowns. This means that whole categories of inmates are subject to lockdowns (mandatory confinement to their cells) not due to their individual behavior but because of their race or ethnicity. This action was brought on behalf of an African American inmate at Folsom State Prison, Robert Mitchell, who complained that he was locked down for more than a year, based solely on his race. Other inmates have joined Mitchell in this legal action. The plaintiffs argue that these racial lockdowns violate their Eighth and Fourteenth Amendment rights and make prisons more dangerous rather than less.

The CDCR acknowledged that it has an official policy to manage inmate populations by ethnicity and by race. When officials believe any incident to involve a racial or ethnic group, all of the inmates of that group are locked in their cells for an indefinite period of time.

The CDCR reported more than 350 race-based lockdowns of an average duration of 60 days or longer. The affected inmates are confined in their cells for 24 hours a day. These inmates are not allowed visits, phone contacts with their family members, outdoor recreation, or access to religious services. During these racial lockdowns, inmates from other groups receive their normal programming.

**Note**

¹. *Brown v. Board of Education* 1954
Analysis of sentencing data from the National Judicial Reporting Program in 2004 reveals that African Americans were more likely than Whites to be sentenced to prison or jail—as opposed to probation—for the same crimes (71% versus 66%). This racial difference in sentencing was also true for those convicted of violent crimes (80% versus 75%) and for drug crimes (70% versus 63%). In addition, these data show that African Americans got longer prison and jail sentences, especially for violent crimes. The more limited data on Hispanic felony defendants show that they were twice as likely to be convicted compared to Whites and 2.4 times more likely to be incarcerated after sentencing. Criminologist Margaret Zatz found that, at both the adult and juvenile levels, poor people and people of color are the most likely to be detained pending trial, and pretrial detention correlates with harsher sentencing outcomes.

The cumulative result of these trends in criminal justice processing is that African Americans were 5.7 times more likely than Whites to be admitted to state and federal prisons. The RRI for prison admissions in 2003 was 1.9 for Hispanics and 4.3 for Native Americans and other Native peoples. Rates of imprisonment were even more disparate for people of color in states such as Wisconsin (16.7), Minnesota (12.5), New Jersey (13.8), New York (10.5), and Pennsylvania (10.7). For Hispanics, the RRI for prison admissions was highest in Pennsylvania (8.2), New York (5.7), New Hampshire (4.9), North Dakota (3.9), and Wisconsin (3.7).

African Americans and Hispanics are more likely than Whites to be sent to prison not only via court commitments but also for probation and parole violations. These racial and ethnic disparities in prison admissions hold true even when one controls for the most serious conviction charge.

On any given day, African Americans are disproportionately represented in probation caseloads and on parole. They are 4 times more likely to be under some form of correctional supervision than Whites. Hispanics are 1.4 times more likely than Whites to be under some type of correctional control. This disparity also extends to those inmates under a sentence of death. In 2007, there were 1,352 African Americans under a death sentence, representing 42% of those awaiting execution.

Another indicator of the influence of race on corrections are the data on the recidivism rates for released prisoners. It is important to recall that these statistics are a function of ex-inmate behavior and the policy decisions of corrections officials. For example, a U.S. Department of Justice study that tracked released inmates from 15 states found that African Americans were more likely to be rearrested than Whites (73% versus 63%) and more likely to be returned to prison (54% versus 50%). The rates for rearrest and remand to prison for Hispanic inmates were lower than for non-Hispanics (who might be African American or White). Another analysis conducted by the National Council on Crime and Delinquency (NCCD) reported very similar results.

Racial and ethnic disproportionality are likewise endemic to the juvenile corrections system. African American youth had an RRI of 4.5 for long-term residential placement; Hispanic youth, 1.9; and Native American youth, 3.2. States with the highest racial disparity for youth were Connecticut, Minnesota, New Hampshire, New Jersey, and Pennsylvania.
THE RACIAL JUSTICE ACT

The South has long been the epicenter of racial tension in the United States, where the terror of lynching and entrenched racial bigotry and hatred was most concentrated. Despite these facts, or perhaps because of them, North Carolina is the only state in the union to have passed legislation that attempts to correct what many feel is an all-too-apparent inequity in the criminal justice system based on race. Racial disparities in the application of the death penalty have compelled efforts to enact legal protections against them. In 2009, North Carolina passed the Racial Justice Act (House Bill 472, Senate Bill 461), which was intended to prevent any person being put to death because of racial bias. The law allows death row defendants to appeal their cases using statistical or other evidence on the grounds that racism had an impact on their sentences. The impetus of the legislation came about in part due to the exoneration (after decades of incarceration) of several African American death row inmates in whose cases there was shown to be such irregularities as withheld evidence, ineffective counsel, prosecutorial misconduct, and perjury by a lead investigator.1 And, in the case of Edward Chapman, the cause of the victim’s death was found to be a drug overdose and not a homicide.2

The Racial Justice Act is highly contested in the state, with repeals of the act passing the General Assembly and the governor vetoing the repeal twice.3 The second time, there were enough legislative votes to overturn the veto. All but one of the state’s district attorneys have claimed that appeals clog the system, that dangerous criminals would be released, and that it is unnecessarily costly. These allegations that can easily be refuted, however. Only two cases had been heard as of 2012, and those proceedings have cost less than a single execution. The result of a successful appeal would mean commuting of the sentence to life in prison without parole; it would not result in release.

QUESTIONS

1. Discuss the fact that North Carolina was the first state to pass a version of the Racial Justice Act.
2. What sorts of facts might you consider if you were a judge in a capital case involving an African American defendant?
3. Why do you think it’s so difficult to pass the Racial Justice Act?

Notes

1. North Carolina Coalition for a Moratorium 2010
2. YouTube 2009
3. Bufkin 2011

Asian Americans and Pacific Islanders and the Corrections System

Although the RRI of Asian Americans appears low relative to other ethnic groups, this is not to say that some members of this group are not subject to racial discrimination and unfair treatment in the corrections system. From 1977 to 1997, overall arrests for Asian American
and Pacific Islanders (APIs) grew by 726%, compared to a 30% decline in arrests for African Americans. This growth in arrests for APIs was twice as large as the increase of this group in the general population during the same period. Although the existing national criminal justice data do not separate specific ethnic groups within the larger category of API individuals, limited data suggest that refugee families from Cambodia, Laos, and Vietnam are overrepresented in the corrections system. For example, San Francisco data show that Samoans have some of the highest rates of incarceration in both the juvenile and adult systems. In Hawaii, Native Hawaiians have rates of incarceration that are higher than that of any other group; Filipinos constitute another large percentage of the confined population. Data from at least two California counties reveal that Vietnamese youth are arrested and processed in the juvenile and adult systems at levels disproportionate to their percentage of the general population.

Statewide data in California showed a steady increase of API youth in the Division of Juvenile Justice; the number of API youth in state youth prisons almost doubled during the 1990s. These youth were more likely than other ethnic groups to be committed to adult facilities for homicide. API youth in adult and juvenile prisons were likely to be sentenced from the most rural communities.

These findings are at odds with the media image of Asian Americans as the “model minority.” There is a false assumption that all Asian Americans have achieved high levels of education and professional status. This “model” is held up to other minorities as a group that has succeeded, despite a history of racial discrimination. The apparent success of Asian Americans has been used by some to discredit the value of affirmative action programs, welfare, and the alleged decline in “family values” in other ethnic groups.

Although the achievements of some segments of the API community are laudable, especially among the long-standing immigrant groups, there are important segments within the API population that are not doing as well. For example, Laotian, Hmong, and...
Cambodian Americans had poverty rates that were much higher than those of the general U.S. population.31 API youth and adults confront many unique challenges relative to corrections. To begin with, very few APIs work in the corrections system. There is very limited programming to assist API inmates with reentry issues, including language barriers, English language literacy, job training, or drug and psychological counseling. Culturally competent programming for API inmates is virtually nonexistent.

API inmates are subjected to a range of racial stereotypes from many justice system officials. For instance, training programs for corrections staff tend to focus on the dangers of evil Chinese gangs that have international ties to criminal syndicates in Hong Kong, Taiwan, and China. These derive from racist stereotypes from the late 19th and early 20th centuries that portrayed Asian women as prostitutes or Asian men as sinister foes who lured White women into forced sexual slavery in opium dens. Corrections officials have sometimes described API inmates who are doing their time quietly as “treacherous.”32

API inmates do not naturally fit into the racial and ethnic structure of most corrections facilities. API inmates band together for self-protection and may engage in prison violence to establish their credibility in the rough social environments of prisons and jails. A recent collection of essays and poems provides a compelling view of the plight of the API corrections population.33

Native Americans and the Corrections System

As with Latinos and APIs, reliable data on Native Americans in the criminal justice system are hard to find. Further complicating the matter is that the information on Native Americans who are arrested and incarcerated in tribal territories is incomplete and likely to be inaccurate.34 Data from tribal territories are collected by each tribal group individually, and there is no consistency among tribes for data collection. Other federal data on crime and justice in tribal territories are collected by the Bureau of Indian Affairs and by U.S. Attorneys.

Native Americans might be confined or supervised by tribal police agencies, federal authorities, or state corrections agencies. Which agency has authority might be determined by the location of the crime or by one of a range of informal agreements among these agencies. Moreover, Native Americans committed to the Federal Bureau of Prisons might be housed in state facilities operated by private prison companies or in state correctional institutions. There is virtually no effective oversight or accountability for facilities operating on tribal lands.

Native Americans face historic prejudice and discrimination in Anglo correctional facilities. As with other racial and ethnic minorities, staff and programs that can respond to Native Americans in a culturally appropriate manner are sorely lacking. Native Americans confront great challenges in terms of alcohol and drug dependency. Tribal territories are havens for illegal activities due to limited law enforcement resources; thus, drug dealing, sex trafficking, and other illegal activities are enormous challenges. However, without a culturally competent approach, programs are ineffective at best and often exacerbate these problems.

Native Americans are often incarcerated hundreds or even thousands of miles from their homes. They have minimal legal resources, and reentry programs are almost nonexistent. They also suffer from the highest rates of violent victimization of any racial or ethnic category, even though that rate declined between 2003 and 2012.35

Cultural competence: An ability to interact effectively with people of different cultural backgrounds. This requires self-awareness of culture, knowledge of the other culture, and an open attitude.

Tribal territories: Also referred to as Indian reservations, these are areas of land managed by the federal government and dedicated to native peoples.
As noted above, the disparity in Native American incarceration is higher than for any other group except African Americans.  

Latinos and the Corrections System

Accurate information is scant on the growing number of Latinos behind bars and under community supervision. Many jurisdictions do not even assemble data on Latinos as a separate category. Similar to APIs, the Latino category encompasses a large number of distinct ethnic communities including longtime American citizens as well as immigrants from Cuba, Puerto Rico, Mexico, other parts of the Caribbean, and Central and South America. Very little reliable information is available about the treatment needs of these defendants. Most current correctional assessment tools were developed and normed based on White or African American offenders; the reliability and validity of these classification tools for other groups is unknown.

A prejudicial burden for Latinos in the corrections system is the stereotype that they are all entrenched gang members who are tied to international drug trafficking cartels. Many prisons and jails, particularly in California, are unduly focused on gathering intelligence about alleged inmate affiliations with Latino prison and street gangs such as MS-13, the Mexican Mafia, and Nuestra Familia. This information is used to manage inmates and results in intensive monitoring and surveillance of Latino inmates and their family members.

Corrections agencies rarely, if ever, offer bilingual staff to assist inmates who speak Spanish or other languages and do not speak English. There are virtually no programs that are culturally attuned to Latino communities. In addition, opportunities to access educational programs are extremely limited, because most corrections agencies hold to an “English only” policy. There is no solid evidence that even those correctional programs that research shows to be effective for other groups are at all helpful to Latinos. As will be discussed later in this chapter, it is routine for prisons and jails to segregate Latino inmates from other inmates and to punish all inmates of a certain group for the misbehavior of a few.
THE TRIBAL LAW AND ORDER ACT OF 2010

The federal government plays an important but limited role in law enforcement, exercising governance over laws that apply to all U.S. citizens. Local governments handle all of the rest. Ironically, on tribal lands, local authority was usurped when the reservation system was imposed on Native peoples. One impact of this system is that tribal lands are notoriously more dangerous, on average, than other American communities. In an attempt to raise the level of justice and public safety, Congress passed the Tribal Law and Order Act of 2010, which established the Indian Law and Order Commission.1

The commission’s mandate was to study the problems on tribal lands and recommend solutions. The comprehensive commission report, released in November 2013, encompasses a wide array of public safety recommendations, including restoring authority over justice matters to the local tribal level, reducing the chaotic complexity of jurisdiction (who’s in charge of this?); reducing the waste of resources, human and economic; intensifying efforts to protect women and other victims; and increased accountability from federal law enforcement.

Tribal citizens tend to regard federal and state law as having distant origins; to Indians, these laws seem foreign and irrelevant and not rooted in the culture they consider their own. The price of this disconnect is high—delayed and inadequate prosecution, trials in distant locations, and an ultimate degradation of justice. Current chaotic questions about jurisdiction have to do with whether the crime was committed on tribal land, whether the person who committed the crime was a Native or a non-Native, and whether the victim was a Native or a non-Native.

Latino and API inmates and probationers are also enmeshed in the immigration system and may be subject to custody holds and deportation based on the policies of U.S. immigration officials.
Inadequate attention from the federal government has resulted in crimes not being prosecuted properly and criminals exploiting that fact. The increased lawlessness endangers the tribal people; for example, there are extremely high rates of domestic violence on tribal lands. Also according to the commission, the federal government’s role in tribal justice must be reconsidered and reformed.

After two years of effort in conjunction with the Bureau of Indian Affairs, the commission released its report. Some of its recommendations are as follows:

- Tribes may opt out of federal or state jurisdiction, except for federal laws that apply to all Americans.
- Establish a new federal circuit court to hear relevant cases arising in Indian country.
- Affirm the jurisdiction of Alaska Native tribal governments.
- Improve the accuracy of data collection and the crime reports generated from those data.
- Improve rehabilitative programming for tribal people.
- Establish sustainable funding for criminal justice programs.

**QUESTIONS**

1. Why should Native peoples have their own system of criminal justice?
2. Discuss the ways that the geography of Native lands can have an effect on criminal justice matters.
3. Should protections for women follow federal or tribal law?

**Notes**

1. U.S. Department of Justice 2013
2. Indian Law and Order Commission 2013

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**Immigration and Incarceration**

In addition to the people of color who are confined in state prisons and local jails, a large number are confined in federal detention centers operated by Immigration and Customs Enforcement (ICE). ICE enforces immigration laws under the authority of the federal Department of Homeland Security, a main strategy of which for controlling illegal immigration is mass detention. Immigration and law enforcement overlap significantly due to the move toward policies that many refer to as the “war on immigrants”—increased criminalization of undocumented status, more militarized control of immigrant communities, and a codified system of immigrant detention and deportation (itself a “boom” industry).

This system overlap is nowhere more significant than in the border state of Arizona, where “minutemen” patrol the border. Despite the critical economic contribution of immigrant labor, immigrants themselves are increasingly demonized. Joe Arpaio, the bombastic and controversial sheriff of Maricopa County, embodies some of the most extreme positions on the treatment of undocumented immigrants. Arpaio has proudly proclaimed his “toughness” and unapologetically applied tactics that his critics call racist, an abuse of power, and unconstitutional. (See Chapter 6.)

Programs such as Secure Communities—which operates in almost every state, uses local law enforcement authorities to carry out detentions and relies on federal databases for identifying alleged suspects—are very blunt instruments for an enormously complex issue. ICE raids sweep up U.S. citizens, which result in lengthy detentions, prevent adequate legal representation, and affect tens of thousands of families that include U.S. citizens. Of
the individuals identified for deportation by Secure Communities, 93% are from Latin American countries, 2% are from Asia, and 1% are from Europe and Canada.\textsuperscript{37}

In 2009, almost 370,000 persons were detained by ICE—double the number of a decade earlier. As many as 20\% of detainees were moved from one location to another; some were housed in facilities directly under ICE management, others in facilities operated under contract with private prison companies, and some in state prisons and jails. On a given day, over 33,400 persons were confined in more than 1,500 separate facilities. Reliable data on the ethnic composition of these detainees are difficult to obtain, but most of them come from Mexico and South America. Thus, though documentation is not clear, the reality is that the ICE detention system further aggravates the disparity in incarceration for Latinos that already exists in prisons, jails, and juvenile facilities.\textsuperscript{38}

Though the flow of immigration is often linked with issues of terrorism and homeland security, it is worth noting that a very minor proportion of ICE detainees are accused of acts of terrorism. Persons taken into custody for terrorism are usually held in facilities operated by the Department of Defense or U.S. intelligence agencies. In 2009 and 2010, half of the immigrant ICE detainees had no criminal history at all; 20\% had a history of traffic offenses.\textsuperscript{39}

Alterations of U.S. immigration policies have led to more federal prosecutions in addition to deportation. In 2007, there were more than 19,000 federal inmates whose most serious crime was a violation of immigration laws. This has vastly increased the Latino inmate population in the Federal Bureau of Prisons. Whereas Latinos accounted for roughly 13\% of the U.S. adult population, they comprised about 40\% of all federal prisoners, almost half of whom were charged with violations of immigration laws.\textsuperscript{40}

The Obama administration is touting immigration reform as a top priority. And, although a vigorous immigrants’ rights movement is growing in momentum, there is dissention between the more mainstream, Democratic Party branch and the more grassroots advocates. The more established advocates feel that current attempts to reform immigration policy (involving guest worker programs, border security, identity verification, and pathways to citizenship) are the best possible solutions for now. Others vehemently disagree.
and say that the proposed solutions in their current form do not go nearly far enough to protect immigrant workers from such things as workplace exploitation, inhuman working conditions, and the threat of deportation.41

Understanding the Causes of Racial Disparity in Corrections

There is an extensive literature of commentary that documents the efforts of researchers seeking to comprehend the huge presence of people of color in the corrections system. Some observers are satisfied with a simplistic explanation—that the disparity is simply a result of people of color being responsible for more crime. Disparity is clearly a very complex social process that encompasses the nature and location of the crimes committed, offender attributes, impoverished communities, the policies and practices of criminal agencies from police through prosecution, access to criminal defender resources, the courts, and corrections agencies themselves. Researchers have used the concept of “accumulated disadvantage” to explain the existence of racial disparity in corrections. This means that small differences in the ways people are treated at each stage of the criminal justice process are compounded along the way.42 Community variables and racial tensions are involved in the complex mélange of factors that ultimately produce vast levels of racial disparity.

The nature of sentencing laws and penalties plays a major role. For example, a public policy debate continues about drug laws, especially penalties for possession of crack cocaine many times greater than those for possession of powered cocaine or other dangerous chemicals including methamphetamine. The current crackdown on undocumented immigrants, especially from Mexico, stems in large part from the political focus of law enforcement agencies and official policy and has led to a large increase in Latino inmates in state and federal prisons.

Numerous studies have documented racial bias—both conscious and unconscious—in how probation officials assess the culpability of offenders and the level of threat they may pose to public safety. Other factors such as income, education, and the defendant’s demeanor interact and influence these decisions. Grattet, Petersilia, and Lin have shown how race affects the decision to revoke the parole of recently released prisoners for technical violations of their conditions of supervision.43 There has been extensive research on the impact of race on who is sentenced to death.

Research suggests that public perceptions of dangerousness and trustworthiness are impacted by race and ethnicity. So long as the vast majority of decision makers in the criminal justice system are middle-class Whites who have relatively little contact with people of
Part III • Critical Issues and Policy Questions

PHILANTHROPIC EFFORTS TO REDUCE DISPROPORTIONATE MINORITY CONTACT FOR YOUTH

There are myriad efforts\(^1\) to address the disproportion in the justice system in terms of contact and confinement of young people. One such effort is titled Models for Change, which is a long-term investment on the part of the MacArthur Foundation. Reducing racial disparity is one of three core reform issues. The initiative is operating in 16 states, the first of which was Pennsylvania.\(^2\)

The Annie E. Casey Foundation also has a long-standing effort to improve justice for youth titled the Juvenile Detention Alternatives Initiative, a core principle of which is to help reduce disparate treatment of youth that arises out of racial bias. The initiative stresses that the rise in youth detention is largely driven by increased rates of detention for youth of color.

A staple of disproportionate minority contact (DMC) reform efforts is to refine the methods and systems of data collection. The assumption is that, unless you can honestly assess levels of disparity, you cannot address the apparent inequities. Therefore, thoughtful and accurate data collection is the foundation for effective policy reform. In an attempt to bring about decision making based on the facts of the case and the needs of the individual youth, reforms also focus on structured assessment tools, tracking of decisions throughout the justice process, training for system practitioners, culturally competent interventions, and recruitment and inclusion of people of color in decision-making positions.

QUESTIONS

1. Discuss the ways that youth detention might have an effect on DMC.
2. Why does data collection matter? Does it matter more than usual in issues that involve DMC?
3. Do philanthropic efforts such as these reduce the responsibility of the government to address issues of racial disparity?

Notes

1. Hoytt et al. 2001

color and poor people, these biased perceptions will persist. Allegations of gang membership and immigration status and assumptions about intellectual abilities or “inherent” violent tendencies make targets out of people of color and propel them into prisons and jails.

Unpacking the causes of racial and ethnic bias in corrections is complicated; however, it is hard to deny the bottom-line results that are reflected in the statistics presented here. There are two important concepts to keep in mind. First, race and ethnicity are not scientific facts but are social constructs and thus are tangled up with a host of other social factors. Second, race and ethnicity exert huge effects on all aspects of life such as where you live, what schools you attend, what churches you belong to, the food and music that you enjoy, your employment prospects, and even your life expectancy. It would be naïve to assume that race and ethnicity have only a minimal impact on who is incarcerated. Confronting the forces that fill up our prisons and jails with people of color must be a top priority for corrections reformers, policymakers, and professionals.

In the juvenile arena, the federal Juvenile Justice and Delinquency Prevention Act (JJDPA) was amended in 1980 to require that all states receiving funding under the JJDPA conduct
an annual analysis of the extent of DMC in the juvenile justice system and to submit a “good-faith plan” to remedy known and acknowledged disparities. When the act was reauthorized in 2002, Congress recognized that disparities were prevalent at every stage of the system and expanded the core requirements to address arrest, referrals to court, and diversions, in addition to secure confinement and prosecution in the adult court (also referred to as “waiver”). DMC now stands for disproportionate minority contact instead of disproportionate minority confinement, in recognition of the broader problem. Some states such as Wisconsin and Connecticut have enacted even stronger local mandates to reduce the high rates of confinement for young people of color. North Carolina passed a law extending this analysis to adult inmates and those on death row. A proposal before the U.S. Congress to require a racial and ethnic analysis—with possible solutions—was presented by Rep. Steve Cohen of Memphis, Tennessee, as the “Racial Justice Act,” but this proposed law failed to pass the House of Representatives.

Racial Profiling

The presumption of innocence is a fundamental pillar of American democracy. Racial profiling is an affront to that principle. It is the use of physical characteristics instead of behavior as grounds for exercising law enforcement practices such as arrest, investigation, or detention. Racial profiling can be informal or institutionalized. It is not a new problem; profiling is as old as discrimination. But it has taken some interesting forms in recent years.

Debates rage in many corners of the nation over specific law enforcement policies and whether they run contrary to our constitutional guarantees of equal protection. The profiling of Arabs and Muslims increased dramatically after the attacks on the World Trade Center in 2001. Intense reactions of fear and loathing made this practice seem reasonable to some. Profiling Latinos for suspected immigration violations in Arizona is codified into a highly controversial law there (SB 1070). The bill’s original version required the police...
to stop, question, and demand documents from anyone they suspected of being in the country illegally. To its authors, this type of profiling is considered a legitimate and large-scale strategy to create an atmosphere in which undocumented immigrants (mostly from Mexico, clearly) will “self-deport.” In Florida, the police in Miami Gardens were embroiled in a profiling controversy that surfaced after a year’s worth of convenience store videotape revealed a pattern of wanton police harassment in the predominantly African American neighborhood business. Storeowners and customers filed a lawsuit, and the police chief resigned.45

In a glaring example, New York City has had a policy of “stop and frisk” for over a decade—a key component of the city’s crime-fighting strategy. Police officers may stop and search anyone they suspect of criminal behavior. Given the looseness of the criteria, officers have extremely wide latitude in deciding what “suspicious” means. Those who defend stop and frisk claim that it is largely responsible for the crime decline in New York, and therefore necessary. Opponents argue that it is an unconstitutional violation of basic civil rights of innocent people going about their daily lives, undermining the trust of the community in the police without making anyone safer. Officers speaking under the protection of anonymity have revealed the pressure they are under from top-level administrators to reach certain quotas. And private citizens have documented their experiences and lodged complaints about the harassment they experience on the street.

The practice has prompted strenuous objection and several lawsuits, one of which ended with the release of department data. These data showed that in 2002, the department logged almost 100,000 stop and frisk incidents. By 2011, this number had climbed to over 685,000. In 90% of those stops, the police found no criminal activity; only 10% resulted in an arrest or a court summons. In over 80% of those stops, African Americans and Latinos were the targets.46 Beyond the question of civil rights, these numbers beg the question of whether the policy is an effective and efficient use of law enforcement resources. Although the practice has spread to several other states, political winds are blowing from the direction of reform; stop and frisk in New York may be in for a change.

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**SUMMARY**

Race has had an extraordinary impact on American history, including the history of crime and punishment, which has left a legacy of enormous disproportion of people of color in the criminal and juvenile justice systems. This disproportion is in large part responsible for the record-high rates of American incarceration, which has had devastating effects on individuals and communities alike. Although data are imperfect, all indicators point to a striking and accumulated disadvantage in corrections for members of minority groups. Stereotypes and ingrained prejudices form a burden for African Americans, Native Americans, Latinos, and sectors of the API population, among others. The cultural differences in these groups and the language barriers they face are rarely addressed or accommodated in correctional facilities, where staff diversity is lacking as is culturally competent programming. Immigrants tend to suffer additional consequences merely because of their immigration status. Native Americans are subject to maltreatment and are incarcerated in facilities that are outside official scrutiny and accountability. Segregation policies within prison walls tend to exacerbate racial tensions and gang activities. Racial disparity is a complex issue with many causes that stem from issues of race in U.S. society. A great deal more needs to be done to acknowledge and address the nature and scope of racial problems in corrections.
DISCUSSION QUESTIONS

1. Discuss ways in which you experience or witness or are aware of racial bias in your community.

2. What do you think are the implications of the fact that more African Americans are under criminal justice supervision than were slaves prior to the Civil War?

3. What are some of the disadvantages or problems with collecting criminal justice data on race and ethnicity?

4. Explore through discussion how the effects of disproportionality might compound as people become more entrenched in the system.

5. How should data about Hispanic ethnicity be collected and analyzed?

6. What do you think of the idea of the “model minority”? What facts might challenge this idea?

7. Discuss the plight of undocumented immigrants and the implications of and response to incarcerating them.

8. What are the advantages and disadvantages of Native Americans having a separate system of justice on Native lands?

9. Should prisons be segregated by race? Why or why not?

KEY TERMS

Cultural competence, 264
Ku Klux Klan, 258
Perjury, 262
Racial profiling, 271
Tribal territories, 264
Waiver, 271

NOTES

1. Myrdal 1944
2. Du Bois 1903
3. Hartney and Vuong 2009
4. Blumstein 1982
5. Miller 1994
6. Pettit and Western 2004
7. JEA Institute 2007
8. Alexander 2010
10. It is worth noting the data on how much crime is actually committed by each racial or ethnic group. The only relevant sources of these data are self-reported crime activities or the accounts of victims, neither of which is very reliable. Moreover, arrest data are also an unreliable gauge of offenses by race or ethnicity, because the race of the alleged offender is unknown until an arrest is made, but who gets arrested (and who does not) may be intentionally or unintentionally correlated with race.

11. Hartney and Vuong 2009
12. In these analyses, Hispanics might be included in either group.
15. Wacquant 2002
17. Hartney and Vuong 2009
18. Zatz 2000
20. Ibid.
21. Ibid.
22. Hartney and Vuong 2009
23. Ibid.
24. NCCD 2007
25. National Corrections Reporting Program 2003. These data do not distinguish Hispanic from non-Hispanic youth.
27. FBI 1997
28. Le et al. 2001
29. Ibid.
30. Takagi 1989
31. President’s Advisory Commission on Asian Americans and Pacific Islanders 2001
32. Krisberg 2007
33. Zheng and Zia 2007
34. Maguire and Pastore 2000
35. Truman, Langton, and Planty 2013
36. NCCD 2007
37. Kohli, Markowitz, and Chavez 2011; Tan 2011
38. Tan 2011
40. Lopez and Light 2009
41. Robinson 2013

42. Bushway and Piehl 2007
43. Grattet, Petersilia, and Lin 2009
44. Office of Juvenile Justice and Delinquency Prevention 2009
45. J. Brown 2013
46. Ibid.

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