

RACIAL DISPARITY REFORM:
RACIAL INEQUALITY AND THE EMERGENCE OF POLICY RESPONSES
IN U.S. NATIONAL POLITICS

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Abstract

Persistent racial inequalities in the U.S. criminal justice system have prompted national elected officials to enact a variety of corrective measures. Although politics largely defines the size and racial character of American criminal justice, little is known about the political process of remedying racial issues in criminal processing. Introducing the theory of “racial disparity reform,” this article describes how elected officials develop policies that redress politically-defined problems of racial inequality. It applies this framework to explain the emergence of reforms in three criminal processing areas. Lessons are drawn underscoring how politics can forge a more racially egalitarian criminal justice system.

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Introduction

Overrepresentation of racial and ethnic minorities is troubling part of the U.S. adult and juvenile justice systems (Baldus and Woodworth 2004; Mitchell 2005; Pope and Feyerherm 1990; Tonry and Melewski 2008). In response, national elected officials often attempt to improve racial equality by enacting a variety of policies that target the criminal processing of minorities (King and Smith 2011).¹ For example, Congress required states to reduce the disproportionate number of minorities interacting with their juvenile justice systems (Leiber 2002), the Bush administration banned racial profiling in routine federal law enforcement investigations (U.S. Department of Justice 2003), and the Obama administration curtailed mandatory minimum sentences for low-level drug offenders who are predominantly nonwhite (Horwitz 2013). Traditionally, scholars have examined how politics contributed to the expansive size and racially unequal character of the criminal justice system (Murakawa 2014; Tonry 1995; Weaver 2007). More recently, scholars have explored how politics can reduce criminal processing based on race-neutral, economic arguments (Dagan and Teles 2014; Gottschalk 2010). Yet there is no clear statement of how politics works to diminish racial inequalities in the criminal justice system.

I develop a theory of “racial disparity reform” to understand why elected officials seek to address racial issues in criminal justice. A “racial disparity reform” is any policy that actively

seeks to change the practices, policies, or structures criminal justice institutions in a manner that diminishes unnecessary or adverse processing differences among racial groups. Elected officials strive to create racial disparity reforms because socially efficient policies further reelection and institutional interests (Fenno 1978; Sunstein 1988). These reforms provide an opportunity for elected officials to fulfill social needs without producing more controversies or problems in criminal processing (Esterling 2004). Because elected branches do not have the analytical capacity to know or act upon the state of criminological research, elected officials construct their own understandings of racial inequality based on available scientific and political information (Whiteman 1995). Different types of racial disparity reforms are then developed from policymakers' constructions of criminal justice decision-making.

This article illustrates the applicability of my theoretical framework through case studies of national reforms in three areas of criminal justice: capital punishment, racial profiling, and youth confinement. These cases studies indicate U.S. presidents and Congress come to a consensus about racial disparity reform based on 1) judicial rulings concerning the constitutionality of racial considerations, 2) controversial events², and 3) studies of race in criminal processing. When national elected officials see racial inequality as a more glaring problem, reforms assume more potent forms.

By focusing on the emergence of criminal justice policies addressing racial inequalities—regardless of whether these measures are effective—this article shows politics can be instrumental in forging a more racially egalitarian criminal justice system. Elected officials can promulgate a diverse range of racial disparity reforms during seemingly less than opportune political moments. Moreover, racial justice advocacy need not rely on the courts or race-neutral language to generate necessary policy change. At a time when racial inequities associated with

crime controls are becoming more palpable, this article highlights the possibilities for politics in redefining the relationship between race and criminal justice.

Prior Literature on Politics and Criminal Justice

Over the past four decades, crime has become “a, if not, the defining problem of government” (Simon 1996, 13). Dominant narratives of U.S. criminal justice policymaking have elucidated how politics has created an expansive and racially disparate “carceral state” (Lerman and Weaver 2014). According to these accounts, today’s criminal justice system finds its origins in opposition to the Civil Rights Movement. During the 1960s, the upheaval of civil rights protests, appearance of rising crime rates, and white resistance to desegregation fuelled public cries for restoration of order (Mauer 2006; Tonry 1995). Elected officials capitalized upon fermenting “law and order” sentiments (Weaver 2007). Republican Party leaders like Barry Goldwater, Richard Nixon, and Ronald Reagan incorporated promises to clamp down on lawlessness into their political platforms and policy agendas. Facing electoral disadvantage due to the exodus of Southern anti-civil rights voters and criticism for being “soft” on crime. Democrats similarly embraced anti-crime rhetoric. The message of getting-tough on crime was subtly racial with connections to undeservingness and perverse “cultures of poverty” (Beckett 1997; Soss et al. 2014). Such politics encouraged the rapid enactment of tougher sentences, new drug legislation under the War on Drugs, enlarged prison and jail operations, and restrictions on offenders’ rights throughout the 1980s and 1990s.³

Racial minorities bore the brunt these punitive policies, as nearly one in eleven African Americans and one in twenty-seven Hispanics are currently under correctional supervision at any

given time (Pew Center for the States 2009, 7). The collateral consequences of interacting with the criminal justice system have been steep: offenders are disadvantaged with respect to employment, earnings, access to social services, political representation, and most other life course factors (Clear 2007; Western 2006; Pettit 2012). The criminal justice system has been portrayed as the latest “peculiar institution” descended from slavery and Jim Crow segregation that controls nonwhite populations (Wacquant 2009). Alexander (2010) laments such racial inequality is so durable that “criminal justice reform efforts—standing alone—are futile,” (217).

In the past decade, politics has moved away from unwavering commitments to tougher crime controls (Greene and Mauer 2010; Murakawa 2014). Crime has steadily decreased and the U.S. prison population has dropped consecutively over the past three years (Maruschak and Parks 2012). Public opinion no longer ranks crime among the nation’s most important problems (Cole 2011). Economic recessions in 2001 and 2008 have prompted politicians to reassess government spending and expenditures. Elected officials have begun mobilizing against the enormity of the criminal justice apparatus, framing it as a pressing and unsustainable fiscal problem. Such race-neutral, economic arguments for a more austere criminal justice system have particularly resonated among Tea Party-affiliated politicians and libertarian activists (Dagan and Teles 2014). Although calls for deescalation could be parlayed into new and more submerged forms of crime control like private prisons (Gottschalk 2014), states have taken various steps to cut down their massive correctional populations. Expanded parole release, diversionary programs like HOPE, and elimination of mandatory minimums are just a few measures that have greatly abated states’ imprisonment rates (Lerman and Weaver 2014).

While prior scholarship provides compelling theories of why politics has built up a large and racially disparate criminal justice system, much less is known about fostering its

dismantling. Recent literature suggests a politics based on race-neutral, economic arguments may begin to radically scale back criminal justice operations. Yet extant research says little about the political process that prompts elected officials to fix racial inequalities in criminal processing. A theory of racial disparity reform explains why and how politics has sought to improve the treatment of racial minorities in the U.S. criminal justice system.

A Theory of Racial Disparity Reform

Since the end of the Civil Rights Era, national and state elected officials have developed policies to reduce racial inequalities in criminal justice (King and Smith 2011).⁴ A racial disparity reform is a proposal, decision, or enacted measure by government that seeks to alter criminal justice institutions in order to eliminate racial differences. A racial disparity reform has two defining characteristics. First, it must address a racial subject matter. Second, it must aim to reduce differential treatment, disproportionate impact, or other harms incurred by minority groups. Reform must first respond to an issue affecting racial minorities. While any policy change is motivated by multiple interests, racial disparity reform makes racial problems its primary focus. Such consciousness of race is apparent in the political rhetoric surrounding a reform and typically appears in the language of the reform itself. To illustrate, the proposed congressional Traffic Stops Statistics Act of 1998 called for the mandatory collection of race and ethnicity information for all individuals stopped for traffic violations. Its proponents made clear the bill was meant to extinguish “driving while black” as a ground for stops (H. Rep. 105-435).

The fundamental purpose of solving racial inequality separates racial disparity reforms from other criminal justice reform initiatives. Racial disparity reform differs from ordinary

disparity reform seeking to eradicate distinctions in the treatment of individuals without regard to identity, social status, or group affiliation. Federal sentencing guidelines embody this type of disparity reform. Unwarranted disparity was a “rallying cry” for proponents of the U.S. Sentencing Commission (Stith and Koh 1993, 105). Advocacy for federal sentencing reform did have a racial dimension, as minorities often received longer sentences than whites committing similar offenses (Frankel 1972; Howard 1975). Concerns for consistency and unjustified leniency ultimately took precedence over racial considerations, however. This is evidenced by the Sentencing Reform Act of 1984’s lack of racial language and subsequent congressional interest in more certain punishments like mandatory minimum sentences (Stith and Cabranes 1998).

Racial disparity reform also stands in contrast to race-neutral reforms that may have profound impacts on the treatment of minorities. Consider again movements to deescalate sentencing policies. Redefining imprisonment in terms of months for most offenses and single digit years for more serious crimes would shrink the nation’s enormous incarcerated population and simultaneously cut its high African American imprisonment rate (Raphael and Stoll 2013; Tonry 2011). But efforts to deescalate criminal processing are primarily driven by non-racial reasons like economic cost, public safety, and rehabilitation (Gottschalk 2006).

The second hallmark of racial disparity reform is its egalitarian aims, or at least the appearance of a commitment to more fair and equal ends. Reforms strive to revise a status quo practice by eliminating or moderating its detrimental consequences for minorities.⁵ Similar initiatives can proactively limit racial inequality by outlining undue racial effects of extant or proposed statutes, as recently seen in racial impact statements (Mauer 2009). Whether racial disparity reforms actualize their goals of creating more equality among racial groups is a separate

question. Watershed racial disparity reforms have been cast by critics as merely symbolic (see Neal 2004 on the Kentucky Racial Justice Act), a claim sometimes unable to be tested empirically (see Liederbach 2007 on anti-racial profiling legislation). In identifying racial disparity reforms, the intentions behind changing criminal justice structures matter most due to their effects on the scope and implementation of criminal justice policies (Feeley and Sarat 1980).

Motivation for Racial Disparity Reform

A broader framework of racial disparity reform helps to elucidate how criminal justice policies targeting racial inequality emerge in politics. Motivation for racial disparity reform comes from elected officials' need to develop socially efficient policies (Sunstein 1988; Esterling 2004). Politicians have strong incentives to respond to social concerns. First, reelection depends on satisfying the demands of constituents and interest groups. Policymaking provides opportunities for elected officials to take positions that separate them from other candidates. (Mayhew 1974; Kreihbel 1992). It also allows elected officials to claim credit for solving problems and make "good" public policy for their electoral base (Fenno 1978). Second, elected officials can use policymaking as a way to maintain institutional power. In a system of separated powers, the development of socially desirable laws can enhance the reputation, capacity, and governance of an elected official's institution (Patashnik and Peck 2015). A publicly supported institution can further yield electoral benefits for individual policymakers.

At the same time, elected officials wish to design "efficient" social policies. Reforms should address a problem in a way that does not produce controversy, waste resources, or

otherwise fail to deliver promises. In criminal processing, new policies should not worsen or introduce new forms of injustice. Elected officials are conscious that any of these inefficiencies will make them vulnerable to political opponents (Sunstein 1988). A major issue in designing efficient reforms is elected branches lack the internal capacity to discern the state-of-knowledge on a problem and sort through all available alternatives to design a technically elegant policy (Esterling 2004, 77). An issue like racial inequality in criminal justice especially raises tremendous challenges in identifying the problem's sources and publicly acceptable solutions.

Elected officials thus develop racial disparity reforms based upon their own political constructions of racial inequality in criminal processing (Blumer 1971; Schattschneider 1960; Rochefort and Cobb 1994). As Loury (2002) observes, policymakers confronted with racial problems in law enforcement “need to tell themselves a ‘story,’ to adopt some ‘model’ of what has generated their data, to embrace some framework for gauging how best to respond” (158). Elected officials define their own problems by merging scientific information with relevant political information. While scientific information is based on expert or academic studies, political information includes the positions of other elite political actors (e.g. the courts) and the views of constituents (Whiteman 1995, 40). Because policy enactments require a degree of consensus among elected officials, this information helps to develop shared constructions of racial inequality and point to socially efficient reforms. When a racial disparity reform is finally enacted, elected officials on the whole meet societal demands, improve the welfare of the criminally processed, and advance their own political interests.⁶

Types of Racial Inequality and Racial Disparity Reforms

The theory of racial disparity reform must then distinguish elected officials' different understandings of racial inequality in criminal justice and their resultant policy solutions. Departing from Blumstein et al. (1983)'s portrayal of sentencing, I separate politically-defined problems of racial inequality in all forms of criminal processing with regard to two principles: consistency and legitimacy. Consistency refers to the expectation that a criminal justice official will handle an individual's case in manner that accords with the approaches to others facing comparable circumstances (Tyler 1990). Legitimacy refers to the legal permissibility of the criteria used in a decision to enforce a law or policy. Legitimate factors are attributes of a case that characterize an offense, an offender's culpability, or an offender's potential for future criminality (Blumstein et al. 1983; Tyler 1990). Inappropriate and morally objectionable decision-making factors include race or socioeconomic status.

Interacting the principles of consistency and legitimacy gives rise to four types of racial inequality and corresponding reforms. Racial inequality is broken down into issues of disproportionate impact, discrimination, and disparity. Racial disparity reforms address these problems in four forms: exploratory, prohibitory, policy-specific, and comprehensive reform. Each problem-solution, policymaking scenario is represented by a distinct quadrant in Table 1.

Exploratory reforms develop when elected officials believe racial inequality may be a problem of disproportionate impact. In Quadrant I, disproportionate impact originates from the assumed legitimate and consistent application of the law. Racial inequalities in criminal processing will only appear if certain racial groups are differentially involved in proscribed acts. Disproportionate impact is legally permissible so long as legal factors are solely responsible for these imbalances (Engen et al. 2002; Bridges et al. 1987; Durkheim 1964).⁷

Exploratory reforms determine to what extent disproportionate impact exists and whether these racial imbalances are normatively acceptable. These measures illuminate differences among racial groups by requiring the collection of data and/or additional study of racial influences in criminal justice decision-making. An example is President Clinton's directive to federal law enforcement agencies to track their activities with statistics relating to race, ethnicity, and gender (Holmes 1999). The motivation behind such reform is two-fold: policymakers get a better understanding of the racially disproportionate impacts of current policies and public awareness of racial differences can encourage more critical assessment of the criminal justice system.

Next, prohibitory reforms are policymakers' answers to issues of discrimination, or the steady illegitimate use of race as a decision-making factor (Quadrant III). Discrimination is expressed by the excessive discipline of a particular population to ensure its repression (Garland 2001; Soss et al. 2011). Racial discrimination may derive from a powerful majority continually trying to preserve its dominance over marginalized, nonwhite populations (Chambliss 1973; Quinney 1975). Similarly, it may stem from intensified conflict among racial groups as economic, political, social differences narrow within society (Blalock 1967; Hawkins 1987; Frazier et al. 1992).

Prohibitory reforms aim to eliminate the differential treatment of individuals based upon their racial group membership. Restrictions on the use of race as a category and other anti-discrimination measures are common solutions. For instance, the Kentucky Racial Justice Act bars the imposition of the death penalty if statistical evidence shows race may have influenced the decision to seek a capital sentence (Neal 2004). Prohibitory reforms also typically stipulate judicial recourse for acts of discrimination.

Disparities without discrimination motivate elected officials to design policy-specific reforms. In Quadrant II, disparities refer to differences among cases with similar attributes when the enforcement of criminal justice policies is lawful, but inconsistent. Disparity is typically a consequence of criminal justice bureaucracies accommodating their decision processes to their present conditions and local settings (Scheingold 1984, 230; Wilson 1968; Nardulli et al. 1985). These disparities in criminal justice decision-making can become problematic under the guarantee of equal protection, particularly if they inadvertently map onto racial lines.

Policy-specific reforms intend to promote consistency by revising the practices of criminal justice bureaucracies. The scope of such reform is usually narrow, obtaining to only a certain subset of offenses, penalties, or criminal processing stages. In this regard, these policies make more technical and incremental changes rather than overhaul an entire criminal processing system. The Fair Sentencing Act of 2010 typifies policy-specific reform.⁸ The law reduced the 100:1 crack and powder cocaine federal sentencing disparity that sought to deter rising crack use, but resulted in longer sentences for African Americans as the primary users of crack. The new 18:1 statutory ratio has made sentencing fairer, but it has not eliminated a disparity in sanctions for two forms of the same drug (Mauer 2011).

Lastly, when elected officials recognize problems of discrimination and disparity, comprehensive reforms advancing more systematic changes in criminal processing are developed. Today, the preponderance of criminological research acknowledges some combination of these two issues (Blumstein 1982; Tonry and Melewski 2008). Race continues to exert direct influence over processing outcomes, but differences in treatment exist within racial groups, between “like” cases, and among sociopolitical contexts (Crutchfield et al. 2010; Mitchell 2005; Spohn 2000). The net result is complicated forms of racial inequality, suggesting

the criminal justice system is not overtly or consistently racist in its decision patterns (Pope and Feyerherm 1990, 328).

Comprehensive reforms call for regular assessments of racial difference within an entire system, intervention based on these findings, and evaluation of introduced correctives (Johnson 2007). An emphasis is placed on the reform's system-wide focus that holds numerous agencies and services responsible for shifting their approaches to criminal processing. These policies thus motivate institutional changes within multiple criminal justice bureaucracies, such as providing cultural sensitivity training to probation officers, redefining detention policies, or improving local courts' data collection practices (Coggs and Wray 2008). Sometimes comprehensive reforms also incorporate local community institutions like churches or schools into reform initiatives (Griffith et al. 2012). Since 2003, seven states have initiated comprehensive reform processes by establishing government commissions tasked with making reductions in racial inequality across the criminal justice continuum.⁹

Exploring Racial Disparity Reform in U.S. National Politics

To understand how racial disparity reform has worked in practice, this article considers policies enacted by U.S. presidents and Congress that attempt to mitigate racial differences in three areas of criminal justice. It examines national reform developments in capital punishment, racial profiling, and youth confinement. These selected issues first capture different aspects of criminal processing. Interactions with the criminal justice system for adults and youths begin with law enforcement contact. Racial profiling, or selection by law enforcement for stops or searches that relies on an individual's presumed race, is then an early form of processing in

which minority overrepresentation can occur (Fagan 2002; Ramirez et al. 2000). Youth confinement and capital punishment involve decision-making at later criminal processing stages. The former concerns the jailing, detention, confinement, and other commitments of youths to secure public facilities during or after determinations of delinquency (Hsia et al. 2004). The latter concerns the sentencing of the convicted to death in the federal or state court systems (Baldus et al. 1994).

Additionally, these areas reflect a variety of established reforms. As shown in the following, national elected officials had different understandings of racial inequalities at these processing stages. Such constructions were crystallized by three sources of political and scientific information: judicial decisions regarding the constitutionality of racial considerations, controversial events, and studies of race in criminal processing. An exploratory reform calling for additional study of race and the death penalty was established because national legislators believed capital sentencing was marked by disproportionate impact. A prohibitory reform banning racial profiling by federal law enforcement arose as Congress and the President came to accept the ubiquity of discrimination in law enforcement. A comprehensive reform was promulgated when national policymakers recognized continuing discrimination and disparity in youth confinement after policy-specific reform had taken place.

Capital Punishment

Racial inequality in the imposition of the death penalty emerged on Congress' agenda in 1988. Following *Furman v. Georgia* (1972), Congress sought to reinstate federal death sentences in an omnibus crime bill and redefine procedural standards to ensure the penalty would not be

imposed in an arbitrary manner. Just a year earlier, the Supreme Court had ruled in *McCleskey v. Kemp* (1987) that statistical evidence of racial bias did not prove the inconsistent and unconstitutional application of the death penalty. Only legislatures could evaluate such evidence and redesign *any* penalty with disparate impacts. Senator Edward Kennedy (D-MA) and other legislators took this opportunity to assert racial minorities were disproportionately sentenced to death without any sign of relief. “Racial discrimination is intolerable,” Senator Kennedy proclaimed, “...it is a wrong that cries out to be remedied by the Congress” (134 Cong Rec. 13978).

In the death penalty deliberations that followed, members of Congress accepted well-established statistics showing the death penalty was more often applied to blacks defendants, especially in cases involving white victims (134 Cong Rec. 13978-80). Yet many disagreed with the conclusion that such disproportionate impacts demonstrated the illegitimate or inconsistent application of capital punishment. Senator Alfonse D’Amato (R-NY) noted differential involvement in crime could easily drive these racial statistics. He observed it would be fallacious to assert prejudice affects the prosecution of those engaged in securities fraud because such offenders are disproportionately white. “I do not believe you can simply take a statistic and say that because there are more people of one race who have the death penalty applied to them...it is discrimination,” he concluded (134 Cong Rec. 13980).

Legislators also pointed to judicial precedent that statistics could not prove discrimination in death sentencing. Senators invoked the Supreme Court’s decision that the unprecedented Baldus study presented in *McCleskey* was detailed, but “far from conclusive” (134 Cong Rec. 14098). It would be a leap to say statistical evidence could illuminate racial bias in specific cases when courts heavily scrutinize any claims of discrimination (134 Cong Rec. 13988). Other cited

cases like *Spinkellink v. Wainwright* (1978) highlighted the possibility that omitted factors may account for differences in outcomes between death-eligible “black victim” and “white victim” cases (134 Cong Rec. 14097). In light of these immeasurable conditions, the court could not firmly say a deleterious racial effect was real. Senator Orrin Hatch (R-UT) urged his colleagues to follow judicial approaches to statistics by succinctly stating, “The courts have been unanimous: statistical justice is no justice” (134 Cong Rec. 13988).

As Quadrant I of Table 1 predicts, acceptance of disproportionate impact in capital punishment led to exploratory reform as Congress’ preferred policy solution. On June 9, 1988, Senator Kennedy offered a two-part amendment to reduce racial inequality in the state and federal capital punishment systems. The amendment first introduced the Racial Justice Act that banned the racially disproportionate application of the death penalty. This prohibitory measure effectively overruled *McCleskey* by allowing statistical analyses that showed racial imbalances to establish a prima facie case of racial discrimination. Second, the amendment required the Comptroller General to conduct a study that investigated whether race represented a “significant risk” that influenced sentencing outcomes. Race of victim and race of defendant effects would be thoroughly examined using ordinary statistical methods. The amendment went nowhere.

The following day, Senator Kennedy reintroduced his amendment without the Racial Justice Act. Moreover, he emphasized the commissioned General Accounting Office (GAO) study was purely exploratory. The study could only assist Congress in “studying” and “fashioning appropriate responses” to any revealed racial inequalities (134 Cong Rec. 14096). It could not be used for legal proceedings concerning discrimination and otherwise would have no effect beyond gathering more information. This revised, exploratory amendment passed the Senate with little fanfare. In turn, this racial disparity reform in capital sentencing was enacted in

the Anti-Drug Abuse Act of 1988. Findings from this reform later inspired the reintroduction of Racial Justice Act in the 1990s, but national elected officials have yet to adopt a policy addressing disparities or discrimination in the capital punishment system (Edwards and Conyers 1994; Johnson 2007).

Racial Profiling

In 2001, Congress and the President identified racial profiling as one of the nation's most pressing problems. Impetus for addressing racial profiling first came from state courts and accompanying criminological research. In Maryland and New Jersey, civil lawsuits contested enormous racial differences in stops and searches by state highway patrol agencies. These cases relied upon the first systematic assessments of racial profiling conducted by John Lamberth. The premise of Lamberth's studies was simple: compare the racial composition of motorists detained and searched by law enforcement to the racial composition of motorists and of motorists violating traffic laws. Gross imbalances in the treatment of drivers were unmistakable and unexplained by legal factors.¹⁰ Although the courts ruled to amend law enforcement practices, national policymakers complained these state-specific lawsuits could not reduce unwarranted racial differences in stops and searches in other parts of the country (H.Rep. 105-435).

The Supreme Court's unwillingness to proscribe racially-motivated law enforcement decisions also indicated to national policymakers that racial profiling could be an unchecked problem. *Whren v. United States* (1996) affirmed pretextual stops and searches, including those motivated by race, were constitutional under the Fourth Amendment. The ruling likewise distinguished the Fourteenth Amendment as the sole constitutional means for objecting to

discriminatory treatment by police. The courts could not then relieve racial inequalities based on criminological evidence without proof of discriminatory intent (Alexander 2010; Fagan 2002). Politicians thus saw *Whren* as giving police unlimited discretion with little recourse for ensuring equal protection of the law (H.Rep. 105-435).

Furthermore, current affairs underscored growing public acceptance of the pervasiveness and abhorrence of racial profiling. By 1999, “driving while black” had decidedly captured public attention. Popular magazines like *Time* and *People* exposed police harassment of minorities across the country. Gallup polls reported an increasing percentage of African Americans citing unfair treatment by police. A majority of Americans (59%) believed racial profiling was widespread (Gallup 1999). The killing of West African immigrant Amadou Diallo and sexual assault of Haitian immigrant Abner Louisma by New York City Police Department officers incited additional interrogation of the racial neutrality of police-citizen interactions (Holmes 1999).

In a context indicating the consistent mistreatment of minorities by law enforcement, Congress and the President cast racial profiling as an issue of discrimination. “We no longer need just a study. We now have the facts that show us racial profiling is... a real and measurable phenomenon,” Senator Russ Feingold (D-WI) observed on the floor (147 Cong Rec. S5892, daily ed. June 6, 2001). In his 2001 State of the Union Address, President George W. Bush shared that “too many citizens have cause to doubt our Nation’s justice when the law points the finger of suspicion on groups instead of individuals.”

Because problems of discrimination motivate prohibitory reform (Quadrant III in Table 1), national policymakers pursued new restrictions on the use of race in law enforcement. Some legislators sought to ban racial profiling at all levels of government through proposals like the

End Racial Profiling Act (H.R. 2074; S. 989). Others like Representative Eleanor Norton (D-DC) sought to eliminate “this last disgraceful scar of overt discrimination” by creating new anti-racial profiling standards for receiving federal funding (147 Cong Rec. E833, daily ed. May 17, 2001). The executive branch assumed a similar approach. In February 2001, President Bush ordered the Attorney General to develop recommendations to end racial profiling by federal law enforcement agencies and coordinate with states and localities to extend these efforts everywhere.

Just as a national bipartisan, prohibitory solution to racial profiling seemed possible, policymakers backed away from completely rejecting race as a decision-making factor. The terrorist attacks of September 11, 2001 fractured American perspectives on the proper scope of law enforcement activities. Polling evidence indicated nearly 70% of the public approved of racial profiling as a tool to prevent terrorism. Over 50% of Americans supported requiring those of Arab descent to incur “special, more intensive security checks” and carry “special I.D.s” (Higgins 2003). “Politely and respectfully” using race in investigations was politically accepted as a means to prevent future tragedies (Laney 2004). Because race could be a legitimate factor, the consistent use of racial considerations did not make law enforcement illegitimate or discriminatory.

The resultant U.S. Department of Justice’s guidance on racial profiling internalized two reform sentiments. On the one hand, the directive reflected a national consensus to eliminate racial profiling as a widespread and discriminatory criminal justice practice. The document stipulated race and general stereotyping could not be used “to any degree” in a routine law enforcement activities. On the other, it conceded race could be considered in national security investigations “in accordance with Constitution and law of the United States.” Effectively, the policy allowed federal law enforcement to retain discretion that *Whren* and post-9/11 public

opinion had already endorsed. While moderated by the events of September 11th, this prohibitory reform has been a baseline for national policymakers in attempting to extinguish racial profiling as a form of discrimination.

Youth Confinement

When Congress revisited its youth confinement policies in the late 1990s, efforts to address minority overrepresentation in secure public facilities had been ongoing for nearly a decade. In 1988, Congress responded to soaring rates of minority confinement after the “due process” revolution in juvenile justice. While community-based alternatives to incarceration proliferated for white youths who were eligible for secure confinement, these sanctions were not consistently extended to similarly situated minority youths (Krisberg et al. 1987). To prevent the emergence of “two-tiered” juvenile justice system created by these disparities (H.Hrg. 99-147), Congress established the Disproportionate Minority Confinement (DMC) mandate. Following Quadrant II of Table 1, this policy-specific reform compelled a state to decrease the proportion of minorities placed in secure facilities if this amount exceeded their representation in the general population. Congress hoped the mandate would lead practitioners and researchers to identify, publish, and replicate interventions that produced more race-neutral results (H. Rep. 100-605, 10). Yet several factors would inspire revision of this policy-specific measure.

First, Congress began to reevaluate its youth confinement laws because criminological research continued to reveal severe minority overrepresentation among securely confined youth populations. By 1999, 7 out of 10 juveniles in confinement were nonwhite (145 Cong Rec. S5560, daily ed. May, 1999). Unexplainable racial inequalities were also remarkable at prior

decision-points like referral to juvenile court and adjudication (Pope and Feyerherm 1990). Findings of enduring racial imbalances in youth confinement irked national legislators. For instance, a four-fold disparity in the racial composition of California's general and confined youth populations prompted Representative Matthew Martinez (D-CA) to sigh, "You know, I imagined that because this is a mandate, a study would be done and something constructive would be done about disproportionate minority confinement" (H. Hrg. 105-23, 45).

Second, policy developments in affirmative action raised doubts among legislators that the Disproportionate Minority Confinement mandate could lawfully produce more racially equal processing practices. In *Adarand Constructors, Inc. v. Peña* (1995), the Supreme Court designated race as a category whose use requires strict scrutiny by the courts. The federal government could only rely on racial classifications to further a "compelling state interest." A month later, President Clinton directed executive agencies to eliminate any program that created racial quotas or reverse discrimination (July 19, 1995). These events figured prominently into public and political views of Congress' minority youth confinement corrective. Juvenile justice practitioners complained the DMC mandate's imperative to reduce disparities in the racial composition of securely confined youth populations effectively amounted to an unconstitutional quota.¹¹ Some worried the policy would inspire states to make illogical interventions like ignore racial inequalities at previous processing stages or release dangerous offenders in the name of racial equality (H. Rep. 105-155).

In pondering the fate of the DMC mandate, members of Congress invoked issues of disparity and discrimination in the juvenile justice system. Following expert testimony that inequalities in confinement partly derive from crime and partly from race, Representative Michael Castle (R-DE) proclaimed, "This is a fact which I think I can understand" (H. Hrg. 106-

12, 50). Senators like Paul Wellstone (D-MN) drew more detailed conclusions from disproportionate minority confinement studies and congressional discussion on the topic. “I do not think this whole problem of disproportionate minority confinement is the product of bigoted or racist authorities, though there is too much bigotry and there is too much racism,” he observed. Differences in poverty, education, and political connections created “unconscionable” racial distinctions as well (145 Cong. Rec. S5560, daily ed. May 19, 1999). Senator Kennedy added an ideal response to minority youth confinement should make states “more sensitive” to the everyday socioeconomic and racial challenges individuals face in American society (145 Cong. Rec. S5565, daily ed. May 19, 1999).

With a vision of racial inequality in youth confinement as a problem of disparity and discrimination, Congress expectedly developed a comprehensive reform (Quadrant IV of Table 1). It expanded the DMC mandate “confinement” to “contact” with the juvenile justice system. Addressing disparities, the Disproportionate Minority Contact mandate intended to ensure individuals charged with the same crime and same circumstances would be treated uniformly. Tackling discrimination, the measure promised to “eliminate true bias” throughout the juvenile justice continuum (H. Rep. 107-203, 29). The comprehensive DMC mandate was enacted in the reauthorized Juvenile Justice and Delinquent Prevention Act of 2001. The provision requires federally-funded states to reduce the disproportionate number of minorities handled at all decision-points in the juvenile justice system without the use numeric standards or quotas. It became the nation’s first racial disparity reform to tackle inequalities throughout an entire justice system. Today, it is a model for comprehensive reform proposals for adult criminal processing (H. Hrg. 111-78).

Conclusions

Racial inequality is a disturbing and complicated issue in the U.S. criminal justice system. Elected officials frequently seek to rectify these racial problems in criminal processing with different reforms. While prior literature has argued politics is instrumental in expanding racially disparate crime controls and possibly contracting the criminal justice apparatus, this article has uncovered how politics attempts to ameliorate racial inequalities in criminal justice. The theory of racial disparity reform asserts that elected officials respond to racial issues in criminal justice due to their interests in designing socially efficient policies. These policies accord policymakers electoral and institutional benefits, yet they can be difficult to design because elected officials do not know the state of criminological research. Elected officials therefore construct their own visions of racial inequality based on available scientific and political information. Beliefs concerning whether or not the criminal justice system is legitimately and consistently applying the law signal issues of disproportionate impact, disparity, or discrimination (Blumstein et al. 1983). These politically-defined problems of racial inequality motivate distinct policy solutions.

The article then applied the racial disparity reform framework to explain how U.S. presidents and Congress have responded to racial differences in criminal processing. Case studies of reforms in capital punishment, racial profiling, and youth confinement revealed two findings. First, consensus for reform among national elected officials is forged in light of judicial decisions concerning the constitutionality of racial considerations, controversial events, and studies of race in criminal processing. Second, policymakers' portrayals of racial inequality generate various policy responses. An exploratory reform addressed racial inequalities in capital

punishment because national elected officials accepted the penalty's disproportionate impacts. A prohibition on racial profiling developed as policymakers came to believe in the prevalence of discriminatory law enforcement practices. Recognition of continuing disparities and discrimination in youth confinement ultimately prompted Congress to develop a comprehensive reform reducing disproportionate minority contact with juvenile justice structures.

Together, the racial disparity reform framework and these qualitative findings point to several policy implications. First, racial disparity reform in criminal justice is possible under seemingly less than favorable political conditions. Congress enacted measures like the Disproportionate Minority Confinement mandate and the GAO study of race and capital punishment at the height of political calls to "get tough" on crime (Tonry 1995). The Bush administration released an unprecedented ban on racial profiling after the September 11th attacks. Although criminal justice policymaking of the 21st century has been dominated by political commitments to more punitive and racially disparate measures, it is crucial to illuminate racially-conscious, progressive elements of crime politics and their manifestation in public policies (King and Smith 2011).

Second, criminal justice reform on behalf of promoting racial equality is not an entirely new political phenomenon. Under President Obama, national policymakers have done more to address racial problems in criminal processing than at any other point in history (Savage and Goode 2013). It would be mistaken to argue national elected officials have not previously tried to address such issues, however. Democrats and Republicans alike have historically adopted policies reacting to contemporary visions of racial inequality. With clear problems of minority overrepresentation and mass public demonstrations on behalf of racial justice across the country, elected officials of various backgrounds will continue to formulate new criminal justice reforms.

Acknowledging how racial inequalities have been constructed and resolved through a range of policies in the past can still inform reform advocacy efforts today.

Finally, future attempts to remedy vast racial disparities in the criminal justice system should consider pursuing race-focused reform initiatives within the legislative and executive branches. On the one hand, the courts have slowly closed their doors to amending racially disparate criminal justice practices since *McCleskey* (Alexander 2010; Johnson 2007). Recent judicial decisions surrounding the deaths of Michael Brown and Trayvon Martin have raised more questions concerning the courts' ability to deliver racial justice. As the cases studies show, elected officials can and do respond to racial problems in criminal justice following judicial non-intervention. On the other, calls for reform can be racially-conscious with connections to major events or criminological research. Racial justice advocates need not then advance their position using race-neutral, economic cost arguments alone, particularly when public willingness to pay for anti-crime measures could resume with a stronger economy or future crime increases.

Looking ahead, complete abolition of racial inequities in criminal processing will require great reenvisioning of American sentencing and imprisonment practices. Yet exploration of previous racial disparity reforms in U.S. national politics shows elected officials can still institute social change. Soss et al. (2011) observe, "racial disparities do not flow directly from social structures. They depend ultimately on what specific human agents decide and do in the process of governing," (14). Racial disparity reform involves engagement in the politics of criminal justice, yet resultant policies can be key to changing the nature of American criminal processing.

Notes

¹ This article hereafter uses the terms “criminal justice system” and “criminal processing” to describe government processing of adults and juveniles for criminal or delinquent acts. It also refers to racial and ethnic minorities under the term “racial minorities.” This choice reflects policymakers’ frequent treatment of racial and ethnic inequalities as a singular problem. It likewise responds to criminal justice record-keeping practices, as many agencies do not differentiate between racial and ethnic categories (Mauer and King 2007).

² I follow Mayhew (2007) in defining a controversial event as an incident or occurrence that changes a political context by creating a new sense among policymakers about the importance of certain ideas, the urgency of societal problems, and the desirability of proposed solutions (101).

³ These policies would be furthered and protected by a diverse collection of interest groups representing women’s rights, victims’ rights, prison-guard unions, and local economic developers among other concerns (Gottschalk 2006; Mauer 2006; Page 2011).

⁴ Racial disparity reform is possible, but limited within the judiciary. Many state supreme court systems have developed racial fairness committees tasked with examining issues of racial inequality and designing appropriate interventions (Norris 2011). Courts may also issue rulings that seek to eliminate racial disparities. For instance, a federal court ruled that the New York City Police Department’s stop-and-frisk policies were unconstitutional due to their racial discriminatory nature (Goldstein 2013). Yet these rulings are circumscribed by constitutional questions and precedents allowing for racial disparate impacts in criminal processing, as further described in the case studies (Johnson 2007). Criminal justice bureaucracies, such as state police forces or juvenile probation offices, may likewise choose to revise their practices on behalf of promoting more racial equity. Because a bureaucracy is often protective of its existing practices

without regard to their racial consequences (Wilson 1968), legislative and executive oversight typically drives bureaucratic racial disparity reform.

⁵ Racially-conscious reform with anti-egalitarian ends is rare, but plausible. For example, Governor Susana Martinez of New Mexico rescinded Executive-Order 2005-019 prohibiting state law enforcement officials from inquiring about a criminal suspect's immigration status. Critics of Martinez's order have equated it with sanctioning racial profiling (McCoy 2011).

⁶ An emphasis is placed on aggregate benefits because socially efficient policies will not please all elected officials, interests groups, or constituents. As Esterling (2004) observes, socially efficient policies are "only hypothetical solutions to policy problems" that reflect overall political consensus (78-79).

⁷ Disproportionate impacts are assumed to occur in Quadrants II-IV, but these effects are a result of discrimination and/or disparity.

⁸ Also see the rollback of New York's Rockefeller Drug Laws, under which 90% of the state's drug offenders were black or Hispanic (Cole 2011).

⁹ These states include Arkansas, Colorado, Connecticut, Illinois, Minnesota, Virginia, and Wisconsin (XXX 2015).

¹⁰ In New Jersey, African Americans represented 13.5% of all motorists and 15% of traffic violators, but constituted 35% of motorists stopped by police. Given this discontinuity, the Supreme Court of New Jersey ruled such racial disparity in stops violated the state and U.S. constitutions. In Maryland, African Americans made up 17.5% of the eligible traffic stop population, but constituted 74.9% of all searches. Following the study, Maryland State Police promised to revise its policing practices under consent decree (Lamberth et al. 2005).

¹¹ One Oklahoma juvenile justice administrator testified before Congress that “quotas are not the answer. Youth are placed in a system based on their acts, not their race” (H. Rep. 107-203, 29).

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Table 1: Types of Racial Inequality and Racial Disparity Reforms in the Criminal Justice System in Terms of Consistency and Legitimacy

	Application of Laws and Criminal Justice Policies	
Legitimacy of Criteria in Decision to Apply Laws and Criminal Justice Policies	Consistent	Inconsistent
Legitimate	Problem: Disproportionate Impact Reform: Exploratory (I)	Problem: Disparity Reform: Policy-Specific (II)
Illegitimate	Problem: Discrimination Reform: Prohibitory (III)	Problem: Disparity & Discrimination Reform: Comprehensive (IV)