

Mass Incarceration: A Contemporary Mechanism of Racialization in the United States

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ABSTRACT

Mass incarceration dominates the social and economic context of life for millions of African Americans, and continues a historical pattern of structural disadvantage that is defined by race. This article examines the broader consequences of prison expansion by focusing on its contribution to contemporary racial ideologies and structures of economic disadvantage. While other scholars have argued that ideological beliefs about African American criminality have facilitated their disproportionately high rates of imprisonment, this article argues that ideological beliefs about race are also informed by African American men's disproportionately high rates of incarceration. Mass incarceration produces structures of disadvantage, as economic disparities are magnified along racial lines long after ex-inmates are released. Ultimately, this article develops the idea that mass incarceration operates as a contemporary mechanism of racialization—a structure for continuing social stigma and economic marginalization by race—and illustrates this point by examining the impact of incarceration stigma on labor market exclusion.

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I. INTRODUCTION

The election of Barack Obama to the United States presidency was heralded by some as a symbol of the demise of the Jim Crow era socioeconomic and cultural landscape that defined systems of justice, mobility, and daily life for millions of African Americans along racial lines.¹ Yet in every state of the nation, a disproportionately high percentage of African American men presently live under

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1. *President-Elect Obama*, WALL ST. J., Nov. 5, 2008, at A22, available at <http://online.wsj.com/article/SB122586244657800863.html>.

some kind of state or federally mandated detainment.² Just one year prior to the 2008 election, roughly 35% of incarcerated men in federal and state prisons and jails were African American,³ although they comprised just over 12% of the total non-incarcerated adult male population.⁴ Patterns of racial disparity in 2008 were even more dramatic in states such as Massachusetts, where African American men were incarcerated at eight times the rate of non-Hispanic whites.⁵ In 2010, the U.S. prison population declined for the first time since 1972,⁶ but this trend has not significantly changed racial disparities in imprisonment. According to recent estimates, African American males are imprisoned at an overall rate of nearly seven times that of white males.⁷

The high rate of incarceration among African American men is part of an overall trend in punishment defined by a dramatic increase in the “carceral system”⁸—a term used to characterize the legitimization and normalization of imprisonment as a factor of social life.⁹ Yet the collateral consequences of increased incarceration are most

2. See JENIFER WARREN, *THE PEW CTR. ON THE STATES, ONE IN 100: BEHIND BARS IN AMERICA 2008*, at 3-6 (2008), available at <http://www.pewcenteronthestates.org/uploaded/Files/One%20in%20100.pdf>.

3. Pierre Thomas & Jason Ryan, *U.S. Prison Population Hits All-Time High: 2.3 Million Incarcerated*, ABC NEWS (June 6, 2008), <http://abcnews.go.com/TheLaw/story?id=5009270>.

4. SEE U.S. CENSUS BUREAU, U.S. DEP'T OF COMMERCE, *STATISTICAL ABSTRACT OF THE UNITED STATES: 2012*, at 10 tbl.6 (2012), available at <http://www.census.gov/prod/2011/pubs/12statab/pop.pdf>.

5. MARC MAUER & RYAN S. KING, *THE SENTENCING PROJECT, UNEVEN JUSTICE: STATE RATES OF INCARCERATION BY RACE AND ETHNICITY 6* (2007), available at http://sentencingproject.org/doc/publications/rd_stateratesofincbyraceandethnicity.pdf.

6. PAUL GUERINO ET AL., *BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SER. NO. NCJ 236096, PRISONERS IN 2010*, at 1 (2011), available at <http://www.bjs.gov/content/pub/pdf/p10.pdf>.

7. *Id.* at 7.

8. MICHEL FOUCAULT, *DISCIPLINE AND PUNISH 247-48* (Alan Sheridan trans., Pantheon Books 1977) (1975). Foucault used this term to refer to the prevalence of forms of social control, surveillance, and punishment—especially the prison system—in modern life. He argued that the principles, techniques, apparatuses, and networks of the carceral system that was initially developed to control criminals have become embedded into the rest of society. Thus, mass incarceration is a reflection of a society where penal systems of social control are normalized and legitimized within everyday beliefs, practices, and institutional policies. *Id.*

9. See RYAN S. KING ET AL., *THE SENTENCING PROJECT, INCARCERATION AND CRIME: A COMPLEX RELATIONSHIP 1* (2005), available at http://www.sentencingproject.org/doc/publications/inc_iandc_complex.pdf. The United States leads other industrialized nations with 2.1 million people incarcerated in prisons or jails—an increase of more than 500% over the last thirty years. *Id.* Between 1994 and 2004, the incarceration rate rose nationally by

significant for African American men.¹⁰ According to author Michelle Alexander, “More African Americans are under correctional control today—in prison or jail, on probation or on parole—than were enslaved in 1850, before the Civil War began.”¹¹ Moreover, a long list of “invisible punishments,” such as housing loss, labor market exclusion, and political disenfranchisement, continue to plague former inmates long after release.¹² Restrictions associated with felony convictions meant that nearly 1.4 million African American men were ineligible to vote in the 2008 presidential election which, ironically, has been identified as a major turning point in American race relations and has led many to conclude that race is no longer a significant factor in social or economic progress in the United States.¹³ But, this type of “end-of-race” rhetoric¹⁴ ignores the continued social and economic disenfranchisement of millions of African American men by recasting it as a racially neutral, color-blind occurrence that is the lone outcome of individual choice. The reality is that mass incarceration dominates the social and economic context of life for millions of African Americans, and continues a historical pattern of structural disadvantage that is defined by race.

Scholar Manning Marable identifies the criminal justice system as one of three pillars forming a deadly triangle of “institutional racism.”¹⁵ Alexander agrees with this characterization, arguing “mass incarceration has established a ‘racial caste system’ in society, primarily driven by politics, not crime.”¹⁶ Others claim that while

24%, while the rate of violent crime and property crime decreased by 33% and 23% respectively. *Id.* at 3.

10. See discussion *infra* Part III.

11. MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 175 (2010).

12. Jeremy Travis, *Invisible Punishment: An Instrument of Social Exclusion*, in *INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT* 16, 23-25 (Marc Mauer & Meda Chesney-Lind eds., 2002).

13. *Felony Disenfranchisement Laws in the United States*, SENT’G PROJECT (Dec. 2011), http://www.sentencingproject.org/doc/publications/fd_bs_fdlawsinusDec11.pdf; Pearl Korn, *80 Million Disenfranchised and Disinterested Americans Didn’t Vote in ‘08. What Portends for 2012?*, HUFFINGTON POST (Sept. 19, 2011, 11:41 AM), http://www.huffingtonpost.com/pearl-korn/80-million-disenfranchise_b_969309.html.

14. *Obama and Preferences: It’s Time to Move past Racial Quotas*, WALL ST. J., Nov. 6, 2008, at A18, available at <http://online.wsj.com/article/SB122593282865203503.html>.

15. Manning Marable, *Introduction to RACIALIZING JUSTICE, DISENFRANCHISING LIVES* 11-12 (Manning Marable et al. eds., 2007). Institutional Racism was defined by Marable as “the systemic inequality of an entire people justified by their race.” *Id.* Aside from the criminal justice system, Marable lists the other two pillars as mass unemployment and disenfranchisement. *Id.*

16. ALEXANDER, *supra* note 11, at 9-12.

historical “Jim Crow”¹⁷ barriers have been abolished, criminal justice policies and procedures that stress incarceration as a means of social control continue to challenge basic U.S. principles of democracy and justice, especially for the significant amount of affected individuals involved in non-violent crimes.¹⁸

These critiques have led to calls for an evaluation of the cultural effects of prison expansion, both in terms of its emphasis on violence and dehumanization as a means for solving social conflicts, and the policing policies and political slogans that focus on a so-called “war” on crime.¹⁹ This is particularly problematic when such wars are disproportionately fought in communities of color and members of those communities are targeted as the primary criminals and victims.²⁰ Others contend that the punitive ideology that justifies contemporary forms of punishment reify the eugenic arguments embraced by classical criminologists that there is a dangerous class of criminals.²¹ Such essentialist ideology is used not only to justify the unequal treatment of members of socially disadvantaged groups within systems of criminal justice, but also to justify their devalued status in all areas of social life.²²

17. From 1875 until the mid 1960s, most states in the United States enforced racial segregation through a series of statutes. Named after a minstrel show character, “Jim Crow” laws mandated “separate but equal” status in social, economic, and political relationships for African Americans and whites. Examples include racially segregated public schools, hospitals, restaurants, public transportation, public restrooms, drinking fountains, and other public facilities, as well as laws against interracial marriage. For a comprehensive history, see *The Rise and Fall of Jim Crow* (PBS television broadcast series, premiered Oct. 1, 2002).

18. Jason L. Mallory, *Mass Incarceration, Democracy, and Inclusion*, 21 *SOCIALISM & DEMOCRACY* 97 (2007), available at <http://sdonline.org/43/mass-incarceration-democracy-and-inclusion/>.

19. Thomas Mathiesen, *The Arguments Against Prison Construction, in ABOLITIONISM: TOWARDS A NON-REPRESSIVE APPROACH TO CRIME* 83, 84, 88-89 (Herman Bianchi & René van Swaaningen eds., 1986).

20. Darren Wheelock & Christopher Uggen, *Punishment, Crime, and Poverty, in THE COLORS OF POVERTY: WHY RACIAL AND ETHNIC DISPARITIES PERSIST* 261, 262, 272 (Ann Chih Lin & David R. Harris eds., 2008).

21. MICHAEL J. LYNCH & W. BYRON GROVES, *A PRIMER IN RADICAL CRIMINOLOGY* 117-19 (2d ed. 1989).

22. *Id.* For example, according to a report by the New York Civil Liberties Union, police disproportionately target communities of color for stop-and-frisk practices. *Stop-and-Frisk Campaign: About the Issue*, N.Y. CIVIL LIBERTIES UNION, <http://www.nyclu.org/issues/racial-justice/stop-and-frisk-practices> (last visited Feb. 16, 2012). Stop-and-frisk practices involve the random stopping and questioning of pedestrians suspected of criminal involvement. *Id.* In New York City, between 86% and 90% of pedestrians stopped from 2004 to 2011 were people of color. *Id.* Approximately “45 percent of blacks and Latinos who were stopped were also frisked, compared with only 29 percent of whites.” *Stop and Frisk Fact Sheet*, N.Y. CIVIL LIBERTIES UNION, <http://www.nyclu.org/node/1598> (last visited Feb. 16, 2012). This is despite the fact that whites were two times as likely to be found with

This article examines the broader consequences of prison expansion by focusing on its contribution to contemporary racial ideologies and structures of economic disadvantage. Part II explores recent writings on racialization, criminal stigma, and incarceration. Racialization is defined as a process that reproduces and magnifies racial classifications as structures of inequality within interlocking ideologies, institutions, social systems, and everyday practices.²³ While other scholars have argued that ideological beliefs about African American male criminality have facilitated their disproportionately high rates of imprisonment,²⁴ this article argues that ideological beliefs about race are also informed by African American men's disproportionately high rates of incarceration. Correspondingly, the economic disadvantages that lead a large number of African American men to jail and prison cells are reproduced and magnified by mass incarceration to produce systemic economic disparities along racial lines.

Ultimately, this article proposes that contemporary ideas about race and structural-level racial disparities are heavily informed by the stigma and economic marginalization produced in mass incarceration. Part III illustrates this point by examining the impact of incarceration stigma on labor market exclusion. Research is presented to show that the ideological link between incarceration and race is so pervasive that race and a record of incarceration are often conflated as mutually reinforcing forms of labor market bias experienced by African American men.²⁵ This article makes the case that the relationship between racial ideology and economic marginalization is made possible by mass incarceration's close structural relationship to other social systems, such as labor markets, which magnify these forms of racial disadvantage. In this light, mass incarceration operates as a contemporary mechanism of racialization.

II. INCARCERATION AS A MECHANISM OF RACIALIZATION

[T]he role of the carceral institution today is different in that, for the first time in US history, it has been elevated to the rank of main machine for "race making".

"guns, drugs, or stolen property" as black suspects. *Id.* Moreover, police are 50% more likely to use force when the suspect is black or Latino (i.e., handcuffing, restraining, drawing weapons) than when the suspect is white. *Id.*

23. MICHAEL OMI & HOWARD WINANT, *RACIAL FORMATION IN THE UNITED STATES FROM THE 1960S TO THE 1980S* 64-67 (1986).

24. ALEXANDER, *supra* note 11, at 99-100; GLENN C. LOURY, *THE ANATOMY OF RACIAL INEQUALITY* 55-73 (2002) (arguing that ideological beliefs may lead to racial profiling).

25. Devah Pager, *Blacklisted: Hiring Discrimination in an Era of Mass Incarceration*, in *AGAINST THE WALL: POOR, YOUNG, BLACK, AND MALE* 71, 72, 74, 78-79 (Elijah Anderson ed., 2008).

Its material stranglehold and classificatory activity have assumed a salience and reach that are wholly unprecedented in American history as well as unparalleled in any other society.²⁶

In this statement, Loïc Wacquant discusses the criminal justice system as a major site of racialization—a term defined by sociologists Michael Omi and Howard Winant as “the extension of racial meaning to a previously racially unclassified relationship, social practice or group.”²⁷ Racial classifications are forms of inequality that use physical differences to define and rank groups on the basis of status, power, and access to resources.²⁸ Racial classifications are realized through “racial projects,” which are described by Omi and Winant in the following manner:

A racial project is simultaneously an interpretation, representation, or explanation of racial dynamics, and an effort to reorganize and redistribute resources along particular racial lines. Racial projects connect what race means in a particular discursive practice and the ways in which both social structures and everyday experiences are racially organized, based upon that meaning.²⁹

In other words, racial projects are where racial ideology meets structural disadvantage to form structural patterns of racial inequality. Omi and Winant discuss slavery, Jim Crow laws, and exclusionary immigration policies as examples of “racial projects” within the United States that have used the legal system to reproduce and control essentialist notions of race in order to establish and maintain structures of social and economic hierarchy.³⁰

For some, the criminal justice system has simply replaced slavery and segregation as a contemporary racial project.³¹ Indeed, this perspective argues that the criminal justice system is “inherently racialized” as a result of the disproportionate representation of people of color “as both victims and perpetrators of crime.”³² Wacquant builds on this idea, but focuses on the race and class dynamics involved in the expansion of the carceral system.³³ He argues that the term “mass incarceration”

26. Loïc Wacquant, *Race as Civic Felony*, 57 INT'L SOC. SCI. J. 127, 128 (2005).

27. OMI & WINANT, *supra* note 23, at 64.

28. MICHAEL OMI & HOWARD WINANT, *RACIAL FORMATION IN THE UNITED STATES FROM THE 1960S TO THE 1990S* 56, 71 (2d ed. 1994).

29. *Id.* at 56 (emphasis omitted).

30. *Id.* at 71.

31. Sheila A. Bedi, *The Constructed Identities of Asian and African Americans: A Story of Two Races and the Criminal Justice System*, 19 HARV. BLACKLETTER L.J. 181, 182 (2003).

32. *Id.*

33. Loïc Wacquant, *Class, Race & Hyperincarceration in Revanchist America*,

obscures race by erroneously conceptualizing African American men's disproportionate involvement in the criminal justice system as an unfortunate, unintended consequence of widely cast policies and procedures, rather than the outcome of racially focused policies and practices:

[T]he expansion and intensification of the activities of the police, courts, and prison over the past quarter-century have been anything but broad and indiscriminate. They have been *finely targeted*, first by class, second by that disguised brand of ethnicity called race, and third by place. This cumulative targeting has led to the *hyperincarceration* of one particular category, *lower-class black African American men trapped in the crumbling ghetto*, while leaving the rest of society—including, most remarkably, middle- and upper-class African Americans—practically untouched.³⁴

As Wacquant contends, high rates of incarceration are often driven by class dynamics, as poverty is a prevailing factor among the incarcerated.³⁵ Although it often said, “the poor get prison,”³⁶ statistics indicate that African Americans bear the brunt of punitive policies that feature incarceration.³⁷ Studies have exposed large scale patterns of racial disparity in sentencing, where, as a consequence of departures from sentencing guidelines, African American males with low levels of education are more likely to be incarcerated, receive longer sentences, or are less likely to receive a no-prison option when it is available, than similar whites.³⁸ Racial disparities in sentencing have been explained by some as a consequence of African American men's higher rates of arrest and participation in serious, violent crimes, rather than discriminatory policies or judgments.³⁹ Yet, after reviewing forty studies published since 1980 that investigate racial bias in sentencing, a report compiled by the

DÆDALUS, Summer 2010, at 74-90.

34. *Id.* (footnote omitted).

35. JEFFREY REIMAN, *THE RICH GET RICHER AND THE POOR GET PRISON* 151-52 tbl.3.4, 153-55 (Dave Repetto ed., 8th ed. 2007).

36. *Id.* at 150.

37. David B. Mustard, *Racial, Ethnic, and Gender Disparities in Sentencing: Evidence from the U.S. Federal Courts*, 44 J.L. & ECON. 285, 305-12 & tbls.8, 9 & 11 (2001); Cassia Spohn & David Holleran, *The Imprisonment Penalty Paid by Young, Unemployed Black and Hispanic Male Offenders*, 38 CRIMINOLOGY 281, 295 & tbl.4, 296 (2000).

38. *See, e.g.*, TUSHAR KANSAL, *THE SENTENCING PROJECT, RACIAL DISPARITY IN SENTENCING: A REVIEW OF THE LITERATURE 2* (Marc Mauer ed., 2005), available at http://www.sentencingproject.org/doc/publications/rd_sentencing_review.pdf; Mustard, *supra* note 37, at 311-12; Spohn & Holleran, *supra* note 37, at 296-99.

39. James Q. Wilson, *Crime*, in *BEYOND THE COLOR LINE* 115, 116-17 (Abigail Thernstrom & Stephan Thernstrom eds., 2002).

Sentencing Project maintains that type and severity of crime do not fully explain racial disparities in sentencing outcomes.⁴⁰ On the contrary, the report found greater racial disparities in sentencing (in terms of type of judgment and length of sentence) for less serious crimes, such as low level drug offenses and property crimes. “There is evidence of direct racial discrimination (against minority defendants in sentencing outcomes),” the report concluded.⁴¹

Using the discussion of racialization and racial projects as a foundation,⁴² we can think about mass incarceration as a racial project that operates as a mechanism of racialization. This view should be contrasted from one that conceptualizes the criminal justice system as a racial project and sees mass incarceration as an outcome of that process of racialization.⁴³ As defined earlier, racialization is a process that reproduces and magnifies racial classifications as structures of inequality within interlocking ideologies, institutions, social systems, and everyday practices.⁴⁴ The criminal justice system is comprised of a collection of institutions, processes, and procedures that facilitate mass incarceration. African American men’s disproportionate relationship to the criminal justice system is a function of mutually reinforcing processes of race and class stratification that construct African American males, as a racialized group, in a position of devalued, marginalized social status in society.⁴⁵ But it is mass incarceration—the *outcome*—where racial ideology meets structural disadvantage, thereby embedding African Americans in a web of social and economic disadvantage not experienced by other racial groups, regardless of their levels of criminal involvement.

Racial ideology is a key factor in how mass incarceration operates as a mechanism of racialization. Racial ideology is informed by status and power differentials and operates as both the facilitator and byproduct of the convergence of race and class stratification.⁴⁶ Professor Eduardo Bonilla-Silva states: “Racial

40. KANSAL, *supra* note 38, at 5. Thirty-two of these studies investigated data on state level sentencing, while eight focused on the federal level. Combined, these studies analyzed as many as ninety-five estimates of the direct relationship between race and sentencing outcomes. *Id.* at 4.

41. *Id.* The researchers conclude that direct racial discrimination is more prominent in federal than state sentencing. *Id.* At the federal level, African Americans are more likely than comparable whites to receive longer sentences. *Id.* At the state level, African Americans are more likely than comparable whites to receive a sentence that includes incarceration, rather than a non-incarceration option. *Id.*

42. See OMI & WINANT, *supra* note 28, at 64-66.

43. See Bedi, *supra* note 31, at 184-85.

44. See *supra* note 23 and accompanying text.

45. DAVID COLE, NO EQUAL JUSTICE 4 (1999); REIMAN, *supra* note 35, at 97-100; Bedi, *supra* note 31, at 185-87.

46. COLE, *supra* note 45, at 42; see also REIMAN, *supra* note 35, at 184-88.

stereotypes are crystallized at the ideological level of a social system. These images ultimately indicate (although in distorted ways) and justify the stereotyped group's position in a society."⁴⁷ When considering the lack of collective public concern over the excessive rates of incarceration among young African American men, the stigma of black-male criminality associated with their devalued status may act as a core part of the common-sense understandings that most Americans have about African American men.⁴⁸ Thus, "stigmatization is not merely the drawing of a negative surmise about someone's productive attributes," but instead involves the "virtual social identity" that stems from negative meanings ascribed to race and structured racial inequality.⁴⁹ This has led some to point out that the collective identity of African American male criminality developed to justify slavery has now been ingrained in the structure of institutions, interactional conventions, and individual perceptions of reality within American society.⁵⁰

Significant research shows that racial stereotypes play an important role in public perceptions of African Americans and crime.⁵¹ What may be surprising for some, however, is the demonstrated link between perceptions of race and support for punitive crime policies that result in incarceration.⁵² One study indicated that white respondents who embraced racial stereotypes were generally more likely to support harsh punitive sanctions, such as the death penalty and longer prison sentences.⁵³ The study also found that support for harsh punishment measures varied with the race of offenders.⁵⁴ In particular, whites are more likely to support punitive measures for African American offenders than white offenders for the same crimes.⁵⁵

47. Eduardo Bonilla-Silva, *Rethinking Racism: Toward a Structural Interpretation*, 62 AM. SOC. REV. 465, 476 (1996).

48. See LOURY, *supra* note 24, at 57-73.

49. ERVING GOFFMAN, STIGMA: NOTES ON THE MANAGEMENT OF SPOILED IDENTITY 1-3 (1963); LOURY, *supra* note 24, at 61.

50. LOURY, *supra* note 24, at 67.

51. Lawrence D. Bobo & Camille Z. Charles, *Race in the American Mind: From the Moynihan Report to the Obama Candidacy*, 621 ANNALS AM. ACAD. POL. & SOC. SCI. 243, 246-47 (2009).

52. Steven F. Cohn et al., *Punitive Attitudes Toward Criminals: Racial Consensus or Racial Conflict?*, 38 SOC. PROBS. 287, 288, 293 (1991); Jon Hurwitz & Mark Peffley, *Public Perceptions of Race and Crime: The Role of Racial Stereotypes*, 41 AM. J. POL. SCI. 375, 393-94 (1997); Devon Johnson, *Punitive Attitudes on Crime: Economic Insecurity, Racial Prejudice, or Both?*, 34 SOC. FOCUS 33, 48 (2001); Michael Tonry, *The Social, Psychological, and Political Causes of Racial Disparities in the American Criminal Justice System*, 39 CRIME & JUST. 273, 277, 288 (2010).

53. Mark Peffley & Jon Hurwitz, *The Racial Components of "Race-Neutral" Crime Policy Attitudes*, 23 POL. PSYCHOL. 59, 67 (2002).

54. *Id.*

55. *Id.*

No doubt, racial biases can be heavily influenced by media images that portray African Americans as criminogenic—especially local news broadcasts that display more images of African American suspects than other racial groups in handcuffs, receiving guilty sentences in court proceedings, or other images suggesting their culpability in serious crimes.⁵⁶ In one study, white non-college educated adults were shown a local news broadcast of a crime story where the skin color of the male suspect was manipulated.⁵⁷ Afterwards, they were asked a series of questions about crime control policies.⁵⁸ Respondents were more likely to support punitive policies when the perpetrator was depicted as African American than when the perpetrator was racially ambiguous or white.⁵⁹ In another study, researchers constructed a punitive index poll that included questions concerning support for three strikes laws, parole, trying juveniles as adults, and harsher penalties for violent offenders.⁶⁰ Results of this study also revealed that whites are generally more likely than African Americans to support punitive crime policies.⁶¹ This same study claimed that racial prejudice can explain support for harsher penalties among whites, while perceived racial injustice helps explain African Americans' lack of support for such policies: "Whites' and Blacks' attitudes towards crime policies are associated with their social structural location vis-à-vis the criminal justice system."⁶² In other words, perceptions of one's personal experiences and the experiences of other members of one's racial group within the criminal justice system inform one's perceptions about the individual and collective experiences of members of other racial groups within the criminal justice system. Thus, public perception is not only affected by racial stereotypes of perceived criminality, but also informs public support of incarceration along racial lines.

This raises an important point about the consequences of mass incarceration that has significant implications for race, particularly in the case of African Americans. While racialized perceptions of criminality may have a strong effect on attitudes about race or crime, criminality suggests the potential for criminal activity that may be associated with a multitude of racial or ethnic groups.⁶³ For example, Italians are

56. ROBERT M. ENTMAN & ANDREW ROJECKI, *THE BLACK IMAGE IN THE WHITE MIND: MEDIA AND RACE IN AMERICA* 78-79 (2000).

57. Franklin D. Gilliam, Jr. & Shanto Iyengar, *Prime Suspects: The Influence of Local Television News on the Viewing Public*, 44 AM. J. POL. SCI. 560, 563 (2000).

58. *Id.* at 564.

59. *Id.* at 567-68.

60. Devon Johnson, *Racial Prejudice, Perceived Injustice, and the Black-White Gap in Punitive Attitudes*, 36 J. CRIM. JUST. 198, 198-206 (2000).

61. *Id.* at 202.

62. *Id.* at 204.

63. See, e.g., Aaron Baker & Juliann Vitullo, *Screening the Italian-American Male*, in *MASCULINITY: BODIES, MOVIES, CULTURE* 213, 216-17, 223 (Peter Lehman ed., 2001).

often associated with potential criminality based on stereotypes about their disproportionate involvement in organized crime, often as a consequence of popular characters in films and television shows.⁶⁴ However, as stated in the aforementioned research, perceptions of criminality for African Americans are informed by devalued class status, devalued racial status, and a large-scale pattern of disproportionate involvement within a formal, institutionalized criminal justice system.⁶⁵ Perceptions of incarceration are thus not simply about racially neutral perceptions of potential criminality. Instead, incarceration stigma is racialized and is most often directed towards African American men.⁶⁶

Race, then, is “embedded in the very foundation of our criminal law . . . [and] helps to determine who the criminals are, what conduct constitutes a crime, and which crimes society treats most seriously.”⁶⁷ For example, one study finds that evaluators pressed to estimate the race of former inmates are much more likely to identify them as “black” than other racial groups, even when the race of that inmate appears to be mixed or ambiguous.⁶⁸ Moreover, the same study found that many ex-inmates who self-identified themselves as “mixed” or “ambiguous” before serving time were likely to self-identify themselves as “black” after being incarcerated.⁶⁹ This finding led the researchers to conclude that incarceration has a racializing effect on individuals that can be linked to the proliferation of stereotypes about African American male criminality.⁷⁰ I argue, however, that it is not the association with criminality that affects perceptions of race. Alternatively, it is modern processes and structures of institutionalization—in an era of mass incarceration that disproportionately features African American men—that have a significant impact on perceptions of race. It is incarceration, not criminality, where racial ideology and economic inequality intersect to magnify structural level racial disparities.

Because African Americans are disproportionately more likely to be institutionalized,⁷¹ their high rate of physical location in jails and prisons brings race to what might otherwise be racially neutral physical space, a process referred to earlier in this article as racialization.⁷² Their disproportionate presence in positions of

64. *Id.*

65. *See* Bobo & Charles, *supra* note 51, at 246, 252-54.

66. *See* Wacquant, *supra* note 33.

67. Dorothy E. Roberts, *Crime, Race, and Reproduction*, 67 TUL. L. REV. 1945, 1945 (1993).

68. Aliya Saperstein & Andrew M. Penner, *The Race of a Criminal Record: How Incarceration Colors Racial Perceptions*, 57 SOC. PROBS. 92, 109 (2010).

69. *Id.* at 110.

70. *Id.*

71. *See supra* note 4 and accompanying text.

72. *Id.*; *supra* note 23 and accompanying text.

social and economic disadvantage also racializes the processes, expectations, interactions, and stigma commonly associated with that space. Unlike the stigma of criminality, the stigma of incarceration is based on a perception of an individual or group that has been systematically accused, arrested, prosecuted, convicted, and imprisoned for committing a crime. Embedded in this stigma is an assumption that formal, organized, and color-blind legal procedures can address any questions of criminality in a carceral system based on truth, justice, and consequences.⁷³ Incarceration stigma, then, provides a rationale for stereotypes about potential criminality by grounding them in a structural, physical reality.

At the ground level, mass incarceration acts as a form of social and residential segregation—that is, the removal of large numbers of African American men from their communities to “reside” within penal institutions.⁷⁴ Meanwhile, the removal of large numbers of African American men from urban underclass neighborhoods adds to the stigmatization of those neighborhoods, which, in turn, results in increased racial segregation and devalued status of those spaces.⁷⁵ Recent legal disputes involving the political and social implications of how and where prisoners are counted for census and redistricting purposes provide evidence that this population is racialized and manipulated through formal social controls.⁷⁶

Because mechanisms of stratification do not operate in isolation,⁷⁷ mass incarceration reproduces devalued status and patterns of racial disadvantage throughout other areas of society. Part III illustrates this by discussing how the ideological and physical constrictions of mass incarceration are reproduced in the labor market experiences of young, poor African American men.

73. See MICHAEL K. BROWN ET AL., *WHITEWASHING RACE: THE MYTH OF A COLOR-BLIND SOCIETY* 135-47 (2003) (explaining that racism has not been expunged from the criminal justice system); see also ALEXANDER, *supra* note 11, at 58-59 (explaining that the criminal justice system is not the perfect system of truth and justice typified in the media).

74. See generally TODD R. CLEAR, *IMPRISONING COMMUNITIES* (2007) (explaining how mass incarceration has a worsening effect on neighborhoods that are already disadvantaged through race or social status).

75. *Id.* at 125-30.

76. See Eric Lotke & Peter Wagner, *Prisoners of the Census: Electoral and Financial Consequences of Counting Prisoners Where They Go, Not Where They Come from*, 24 *PACE L. REV.* 587 (2004) (discussing the primary consequences of the way the U.S. Census Bureau counts people in prison and the impact that approach has on electoral apportionments and financial distributions).

77. Rose M. Brewer & Nancy A. Heitzeg, *The Racialization of Crime and Punishment: Criminal Justice, Color-Blind Racism, and the Political Economy of the Prison Industrial Complex*, 51 *AM. BEHAV. SCIENTIST* 625, 628-29 (2008).

III. INCARCERATION STIGMA, RACE, AND LABOR MARKET EXCLUSION

While some studies find that the effect of conviction on wages varies across the life course with little to no negative effect on the job market performance or wage potential of young offenders,⁷⁸ researchers who have addressed racial disparities in their analysis find that incarceration interrupts the long-term process of transition into stable employment and earnings growth more significantly for African American men than other groups.⁷⁹ Research from sociologists Bruce Western and Becky Pettit finds that incarceration factors prominently in low labor force participation and wage rates of African American men when compared to their white counterparts.⁸⁰ Further, racial disparities in the criminal justice system amplify already existing racial gaps in earnings.⁸¹ For example, a separate study by Western estimates that the black-white earnings gap among men aged thirty or younger could be reduced by as much as 6% if African Americans and whites were incarcerated at an equal rate.⁸²

78. Daniel Nagin & Joel Waldfogel, *The Effect of Conviction on Income Through the Life Cycle*, 18 INT'L REV. L. & ECON. 25, 25-26 (1998); Daniel Nagin & Joel Waldfogel, *The Effects of Criminality and Conviction on the Labor Market Status of Young British Offenders*, 15 INT'L REV. L. & ECON. 109, 122 (1995).

79. Bruce Western, *The Impact of Incarceration on Wage Mobility and Inequality*, 67 AM. SOC. REV. 526, 526-28, 541-42 (2002); Bruce Western & Katherine Beckett, *How Unregulated Is the U.S. Labor Market? The Penal System as a Labor Market Institution*, 104 AM. J. SOC. 1030, 1031 (1999); Richard B. Freeman, *Crime and the Employment of Disadvantaged Youths* 1, 10-15, 20-21 (Nat'l Bureau of Econ. Research, Working Paper No. 3875, 1991), available at http://www.nber.org/papers/w3875.pdf?new_window=1.

80. Bruce Western & Becky Pettit, *Black-White Wage Inequality, Employment Rates, and Incarceration*, 111 AM. J. SOC. 553, 562-63 (2005).

81. Western, *supra* note 79, at 529, 542. According to the Bureau of Labor Statistics, the median weekly earnings for African American men working at full-time jobs is \$661 per week, or 78% of the median weekly income for white men, which is \$847. *Labor Month in Review*, MONTHLY LAB. REV., Oct. 2011, at 2, 2; Press Release No. USDL-11-1501, Bureau of Labor Statistics, U.S. Dep't of Labor, Usual Weekly Earnings of Wage and Salary Workers, Third Quarter 2011, at 1 (Oct. 20, 2011), <http://www.bls.gov/news.release/pdf/wkyeng.pdf>.

82. Bruce Western et al., *Black Economic Progress in the Era of Mass Incarceration*, in WEALTH AND POVERTY IN AMERICA 278, 287 (Dalton Conley ed., 2003). Another study shows racial disparities in earnings among former inmates are not a reflection of momentary gaps in wages that may occur with initial labor market entrance, but persist across workers' entire careers. ECON. MOBILITY PROJECT & PUB. SAFETY PERFORMANCE PROJECT, THE PEW CHARITABLE TRUSTS, COLLATERAL COSTS: INCARCERATION'S EFFECT ON ECONOMIC MOBILITY 12 & tbl.1 (2010), http://www.economicmobility.org/assets/pdfs/EMP_Incarceration.pdf. This study found that incarceration depresses the total lifetime earnings of African Americans by 9%, of Hispanic males by 6%, and of white males by only 2%. *Id.*

Employment exclusion is also high on the list of costs associated with former incarceration.⁸³ Several professions—such as those requiring interaction with children, certain health care services, real estate, and most law enforcement and security professions—are subject to state and federal guidelines that restrict employment opportunities for ex-inmates with felony convictions.⁸⁴ For jobseekers holding certain kinds of criminal records, federal laws also restrict employment in airport security, armored car crews, and jobs involving the administration of employee benefit plans.⁸⁵ The Legal Action Center produced a “report card” of state policies and laws creating legal barriers to individuals with criminal records in 2004, and followed up in 2009. The study found that most states have laws that restrict the employment and occupational licensing opportunities (including professions such as plumbing and cosmetology) of individuals who have criminal records—including arrests that did not lead to convictions.⁸⁶ Employers also limit the range of labor market options for ex-inmates. Citing concerns of safety, trust, and legal liability, employers are less likely to hire job seekers with criminal records than other groups of disadvantaged workers.⁸⁷

Race also factors prominently in employers’ decisions to hire ex-inmates. Employers in many low wage occupations read gaps in employment history as signs

83. ROBERT J. SAMPSON & JOHN H. LAUB, *CRIME IN THE MAKING* 248 (1993); Roger Boshier & Derek Johnson, *Does Conviction Affect Employment Opportunities?*, 14 *BRIT. J. CRIMINOLOGY* 264, 268 (1974); R.H. Finn & Patricia A. Fontaine, *Perceived Employability of Applicants Labeled as Offenders*, 20 *J. EMP. COUNSELING* 139 (1983).

84. AMY L. SOLOMON ET AL., JUSTICE POLICY CTR., URBAN INST., *FROM PRISON TO WORK: THE EMPLOYMENT DIMENSIONS OF PRISONER REENTRY* 13-14 (2004), available at http://www.urban.org/uploadedpdf/411097_From_Prison_to_work.pdf; see JOAN PETERSILIA, NAT’L INST. OF JUSTICE, U.S. DEP’T OF JUSTICE, SER. NO. NCJ 184253, *WHEN PRISONERS RETURN TO THE COMMUNITY: POLITICAL, ECONOMIC, AND SOCIAL CONSEQUENCES* 3 (2000), available at <https://www.ncjrs.gov/pdffiles1/nij/184253.pdf>; JEREMY TRAVIS ET AL., JUSTICE POLICY CTR., URBAN INST., *FROM PRISON TO HOME: THE DIMENSIONS AND CONSEQUENCES OF PRISONER REENTRY* 31 (2001), available at http://www.urban.org/pdfs/from_prison_to_home.pdf; Brewer & Heitzeg, *supra* note 77, at 629; Jeffrey M. Hahn, *Pre-Employment Information Services: Employers Beware?*, 17 *EMP. REL. L.J.* 45, 50 & 67 nn.6-7 (1991).

85. Sharon M. Dietrich, *Criminal Records and Employment: Ex-Offenders Thwarted in Attempts to Earn a Living for Their Families*, in *EVERY DOOR CLOSED: BARRIERS FACING PARENTS WITH CRIMINAL RECORDS* 13, 15 (2002), available at http://www.clasp.org/admin/site/publications_archive/files/0092.pdf.

86. LEGAL ACTION CTR., *AFTER PRISON: ROADBLOCKS TO REENTRY* 8-9 (2004), available at http://www.lac.org/roadblocks-to-reentry/upload/lacreport/LAC_PrintReport.pdf; see PETERSILIA, *supra* note 84; TRAVIS, *supra* note 84.

87. Harry J. Holzer et al., *Perceived Criminality, Criminal Background Checks, and the Racial Hiring Practices of Employers*, 49 *J.L. & ECON.* 451, 453 (2006).

of unreported spells of incarceration for African American men.⁸⁸ This practice has led economists to recommend the use of criminal background checks as a means of correcting incarceration stigma, which is primarily directed at young African American men.⁸⁹ In fact, one study found that employers who initially reported strong aversions to hiring ex-inmates were more likely to hire African Americans if they used criminal background checks.⁹⁰

Some argue that African American men's disproportionate rate of incarceration signals to employers a greater likelihood of informal or formal affiliation with criminogenic peers and the reduced likelihood of attachment to legitimate employment.⁹¹ As a result of this affiliation, employers are less likely to trust the quality of network-based information about African American job candidates. Such employers generally consider African Americans to have fewer valuable or exchangeable resources and question the accuracy of positive evaluations about African Americans as highly productive workers.⁹²

Other researchers find that employer preferences for ex-inmates may vary by job type. In a study of human resource managers in Los Angeles, for example, researchers found that employers are more likely to hire job candidates who have criminal records if the job requires limited contact with customers.⁹³ Other evidence indicates that this process of selection also varies by race. In particular, one study illustrated that when employers offered African Americans jobs, they were more likely to steer the job candidate into lower level positions that featured less public

88. *Id.* at 471-73.

89. *Id.* at 473.

90. *Id.*

91. *See* Western, *supra* note 79, at 528, 541.

92. HARRY J. HOLZER, WHAT EMPLOYERS WANT: JOB PROSPECTS FOR LESS-EDUCATED WORKERS 87-93 (1996); Joleen Kirschenman & Kathryn M. Neckerman, "We'd Love to Hire Them, But . . .": *The Meaning of Race for Employers*, in THE URBAN UNDERCLASS 203, 228-31 (Christopher Jencks & Paul E. Peterson eds., 1991); DEIRDRE A. ROYSTER, RACE AND THE INVISIBLE HAND: HOW WHITE NETWORKS EXCLUDE BLACK MEN FROM BLUE-COLLAR JOBS 156-58 (2003); Jomills Henry Braddock II & James M. McPartland, *How Minorities Continue to Be Excluded from Equal Employment Opportunities: Research on Labor Market and Institutional Barriers*, J. SOC. ISSUES, Spring 1987, at 5, 19.

93. Harry J. Holzer et al., *The Effect of an Applicant's Criminal History on Employer Hiring Decisions and Screening Practices: Evidence from Los Angeles*, in BARRIERS TO REENTRY? 117, 125 (Shawn Bushway et al. eds., 2007).

contact and lower wages.⁹⁴ This practice of steering was common for African American candidates whether or not they had criminal records.⁹⁵

Some of the most current and well-cited research on employer evaluations of ex-inmates involves audit studies, where matched pairs of African American and white male testers with ex-inmate and non-inmate credentials are trained and sent out to apply for jobs.⁹⁶ This research indicates that while incarceration carries a heavy “mark” for all former inmates, the stigma of a criminal record is harsher for African American job seekers.⁹⁷ Audit studies of employers in Milwaukee, where matched pairs of African American and white male job applicants with and without criminal records for drug possession applied for 350 advertised entry-level jobs, found that ex-inmates received significantly fewer job offers than non-inmates.⁹⁸ However, this pattern differed significantly by race, regardless of former incarceration status.⁹⁹ The callback rate was 17% for whites with a criminal record and 34% for those without.¹⁰⁰ Among African Americans, the callback rate was 5% for those with a criminal record and only 14% for those without.¹⁰¹ These statistics warrant repeating: African American males with *no* criminal records received callbacks 20% less often than whites with *no* criminal records, and 3% less often than whites with *actual* criminal records. Similar hiring patterns were found in a duplicate study of employment in New York City.¹⁰²

As sociologist Devah Pager states, “in terms of one’s chances of finding a job, being black in America today confers just about the same disadvantage as having a felony conviction.”¹⁰³ The “two strikes” of race and incarceration act as an intensification of stigma and amount to an almost complete grounds for exclusion from labor markets for African American men.¹⁰⁴ The conflation of race and incarceration stigma is lamented in the following statement made by an African American minister:

94. DEVAH PAGER & BRUCE WESTERN, RACE AT WORK: REALITIES OF RACE AND CRIMINAL RECORD IN THE NYC JOB MARKET 8-12 (2005), available at http://www.nyc.gov/html/cchr/pdf/race_report_web.pdf.

95. *Id.*

96. See DEVAH PAGER, MARKED: RACE, CRIME, AND FINDING WORK IN AN ERA OF MASS INCARCERATION 59 (2007).

97. *Id.* at 71.

98. *Id.* at 59-60, 72.

99. *Id.* at 68-71.

100. *Id.* at 67.

101. *Id.* at 69, 70 fig.4.4.

102. PAGER & WESTERN, *supra* note 94.

103. Pager, *supra* note 25, at 78.

104. PAGER, *supra* note 96, at 100-01.

“Felony” is the new N-word. They don’t have to call you a nigger anymore. The just say you’re a felon. In every ghetto you see alarming numbers of young men with felony convictions. Once you have that felony stamp, your hope for employment, for any kind of integration into society, it begins to fade out. Today’s lynching is a felony charge. Today’s lynching is incarceration.¹⁰⁵

In summary, race and incarceration status are operationalized as mutually reinforcing sources of racial disadvantage for African American men. While white and Hispanic ex-inmates are also penalized economically and socially by incarceration, the employer data suggests that their racial status seems to give them some labor market advantages over African American ex-inmates.¹⁰⁶ Moreover, the racial status of white ex-inmates appears to give them some labor market advantages over African American men who have *never* been incarcerated.¹⁰⁷ Finally, above and beyond any ideas about potential for criminality, incarceration stigma is disproportionately directed at African American men.

IV. CONCLUSION

The prison system has symbolic, cultural effects that extend beyond the physical boundaries of the complex organization of procedures, processes, and material institutions that comprise the criminal justice system. Incarceration containerizes, legitimizes, and grounds perceptions associating race with criminality. Because of its connection to other systems of stratification—such as labor markets—the stigmatizing, exclusionary, and stratifying effects of mass incarceration are reproduced throughout society to create structured racial disadvantage. Mass incarceration thus acts as a contemporary mechanism of racialization by providing a structure for overlapping systems, processes, and agents of racial stratification that compound racial disadvantage.

Recent calls for reforming the current carceral system have focused on alternatives to incarceration as a means of alleviating the tremendous financial burdens involved in constructing and maintaining prison and jail facilities at the state and federal levels. Reducing the imprisonment of non-violent offenders by one-half, for example, could lower correction expenditures by as much as \$16.9 billion per year.¹⁰⁸ State and local levels would be the biggest beneficiaries of this economic relief, thereby freeing more funds for education, employment support, drug treatment,

105. ALEXANDER, *supra* note 11, at 159.

106. *See supra* notes 81-82 and accompanying text.

107. *See supra* notes 100-102 and accompanying text.

108. JOHN SCHMITT ET AL., CTR. FOR ECON. & POLICY RESEARCH, THE HIGH BUDGETARY COST OF INCARCERATION 11 & tbl.4 (2010).

and other efforts to improve disadvantaged communities that produce high numbers of offenders. Reform efforts have also focused on the human rights consequences of prison overcrowding. In a recent case filed by the American Civil Liberties Union, the United States Supreme Court ruled that California must reduce its prison population by 137.5% in order to adequately meet the physical and mental health needs of inmates.¹⁰⁹

Still, prison reforms should also consider the cultural implications of mass incarceration for civil rights. We must take seriously the fact that nearly one of every three African American men experience residential segregation and social control through incarceration, which serves only to magnify existing economic and social disparities. Further, we ought to consider what such facts mean for justice and democracy in a post-civil rights context of contemporary America. We must take actions to create systems of deterrence that promote structures of racial justice and opportunity, rather than increased racial disparity.

109. *Brown v. Plata*, 131 S. Ct. 1910 (2011).