

Chapter 12

Racial Disproportionality in Prison

Alfred Blumstein

The Problem

The US incarceration rate was impressively flat for 50 years from 1925 to 1975 at a rate of 110 per 100,000 population, a rate that is quite comparable to many of the industrial nations to which we compare ourselves. Indeed, that observation of the flat rate gave rise to a paper entitled “A Theory of the Stability of Punishment” intended to explain this apparently homeostatic process. The argument was that when prisons get filled, then space is made available by releasing prisoners early on parole; when prisons have more capacity, then the system could crack down on marginal offenses like pornography. The key here was that the system was under the control of the functionaries within the criminal justice system, prosecutors, judges, parole boards, and base understood and responded to each other’s needs.

That stable process lasted until the late 1970s, when the rate began to increase increasing by 6–8 % per year until about 2000, when the states, in the aggregate, leveled off at a rate of about 450 per 100,000 and the federal prisons continued to increase, until very recently. Now, the total US incarceration rate has climbed by a factor of about 4.5 to a level of about 500 per 100,000 in prisons, representing about 1.6 million sentenced prisoners. Local jails contain another 250 per 100,000, so that the total incarceration rate is about 750 per 100,000 population, which makes us by far the world’s leader in incarceration, trailed by Russia, whose rate is about 550. If one substitutes the adult population for the total population (a substitution that is quite reasonable since the great majority of prisoners are adults) the rate is a full 1 % of the adult population.

A. Blumstein (✉)
H. John Heinz III School of Public Policy and Management, Carnegie-Mellon University,
Pittsburgh, PA 15213, USA
e-mail: ab0q@andrew.cmu.edu

African Americans have been seriously affected by the growth in incarceration. At the present time, 3 % of all US Black males are in prison, which is 6.3 times the White rate. What is particularly striking is the estimated prevalence of a prison experience to a black male. A BJS report has estimated that 32 % of black males born in 2001 can expect to find themselves in prison sometime in their lives if the 2001 incarceration rates were to continue. This is a striking contrast with 5.8 % of whites and 17 % of Hispanics. When a full third of any particular population group finds itself in prison, that certainly diminishes any stigma associated with that sanction and must significantly diminish its deterrent effect. Also, however, legitimate might be the process that led to such high rates of incarceration, is bound to be seen as discriminatory and thereby diminished the sense of legitimacy of that process along that disadvantaged group.

When one looks at the age-crime curve, which grants the number of arrests of a particular age divided by the total population of that age, one sees a sharp rise to a peak at about age 18, and then a dropping off which happens more quickly for property crimes (where the drop to half the peak value occurs at about age 24) and more slowly for violent crimes and for murder (where the half-peak point occurs in the early 30s). By no means are all arrestees imprisoned; it takes a particularly heinous crime or an accumulation of less serious crimes before an individual is sent to prison. About 29 % of prisoners are in their 20s and an additional 30 % are in their 30s. The rates are only somewhat higher for Black males. As we look beyond incarceration, however, we find that on any single day a full 32 % of Black males in their 20s are under control of the criminal justice system, which includes federal prison, county jail, county parole, and county probation.

Drug Markets

Drug crimes represent the single largest crime type in prison, comprising over 20 % of state prisoners and over 50 % of federal prisoners. The incarceration rate for drug offenses grew by a factor of 10 between 1980 and 2000, by far the single crime type with the greatest growth rate. Drug crimes are the ones where the representation of African Americans in prison is most disproportionate compared to their representation at arrest. And incarceration for drug selling is inherently limited in its ability to reduce drug transactions.

From the viewpoint of incapacitation, incarceration of drug dealers is very weak. In contrast to incarcerating a rapist, which results in taking his rapes off the street, locking up a drug seller is much more likely to result in the recruitment of a replacement as long as the demand remains. Indeed, there is clear evidence that the major effort of incarcerating drug dealers in the 1980s led to recruitment of young people as replacements. Those young people were far less restrained than their predecessors in the use of the guns they had to carry to protect themselves against street robbers, and so we saw a major growth in homicides by young people in the late 1980s as a result.

Since the major target of incarceration was the markets in crack cocaine, and since those markets were operated primarily by African Americans, the major growth in drug prisoners, in the young people arrested for homicide, and in their victims was all predominantly among African Americans.

From the perspective of deterrence, the threat of the criminal justice system must be much weaker than the intense desire to satisfy addiction and much more ambiguous than the threat in the street of a rival drug dealer or a disgruntled customer.

Black–White Incarceration Rate Ratios Across the States

Understandably, different states can display very different incarceration rates for blacks and for whites, and so could display quite different ratios of those incarceration rates. Using data on the incarceration rate of blacks and whites in the different states in 2011. The ratio for the United States as a whole is 5.8. We have calculated the incarceration rate ratio for each individual state and list below the ten states with the highest ratio and the ten states with the lowest ratio:

Ten highest		Ten lowest	
Wisconsin	14.8	W. VA	4.3
Iowa	12.6	Tennessee	4.3
New Jersey	12.6	Nevada	4.2
Minnesota	12.5	Texas	4.2
Connecticut	10.7	Arkansas	4.1
Utah	10.2	Florida	4.0
Pennsylvania	9.9	Kentucky	3.9
Illinois	8.9	Georgia	3.7
New York	8.7	Alabama	3.6
Kansas	8.7	Mississippi	3.2

What may be particularly surprising in this tabulation is that the states with the high ratios are in the Northeast and Midwest, and are states that are generally seen as progressive. On the other hand, the states with the low ratios are predominantly in the South. To the extent that one considers the racial disproportionality in prisons to be predominantly a consequence of racial discrimination, a practice that might be thought of as much more common in the South, this tabulation could well raise important questions about that perspective.

It then raises the question of what in the South is keeping their ratios low and increasing it in the North. At this point one can only speculate on the factors. Undoubtedly, socialization of people who have been there for a long time has been an important factor in the South. Their long residence ensures that they know the social mores and are more likely to obey the rules. On the other hand, African Americans in the North have been much more mobile and are concentrated in cities with much weaker social control and where crime rates are highest and with much greater socioeconomic differences. It would certainly appear useful to explore this

issue of the factors contributing to these North–South differences in incarceration rate ratios. That would certainly be worn to generate insights into the factors contributing to the racial disproportionality in prisons.

The high incarceration rate of African Americans is a problem not just for the people incarcerated. It is also a broader problem because:

- Communities and families are disrupted as people move in and out of prison.
- Prison mores and culture are brought into communities through community–prison networks.
- People with a criminal record, and especially ex-prisoners, find it difficult to reenter the labor force and community.
- The community-level social stigma of having been to prison is reduced as more young people are incarcerated, and this reduces effect of the threat of incarceration as a crime deterrent.
- The large racial disproportionality in prison raises concern in the Black community that all the differences are attributable to discrimination, thereby diminishing the credibility and perceived legitimacy of the criminal justice system.

Causes

Incarceration rates began to increase rapidly four decades ago as control over prison populations shifted from the officials in the criminal justice system to political officials, especially legislators. This politicization of criminal justice policy was initiated by Barry Goldwater, the Republican candidate for President in 1964 by blaming his opponent, Lyndon Johnson, for what he called “the crime in the streets.” In fact, neither Lyndon Johnson nor the national administration had very much to do with the rising crime rates of the 1960s. Rather, the surge of teenagers in the US population at that time was a reflection of the early stages of the “baby-boom” generation that began in 1946 after World War II coming into the high-crime ages as reflected by the peak at age 18 of the crime curve. But it did establish the principle that the political arena was an appropriate place for the public to raise concerns about crime.

That was followed by public demands to “do something” about the crime problem, and especially about the drug problem when so many young people were becoming involved with marijuana as part of the youth culture that began in the 1960s. Those in the political system are constrained by a very limited repertoire of possible responses to this demand. The easy solution was to pass laws to increase prison terms for criminal offenses and especially to mandate prison terms of some minimum duration. These mandatory-minimum sentencing laws were a particularly important feature of the response to the drug concerns, since judges were often sentencing minor drug dealers to probation. The initial response might have been a 2-year mandatory-minimum sentence; when they saw that wasn’t doing much good, they would crank the sentence up to 5 years, and then even to 10 years, hoping that at some point the behavior would be deterred. Unfortunately, the increased sentences were found to be of diminishing effectiveness at reducing crime.

The notorious 100:1 crack-powder-cocaine disparity is an example of this response and certainly one reason for the overrepresentation of Blacks in prison on drug charges. In the early 1980s, crack was an important technological innovation that made the pleasures of cocaine available to poor people at a low price, and the newly established crack markets used violence as an important means of competition. In an attempt to suppress the violence, Congress passed the Anti-Drug Abuse Act of 1986, which imposed a mandatory-minimum sentence of 5 years for possessing five or more grams of crack cocaine and the same sentence for 500 or more grams of powder cocaine. This disparity in the sentencing laws was a response to concern about the high level of violence then prevalent in crack markets. It also reflected information subsequently established as erroneous about the disparate effect of crack and powder on babies. This resulted in many street-level crack dealers being sent to federal prisons for extended terms, and many states followed suit.

The crack-powder disparity also contributed greatly to the racial disparities in prison since 85 % of the people convicted for crack cocaine are Black, whereas only 30 % of those convicted for powder-cocaine offenses are Black. People convicted of crack offenses serve about 50 % more time than those convicted of powder cocaine. Since 1986, the crack markets have largely stabilized and the violence diminished, and so the disparity looked more and more as racial discrimination, but it took the Congress 24 years to reduce the disparity, and then only to a crack-powder ratio of 18:1 under the Fair Sentencing Act of 2010.

Trends in the prison population also reflect actions by prosecutors, judges, and parole boards. They must be responsive to changes in legislation, and those who run for office—most prosecutors and many judges—are motivated by the same political influences that affected legislators. The public is not very sophisticated about what works and how well in controlling crime, and most do seem to respond to actions that seem to be “tough on crime.” That was certainly the case when crime rates were high, but now that crime rates are lower than they have been since the 1960s, the public is likely to respond similarly but probably not with the intensity that they would during periods of high crime. The actions of these political actors include deciding what offense to charge; most crimes with a mandatory-minimum sentence have a non-mandatory variant, usually depending on the amount of drugs when targeted at a drug offense or the nature of the use of a gun. They also decide on the length of the sentence imposed, when to permit parole release, and on what basis to return a parole violator to prison. Another occasionally important participant in sentencing policy are the correctional-officer unions that have an economic stake in keeping prisons full in order to secure the jobs and increase the wages for their members, and so they can become politically active and pressure on legislatures to enact laws that increase incarceration.

In 1998, 70 % of the Black–White differences in incarceration rates were due to corresponding differences in arrest rates for the crimes that are likely to lead to prison. The other 30 % can be accounted for by differences in socioeconomic situations, prior arrest records, as well as a possible discrimination by prosecutors, judges, or parole authorities. Thus, the Black–White ratio at arrest is fairly close to that in prison, and that relationship will differ by crime type.

There is one crime type in which Blacks can be somewhat underrepresented in prison, and that is mostly associated with the crime of murder. This is probably a consequence of what has come to be known as “victim discounting,” punishing more severely for murder against Whites than against Blacks. This has been explained as attributable to a phenomenon known as “victim discounting,” another aspect of racial discrimination where those who murder whites are punished more severely than those who murder blacks. Since most murder is intra-racial, then blacks convicted of murder could be the beneficiary of this discrimination against black murder victims. This issue was raised in the *McCleskey* case as a “disproportionate impact,” but the Supreme Court refused to act on it.

The extreme difference at the other end is associated with drug offenses, where blacks are most significantly overrepresented in prison compared to arrest. This could be attributable to the emphasis on punishing crack offenders. It could also be associated with the observation that drug markets operated by blacks are more often run as street markets, whereas those run by whites are more likely to be indoors, thereby making arrest and conviction easier.

Solutions

Although it is hard to attribute the 6:1 disproportionate representation of Blacks in prison as attributable entirely to racism in the presence of their differential involvement in the crimes that lead to prison, it is hard to argue that racial discrimination plays no role. There are many opportunities for discrimination to appear, and it is important to root out discrimination wherever it exists.

Part of the solution will be to view the drug epidemic in America as a public health problem rather than a crime problem, and deal with that through the public health system accordingly. In addition, policy makers need to recognize the futility of averting drug transactions through deterrence or incapacitation when replacements for drug sellers are available. Incarcerating a rapist removes his rapes from the community, but incarcerating a drug dealer opens the door for a replacement to serve the demand for drugs. Also, it is possible that the replacements represent a greater threat to public safety than the people they replaced; in the crack experience, the replacements were younger and less restrained in using the guns they had to carry to protect themselves from street robbers, and so there was a major rise in the homicide with guns by young people as a result. Locking up the dealer does not solve the issue of drug use in society, and could well make matters worse.

In addition, we need to facilitate redemption by informing employers when a criminal record is stale; the risk of a new crime drops below that of the general population when the former offender has stayed clean for a reasonable amount of time. Employers who follow such a policy could be protected against due-diligence liability by statute. State criminal-record repositories can choose not to disseminate such stale criminal-record information.

There is also the need to reduce incarceration by dramatically shortening the long sentences and increasing certainty of punishment and celerity or immediacy of response. This need is particularly important for individuals who are on parole or probation, where a common requirement is avoiding drug use. It is widely recognized that many prisoners have drug problems, and so it is not surprising that, when they return to the community, they initiate drug use, and that puts them at high risk of being sent back to prison as parole violators. The HOPE program initiated in Hawaii is a good model for avoiding that revolving-door process. HOPE tests drug-using probationers weekly on a randomly chosen day. Those who fail the test are subject to immediate incarceration for several days. The certainty of the response and its immediacy has been shown to be an effective means of reducing the probationers' drug abuse, and thereby avoids the much greater cost of sending them back to regular incarceration as probation violators.

Part of the solution also involves reducing crime by reducing disadvantage, by facilitating employment opportunities through education, job skills, and reentry services. This also warrants a focus on the next generation. For example, home visitation by nurses has been shown to be effective in giving young mothers the knowledge and support for raising their children.

The primary challenge involves a willingness to pursue rational and evidence-based policies and avoid the ideological and discriminatory policies that have driven too much of our actions regarding crime over the past 40 years. The pressure on state governments' budgets created by the Great Recession represents an important opportunity for convergence in an otherwise highly polarized political environment.

Suggested Readings

- Blumstein, A. (1993). Making rationality relevant—The American Society of Criminology Presidential Address. *Criminology*, 31(1), 1–16.
- Blumstein, A. (1995). Youth violence, guns, and the illicit-drug industry. *Journal of Criminal Law and Criminology*, 86(4), 10–36.
- Blumstein, A., & Cohen, J. (1973). A theory of the stability of punishment. *The Journal of Criminal Law and Criminology*, 64(2), 198–207.
- Blumstein, A., & Nakamura, K. (2009). Redemption in the presence of widespread criminal background checks. *Criminology*, 47(2), 327–359.
- Bonczar, T. P. (2003). *Prevalence of imprisonment in the US population, 1974–2001* (Bureau of Justice Statistics Report No. NCJ 197976).
- Carson, E. A., & William, J. S. (2012, December). *Prisoners in 2011* (Bureau of Justice Statistics Report No. NCJ 239808).