

The Imperative of Decarceration

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Abstract

In this paper, I expand upon Elizabeth Anderson's analysis of segregation and racial inequality as it applies to American carceral trends in the closing decades of the twentieth century. Although her non-ideal account of race relations in the United States briefly covers the relationship between race and crime, it omits a thorough analysis of the critical role race plays in the world's largest penal system. I will argue that race-based mass incarceration is a wrong of distributive justice. It is a wrong that stems from the systemic targeting of a racial group for certain criminal offenses and not, as some may assert, the result of isolated instances of prosecutorial discretion. Drawing upon studies in the social sciences, I will also elucidate how systemic race-based punishment negatively impacts African Americans as a class in a multitude of domains. I will further demonstrate that these far-reaching disadvantages involve substantive injustice not operative in individual instances of differential punishment. African Americans have a legitimate claim against race-based mass incarceration and a criminal justice system, deliberately or not, that targets them, thereby perpetuating their disadvantage as a group. Only through a reduction in the racial disproportionality of the United States' criminal justice system can distributive justice be attained.

Keywords: *mass incarceration, non-ideal theory, racial stigma, and decarceration*

In keeping with the non-ideal theoretical framework, Elizabeth Anderson provides a comprehensive depiction of racial inequality in the United States in her book, *The Imperative of Integration*. Using "research in the social sciences in ways not ordinarily found in works of political philosophy,"¹ Anderson begins with the daunting recognition of the existence and persistence of sizable, social, political and material inequalities in the United States. Centering around the substantial proof that America's systematic distribution of salient political and social rights, economic advantages and opportunities, and lifelong burdens and benefits, has a profoundly racialized nature, Anderson successfully highlights the inner workings and dynamics of black disadvantage, elucidating that African Americans are worse off than whites on all major objective measures of wellbeing. Through her solid analysis and wealth of empirical evidence regarding enduring African American inequality, Anderson inextricably links these complex and intense inequities to prevailing and contemporary race-based relations. "The linchpin of these objectionable relations", according to Anderson, is segregation.²

¹ Anderson, Elizabeth. *The Imperative of Integration*. Princeton, NJ: Princeton UP, 2010. Print. pp. 3.

² *Ibid.*, pp. 25.

“Since the 1980’s courts have largely suspended enforcement of *Brown v. Board of Education*... schools have been quietly re-segregating -- in some regions to levels that exceed those obtained before the courts began to seriously enforce *Brown*.”³ During the same period, “45 percent of African American children who lived in middle-income families in 1968 ended up in the bottom fifth of income earners as adults, compared to only 16 percent of white children who started in middle income circumstances at the same time. In other words, nearly half of African Americans who began their lives in middle-class circumstances... landed in poverty (or near it) when they grew up, whereas just one in six whites were downwardly mobile.”⁴

According to Anderson, these statistics reflect a historical reality of race-based opportunity hoarding which has served to undermine African Americans’ access to important goods such as employment, retail and commercial services, health related goods, and professional services, as well as to reinforce age-old stereotypes and stigmatizing representations of blacks. She outlines the many mechanisms by which segregation bars blacks from accumulating social, cultural, financial and human capital. Segregative practices, conditions and processes all deny and deprive blacks of access to “state-provided goods, including decent public schools and adequate law enforcement, while subjecting them to higher tax burdens and discriminatory police practices.”⁵ Certainly, Anderson is correct in her depiction of the conditions and processes by which segregation reinforces stereotypes of blacks as criminal and violent beings subsequently meriting attitudes of “aversion and avoidance” and causing widespread discrimination.⁶ However, Anderson does not explore the dynamics of mass incarceration and the ways in which the swelling of the state’s penal arm may have exacerbated the prevalence with which these discriminatory and stigmatizing social relations took (and still take) place. Inclusion of carceral trends seems to challenge Anderson’s general understanding of racial inequality in America and suggests that to adjust her account to properly address the operative nature of persistent racial gaps in modern United States history, we must integrate and take a closer look at information regarding the expansive reach of the criminal justice system over the last four decades.

Todd Clear and Natasha Frost argue in their book, “*The Punishment Imperative: The Rise and Failure of Mass Incarceration in America*” that after 1980 there was a fundamental shift in the philosophy of the criminal justice

³ Ibid., pp. 1.

⁴ Edelman, Peter B. *So Rich, so Poor: Why It's so Hard to End Poverty in America*. New York: New, 2012. Print. pp. 30.

⁵ Anderson, Elizabeth. *The Imperative of Integration*. Princeton, NJ: Princeton UP, 2010. Print. pp. 43.

⁶ Anderson, Elizabeth. *The Imperative of Integration*. Princeton, NJ: Princeton UP, 2010. Print. Ibid., pp. 15.

system in America.⁷ This involved movement away from rehabilitative goals aimed at giving people a second chance (often through education and job training), toward the more punitive goal of incapacitating criminal beings through detention and incarceration. In conjunction with the rise of the war on drugs and crime as socially and politically salient features of American society, this punitive reorientation resulted in the expedited and unprecedented growth of the American criminal justice system. The Oxford dictionary defines this phenomenon as follows:

“Whether called mass incarceration, mass imprisonment, the prison boom, the carceral state, or hyper-incarceration, this phenomenon refers to the current American experiment in incarceration, which is defined by comparatively and historically extreme rates of imprisonment and by the concentration of imprisonment among young, African American men living in neighborhoods of concentrated disadvantage.”⁸

From 1980-2009, the number of individuals in U.S. prisons and jails rose from just over 500,000 to 2.5 million. Sociologist James Kilgore notes that “with only 5 percent of the world’s population, the United States holds 25 percent of the world’s prisoners.”⁹ The United States incarcerates more people than either Russia or China, and close to as many people are behind bars in America than the number of people detained in both countries.¹⁰

The degree to which this trend can be causally associated with certain political, social, economic and crime related factors has been the topic of heated and contentious debate among criminologists and prominent scholars. Some point to the political gains made by tough on crime politicians as the driving force. Others highlight supposed spikes in crime rates as the leading cause. Many have posited that the carceral system is a new system of racial and social control. These views, as well as various others, enjoy competing levels of support and are differentially substantiated. However, the strength of these explanations is not of concern here. Regardless of which causal approach is correct or incorrect, one aspect of mass incarceration remains constant across all accounts: the overrepresentation of low-education, poor African American men in virtually all aspects of the United States criminal justice system.

Of those who have made serious attempts to understand the dynamics of mass incarceration, few have denied the strength of the claim that the policies and

⁷ Kilgore, James William. *Understanding Mass Incarceration: A People's Guide to the Key Civil Rights Struggle of Our Time*. New York: New, The, 2015. Print. pp. 22-23.

⁸ "Mass Incarceration - Criminology - Oxford Bibliographies - Obo." *Mass Incarceration*. Oxford, 21 Oct. 2016. Web. 16 Nov. 2016.

⁹ Kilgore, James William. *Understanding Mass Incarceration: A People's Guide to the Key Civil Rights Struggle of Our Time*. New York: New, The, 2015. Print. pp. 11.

¹⁰ "Highest to Lowest - Prison Population Total." *Highest to Lowest - Prison Population Total | World Prison Brief*. N.p., n.d. Web. 16 Nov. 2016.

practices most closely associated with the rise of widespread imprisonment disproportionately impact and target low-education black men. The pressing concern is to identify and understand the relationship between the prison boom and deepening racial inequalities in the closing decades of the twentieth century. To do so, it will be useful to take a closer look at the degree to which African Americans have been differentially punished.

There is a consensus among those who study crime that blacks have been differentially and more punitively policed, prosecuted, and sentenced, as compared to their white counterparts.¹¹ A brief statistical analysis of the trend of carceral expansion in the United States seemingly strengthens the above claim. Even though African Americans only represent 13 percent of the U.S. population, by 2012 they constituted nearly 40 percent of those in prisons and jails.¹² At the close of the twentieth century, 21 percent of poor blacks with less than 12 years of schooling were in state or federal prisons, compared to just 2.9 percent of their white counterparts who also dropped out of high school.¹³ “Incarceration rates for blacks are about 8 times higher than those for whites.”¹⁴ Considering the highly-racialized reality of mass incarceration, it seems reasonable to include the effects of mass incarceration on black disadvantage to fully understand the dynamics of race relations in America, and to appropriately formulate a justified normative response to black inequality.

It is important to note a meaningful distinction before proceeding. Above, we noted the degree to which differential punishment has occurred along racial lines. When examining the extent of racialized differential punishment and the disadvantages it tends to produce, it is crucial to remember that we are not concerned with complaints that could possibly be made by individual offenders or convicted parties. Instead, our focus should be on discerning the magnitude and nature of the impact that these observed levels of race-based differential punishment has on black Americans generally. If experience with the criminal justice system tends to produce disadvantage, then one could reasonably expect that blacks would be burdened at much higher rates than whites, considering the levels of racialized punishment.

The experience of incarceration is *closely associated* with: low wages, unemployment, family instability, recidivism, and restrictions on political and social rights.¹⁵ Incarceration reduces the wages of ex-inmates by 10-20 percent and formerly incarcerated individuals experience wage growth at a rate 30 percent

¹¹ Pettit, B., and B. Western. "Mass Imprisonment and the Life Course: Race and Class Inequality in U.S. Incarceration." *American Sociological Review* 69.2 (2004): 151-69. Web.

¹² Kilgore, James William. *Understanding Mass Incarceration: A People's Guide to the Key Civil Rights Struggle of Our Time*. New York: New, The, 2015. Print. pp. 14.

¹³ Pettit, B., and B. Western. "Mass Imprisonment and the Life Course: Race and Class Inequality in U.S. Incarceration." *American Sociological Review* 69.2 (2004): 151-69. Web. pp. 160.

¹⁴ *Ibid.*, pp. 152.

¹⁵ *Ibid.*, pp. 151.

lower than those who have never been detained.¹⁶ Western conducted a study in which he observed that differential incarceration accounts for 10 percent of the mean difference in wages across racial groups. Furthermore, he found that the low wages earned by ex-inmates are associated with further crime after release from prison. Western's analysis concludes that "incarceration adds to an accumulation of disadvantage."¹⁷

As detailed by Loic Wacquant, the formerly incarcerated are denied access to valued cultural capital as they are systematically excluded from social redistribution and public aid, and they are barred from meaningful political participation. Josh Price, a Sociology professor at Binghamton University, refers to this extreme degree of social exclusion endured by many formerly incarcerated Americans as "social death". Those who experience social death become banned beings.¹⁸ They are often denied important requisites for employment and opportunities to earn higher education degrees. For example, their criminal status makes them ineligible for Pell Grants to pay for college. Wacquant notes how, in an increasingly precarious and unstable labor market with low wages, a college degree is increasingly required for one to obtain a decently paying, stable job.¹⁹ Individuals typically are to disclose their criminal history on job applications, drawing immediate attention to any criminality. At Binghamton University for example, applications with a checked box are put in a separate pile subject to heightened scrutiny. Moreover, parolees are often subjected to strict and arbitrary conditions by which they must abide if they wish to avoid re-incarceration.

Price describes this aspect of social death as subjection to the arbitrary tyrannies of parole officers. Each parole officer has the discretion to set additional conditions and restrictions. Some parolees are barred from getting a driver's license making certain jobs an impossibility, particularly those requiring a commute in areas lacking access to public transportation.²⁰ Additionally, officers have the power to restrict ex-inmates' freedom of movement. This often means that formerly incarcerated individuals are not allowed to leave the county. Many are relegated to remaining in neighborhoods that were conducive to their criminal activity in the first place. Anchoring the formerly incarcerated also concretizes segregative conditions, further concentrating disadvantage among those who already occupy the lowest rung in society and increasing the ubiquity of white anxiety and fear around black folks.

"Prisoners are systematically excluded from social redistribution and public aid in an age when work insecurity makes access to such programs more

¹⁶ Ibid., pp. 151-152.

¹⁷ Ibid., pp. 155.

¹⁸ Price, Joshua M. *Prison and Social Death*. New Brunswick: Rutgers UP, 2015. Print.

¹⁹ Wacquant, Loic. "Deadly Symbiosis: When Ghetto and Prison Meet and Mesh." *Mass Imprisonment: Social Causes and Consequences* (n.d.): 82-120. Web.

²⁰ Price, Joshua M. *Prison and Social Death*. New Brunswick: Rutgers UP, 2015. Print.

vital than ever for those dwelling in the lower regions of social space.”²¹ Laws deny welfare payments, veterans benefits, and food stamps for anyone legally detained more than 60 days. They also restrict eligibility for public housing benefits (like Section 8 vouchers) and frequently prohibit the receipt of Medicaid.²² Lastly, but as importantly, the formerly incarcerated - particularly those with felony convictions have, in various ways and to varying degrees, been denied their right to political participation (Price & Wacquant).

Ex-felons are currently denied the right to vote in 14 states, and by the late 1990's, one in seven black men had lost the right to vote. Furthermore, in seven states, more than 25 percent of black men have been banned from voting.²³ Research by the Sentencing Project indicates that by 2015, more than 5.5 million Americans had lost the right to vote. Over seven percent of African Americans, as compared to just 2.5 percent of whites were stripped of that right by 2010.²⁴ The disenfranchisement rule, commonly referred to as voter dilution, also serves to silence the voices of densely populated communities that are disproportionately impacted by hyper carceral trends. According to these laws, incarcerated individuals are not allowed to vote in their area, and instead must vote in the region in which they are detained (often non-urban areas where their voices become meaningless and outnumbered).²⁵ Importantly, this weakens the voices of innocent blacks whose political preferences may concur with inmates' preferences. The political influence of those who agree with inmates, are weakened by the removal of large numbers of black men from their communities.

Price explains at length the ways in which the “no-fraternization rule” infringes on freedom of assembly by prohibiting convicted felons from associating with one another. The strict implementation of this rule inhibits the emergence of legitimate grassroots movement, which may well enjoy a consensus among formerly incarcerated individuals. This could reasonably be considered a violation of their right to freedom of assembly.²⁶ This also further harms the strengthening of familial ties that may already be tenuous. Parents and relatives may have to make the painful decision which child can still live in their house (if both children have felony records).²⁷ According to lifelong anti-poverty advocate Peter Edelman, “the growth in the number of female headed families with children is a significant cause of the increase in child poverty.” In the first-year statistics accounted for race, (1971) 37.1 percent of African American families with children were headed by women - by 2009 that number had reached 52.7 percent.”

²¹ Wacquant, Loic. "Deadly Symbiosis: When Ghetto and Prison Meet and Mesh." *Mass Imprisonment: Social Causes and Consequences* (n.d.): 82-120. Web. pp. 119.

²² *Ibid.*, pp. 120.

²³ *Ibid.*, pp. 100-120.

²⁴ <http://sentencingproject.org/wp-content/uploads/2016/01/Trends-in-US-Corrections.pdf>

²⁵ Price, Joshua M. *Prison and Social Death*. New Brunswick: Rutgers UP, 2015. Print.

²⁶ *Ibid.*

²⁷ *Ibid.*

²⁸ “Children tend to do better when two parents are under one roof, and two wage earners do make things easier.” ²⁹

Thus far, we have established the following: African Americans are differentially impacted by the criminal justice system and; those who experience incarceration have diminished life prospects and are socio-economically and politically burdened by their time spent behind bars. It intuitively follows that “the penal system has influenced the relative distribution of life chances among young, poorly educated black men over the last two decades of the twentieth century” (and the first decade of the twenty first century).³⁰

One could argue that if black individuals engaged in criminal activities more frequently than whites, it would seem morally justified that they be incarcerated at rates reflective of that difference. Further, one could claim that the disadvantages that flow from these differential yet reflective incarceration rates are also justified. However, a quick look at the enforcement of marijuana laws in New York City weakens these claims. Furthermore, it provides a segue into the prevalence of the profound stigmatic consequences of hyper-incarceration in America.

It was recently reported by an NYPD watchdog organization that in the first eight months of 2014, 86 percent of the people arrested for marijuana possession in NYC were black and Latino; only 10 percent were white. The NYPD currently arrests blacks at seven times the rate of whites, even though young whites use marijuana at *higher* rates than young blacks.³¹ This NYPD watchdog also found that:

“The Upper East Side's rate is 10 marijuana arrests per 100,000 residents. The precinct's residents are 10% blacks and Latinos, 90% whites and others, and the median family income is \$111,000. Washington Heights has a rate of 882 marijuana possession arrests per 100,000 residents (110 times higher than in Forest Hills). East Harlem's rate of marijuana possession arrests is an astonishing 1128 per 100,000 residents (110 times higher than in the Upper East Side). Washington Heights' residents are 85% blacks and Latinos, 15% whites and others (almost the exact opposite of Forest Hills'), and the median family income is \$34,000, one-half of the family income in Forest Hills. East Harlem's residents are 88% blacks and Latinos, 12% whites and all others (close to the reverse of the Upper East Side), and the median family income is \$28,000 (a quarter of the

²⁸ Edelman, Peter B. *So Rich, so Poor: Why It's so Hard to End Poverty in America*. New York: New, 2012. Print. pp. 41.

²⁹ *Ibid.*, pp. 45

³⁰ Western, Bruce. "The Impact of Incarceration on Wage Mobility and Inequality." *American Sociological Review* 67.4 (2002): 526-46. *JSTOR*. Web. 16 Nov. 2016. pp. 542.

³¹ <http://marijuana-arrests.com/>

family income on the Upper East Side). These radically different policing patterns are also true for the 20 neighborhoods with the lowest rates of marijuana possession arrests, and for the 20 neighborhoods with the highest rates of marijuana possession arrests.”³²

Consideration of the higher usage rates and lower arrest rates among relatively affluent whites, strongly suggests that one’s likelihood of being arrested and incarcerated has little to do with the rate at which one participates in criminal activity as compared to others. However, regardless of one’s assessment of the justness of the imposition of these harms on convicted parties, an important and pressing question remains: is the exhibition of differential treatment of African Americans on the stated level a wrong of distributive justice?

Below, I address this question and suggest that blacks who have never been incarcerated have even stronger grounds for complaint against the social reality of mass imprisonment and the ways in which it has compounded the stigma of racial marginality. I aim to expose the ways in which the arrangement of the American criminal justice system during the age of mass incarceration is a wrong of distributive justice against African Americans generally. Differential, race-based punishment on a systematic scale is different from individual cases of prosecutorial discretion. I will show that the former is unjust because it attaches stigmatizing stereotypes to, and imposes various harms on, not merely convicted parties and offenders, but rather the whole social group in question. As I shall argue, the widespread propagation of these stigmatic portrayals is unjust because they promote discriminatory and aversive group relations and inhibit the achievement of integration which is an imperative of justice.

Let us imagine that there are two assaults, and that the district attorney (DA) only presses charges against one of the offenders. Although the victim of the unpunished offender may have a complaint against the decision not to press charges, it does not necessarily follow that the charged individual (or the charged individual’s family, etc.) have a complaint that the offender is not being charged. Would it not still be permissible to pursue charges against the first? Most people would likely agree with the intuitively appealing notion that criminal liability is not reducible based upon how others are treated. In other words, at the individual level, it seems reasonable to punish someone for a crime they committed, even if someone else who committed the very same crime goes unpunished. If one person gets off because the DA does not prosecute, and we agree with many people’s intuition that the person who committed the assault and was convicted of it cannot complain of being penalized just because someone else was not, then what possibly could the complaint of African Americans against differential punishment be? If the resultant harms and disadvantages that flow from the carceral experience are a consequence of the criminal wrongdoing of offenders, then why

³² Ibid.

should we think that ‘bystanders’, let alone the convicted parties, have a right to complain?

As I shall argue, the striking and distinctive wrong at issue is the race-based, systematic targeting of African Americans and their unfortunate receipt of differential treatment in all spheres of criminal justice and penal management. This constitutes a wrong because it leads to the propagation and popularization of the inaccurate and dangerous conflation of blackness and criminality, in such a way that not only harms convicts, but also their neighbors, their communities and their whole social group. Carceral hyperinflation has engendered and concretized stigmatic circumstances which continue to cause and perpetuate disadvantages that burden innocent blacks today.

“Imprisonment is an illegitimate timeout that confers an enduring stigma.”³³ However, this official and near permanent status of criminality attaches not just to individual offenders, but to *whole social groups* defined by their race.³⁴

“Middle class blacks often complain that they are avoided like criminals, even when they go out of their way to dress in respectable clothing.”³⁵ This attachment of criminality to blackness is exemplified by Western’s finding that “the labor market does not differentiate so strongly between black non-inmates and ex-inmates.”³⁶ Avoidance of the sort is indicative of what Anderson refers to as default status. Regardless of how blacks act or present themselves, they suffer expressive harms and their dignity is constantly under attack. It is reasonable to assume that the observed level of attachment would not be possible if differential punishment was confined to the biased discretion of one DA. Moreover, the stigmatization that flows from the DA case is radically different than that which flows from the criminal justice system’s comprehensive and punitive targeting, over policing, disproportionate surveilling and harsh treatment of African Americans. Insofar as, the latter of the two differential responses to crime embodies and reproduces stereotypical norms that constitute a harm to all blacks, not just those who commit crimes. As indicated by Western’s statistical analysis, even those African Americans who have successfully exercised upward mobility and done all in their power to better their lives and make a positive contribution to society, are nonetheless burdened by the unequal distributions and default status that flow from the unjust and preferential enforcement of those laws that are most likely to lead to the arrest and prosecution of poor and ‘unruly’ African Americans.

³³ Pettit, B., and B. Western. "Mass Imprisonment and the Life Course: Race and Class Inequality in U.S. Incarceration." *American Sociological Review* 69.2 (2004): 151-69. Web. pp. 155.

³⁴ *Ibid.*, pp. 151.

³⁵ Anderson, Elizabeth. *The Imperative of Integration*. Princeton, NJ: Princeton UP, 2010. Print. pp. 55.

³⁶ Western, Bruce. "The Impact of Incarceration on Wage Mobility and Inequality." *American Sociological Review* 67.4 (2002): 526-46. *JSTOR*. Web. 16 Nov. 2016. pp. 542.

On a smaller scale, like in the case of the DA, discretionary punishment serves to disadvantage the offender (and perhaps even his family and those who care about or depend on his well being). Here, it is reasonable to hold the view that one's actions warrant the consequences, maybe even those imposed on his loved ones. For example, if the son of an incarcerated man must suffer from the reality of a fatherless childhood, his complaint seems to be against the individual choices his father exercised. Can we similarly characterize some of the most consequential effects of *systematic* differential punishment, which are distinctive from the implications of the instance of prosecutorial discretion? Moreover, to what extent, if at all, can we rightly claim that African Americans may have a legitimate complaint against "the practical revivification and official solidification of the centuries old association of blackness with criminality"?³⁷ How might the historical and contemporary perceptions about race and crime mark additional salient differences between the two cases of preferential and discretionary punishment?

In the film The Birth of a Nation, released in 1915, a white man with black face makeup stalks and preys on an innocent white girl. Although many Americans today would openly reject the animalized depiction of black men and would likely characterize it as inaccurate, their thought processes could *still* be biased by unconscious stereotypical norms that are inevitably reinforced by the criminal justice system's propagation of negative portrayals. As noted by Anderson, "mere common knowledge of the stereotype, can interfere" with cooperative race relations and subsequently harm blacks and perpetuate the causes of inequality.³⁸ "We should not be neutral between stigmatizing and non-stigmatizing representations of innocent groups. The stigma is objectionable in and of itself."³⁹ Even though individuals may very well reject overt notions of blacks as being inherently criminal, they may engage in "evaluative discrimination" by supporting tough on crime legislation (which in practice, impacts blacks far more harshly than it does whites), and by exhibiting other subtly harmful forms of conduct. Anderson explains this tendency at great length in chapter three of her book. Increasingly punitive trends seem to have bolstered the prevalence with which isolated whites associate blacks with crime.

The processes of stigmatization depicted in The Birth of a Nation have been reinforced and revitalized by mediatic and political elites of all stripes. Their racially distorted rhetoric heightened the degree to which the American populous consciously and unconsciously associated crime with blacks. Elite actors (for various reasons and to serve different existing interests) have constructed a politically charged "criminal personae, legendary or fictional characters who

³⁷ Wacquant, Loic. "Deadly Symbiosis: When Ghetto and Prison Meet and Mesh." *Mass Imprisonment: Social Causes and Consequences* (n.d.): 82-120. Web. pp. 117.

³⁸ Anderson, Elizabeth. *The Imperative of Integration*. Princeton, NJ: Princeton UP, 2010. Print.

³⁹ *Ibid.*, pp. 15.

reinforced the linkages between blackness and crime.”⁴⁰ Mass incarceration and the public discourse surrounding and feeding it have compounded all three dimensions of stigmatized public standing noted by Anderson. High crime rates and the unsubstantiated, disproportionate, and persistent focus of anti-crime activity on blacks, has induced fear, anxiety and stress, which impair cooperative racial relations. Carceral hyper expansion propounds the prevalence with which isolated whites associated blacks with crime, even when they engaged in certain crimes more frequently than blacks.

Mike Males details the sad reality that “authorities, academic experts, politicians, and geriatric media reporters (the average age of news consumers is well over 50), of 2013 simply do not know how to deal with a young black population that is *not* committing shootings, robberies, drug mayhem and gangsterism in mass numbers...from CNN’s Anderson Cooper to First Lady Michelle Obama, young black men are always misrepresented as getting more violent.”⁴¹ The American inability to deal with young blacks in a way that is comparable to their white counterparts and reflective of the rate at which they engage in illegal activities, is extremely problematic and stems from the profound difference between the respective implications of individually versus systemically produced differential punishment.

A study found that “there was a substantially and significantly higher risk that minority youth would be apprehended and charged” for minor transgressions and infractions in schools, than “the whites who reported committing the same kind of offenses.”⁴² It is important to remember that these youths had not broken the law or committed actual crimes. Instead, black children’s play is treated punitively by the state’s penal arm. In contrast, the very same actions for whites are “dealt with more sensitively and individually at every stage of the juvenile justice process.”⁴³ Prohibitions exist against all youths (under the age of 18) entering the army, driving, living on their own, etc. These rules presume a youthful innocence. That presumption does not extend to young black people. Rather they are widely considered culpable enough to be punitively disadvantaged for minor transgressions in school. It is highly unlikely that those imposing these harsher sanctions are overtly aware of their racialized dispositions, but black youth are nonetheless left to bear the consequences of stigmatized perceptions and the costs of closely associated harms. The institutional character and force of carceral trends have fueled the stigma surrounding young black men (and even youth), and have seriously compounded marginalization by systematically responding to the

⁴⁰ Kilgore, James William. *Understanding Mass Incarceration: A People's Guide to the Key Civil Rights Struggle of Our Time*. New York: New, The, 2015. Print. pp. 33.

⁴¹ Mike Males Published: August 15, 2013. "Why the Gigantic, Decades-Long Drop in Black Youth Crime Threatens Major Interests." *Why the Gigantic, Decades-Long Drop in Black Youth Crime Threatens Major Interests* — Center on Juvenile and Criminal Justice.

⁴² Ferguson, Ann Arnett. *Bad Boys: Public Schools in the Making of Black Masculinity*. Ann Arbor: U of Michigan, 2000. Print. pp. 585.

⁴³ Ibid.

same behaviors across racial groups in a differential fashion. The magnitude and nature of these responses constitute a unique harm in that blacks are subjected to systematically induced, life altering, stigmatic consequences and constant efforts to criminalize and target them during their daily lives.

Blacks are subjected to these biased evaluations many facets of social life. African American men and people of color are generally more likely to be stopped and frisked by police. These policing tactics are often practiced with relative impunity and minimal oversight. For instance, in NYC, from 2002-2011, black and Latino residents made up more than 90 percent of those stopped and frisked by police. Of those 3.2 million New Yorkers, 88 percent were found to be *innocent*.⁴⁴ Blacks who reside in predominantly White neighborhoods are often subjected to frequent searches. They may find themselves face down on the ground without even the slightest clue as to why they are being interrogated and searched. They are forced to deal with sentiments of anxiety and a halo of discomfort that surrounds them, even when their non-deviance is corroborated by an illegally performed search. Police are supposed to ensure people's safety. Thus, when White males walk down the street and see a black man surrounded by officers, they will, rather rationally (and at a bare minimum, subconsciously), associate him with criminality, thereby linking him to a threat to their wellbeing and safety. The lack of accountability in these intensively discriminatory and systematically diffused tactics, induces unjust evaluations that harm the dignity and reputations of innocent blacks. Carceral expansion has perpetuated the prominence of these biases all over the country, and in doing so, has increased the commonality of discriminatory cognitive processes and the harms they tend to produce.

Mr. Harvey, an African American man from San Diego, reported that police had stopped him as a suspected gang member over 50 times, because he lived in one of the city's most violent neighborhoods. He was told by the police that he was in a gang database, even though he was not a gang member.⁴⁵ This sort of conduct impugns the expressive harms of stigma. It may not be intentionally racist; however, it *exacerbates racial injustice*. "It also undermines the prospects for smooth and positive interracial interaction that are essential to a flourishing civil society."⁴⁶ I, a white male, having seen mostly blacks, from whom I have always been isolated, getting stopped and frisked by the police, am subsequently more likely to be plagued by fear and anxiety than I otherwise would be. Even if the operative nature of my decision is subconscious and well intentioned, I am subsequently less likely to hire a black male when looking for a new employee.

⁴⁴ "Stop and Frisk Facts | New York Civil Liberties Union (NYCLU) - American Civil Liberties Union of New York State." *Stop and Frisk Facts | New York Civil Liberties Union (NYCLU) - American Civil Liberties Union of New York State*. N.p., n.d. Web. 16 Nov. 2016.

⁴⁵ Williams, Timothy. "Facial Recognition Software Moves from Overseas Wars to Local Police." *NYT*. NYT, n.d. Web.

⁴⁶ Anderson, Elizabeth. *The Imperative of Integration*. Princeton, NJ: Princeton UP, 2010. Print. pp. 54-55.

The differential character of mass incarceration causes stigmatization by increasing the commonality, noticeability and default status of blacks as criminal. It propagates the reputational injuries endured by all (and often innocent) blacks. It imposes harms on blacks as a group, not just the individual offenders. The imposition of this harm is often a result of public stigmatization not private convictions. Penal expansion has concretized the century old portrayals of blacks as deviant and dangerous beings. Its rise has hardened unconscious, biased depictions of blacks as criminals, and of criminals as black. Innocent men are searched and harassed at will and suffer reputational injuries as a result. Americans, particularly White Americans, are more likely to contribute to, or be complicit in the production of the downward mobility of law-abiding Blacks. They are also more likely to justify black circumstance with the surplus of stereotypical and stigmatic ammunition provided to them by the systematic imposition of racialized carceral differences.

To cope with the reality and consequences of these pervasive stigmatic wrongs, African American women have been forced to assume the role of “caregivers” in their communities. “In the era of mass incarceration, women must assume new burdens of community caregivers”, a title that refers to “the constant work they are required to do to keep their family members from the long reaches of the criminal justice system.”⁴⁷ Here we can see the imposition of a burden on women who have done nothing wrong. They must bear the negative costs of carceral expansion and shield their loved ones from the processes of criminalization and the punitive tendencies of the state.

Nicholas Peart, a young African American man from New York City, writing in a New York Times opinion piece, expressed his hope that police practices will change; that when he eventually has children, he will not have to pass along his mother’s advice never to try to stand up for his rights when dealing with the police. Peart has been stopped and frisked in NYC plenty of times in his life, and each time, he was cooperative and found innocent. Regardless of how tempting deviating from his mother’s advice may have been, Mr. Peart always decided against attempting to exercise his rights.⁴⁸

Racially disproportionate responses to certain crimes have increased the ubiquity and the pervasiveness of implicit, often unconscious, cognitive processes that cause people to associate innocent African Americans with harmful criminal stereotypes. The age of mass incarceration has promoted unjust reactions to the relentlessly injured reputation of blacks to the extent that Black Americans with no criminal history are just as likely to get a job as those who have been convicted of a crime. Whether these discriminatory trends result from purposeful actions of individuals is irrelevant. The salient dynamic at play is rather that of systematically criminalizing innocent blacks, regardless of an individual

⁴⁷ Richie, Beth. "The Social Impact of Mass Incarceration on Women." Print. pp. 146.

⁴⁸ Peart, Nicholas K. "Why Is the N.Y.P.D. After Me?" *The New York Times*. The New York Times, 17 Dec. 2011.

evaluator's intentions. Both segregation and mass incarceration have bolstered the prevalence of the perception of innocent blacks as threatening and fear inducing. The generation of unjustified fear and anxiety constitute expressive harms to blacks because they are inaccurately evaluated by biased individuals whose perceptions are skewed by racially stigmatizing ideas.

Independent of the specific complaints of offenders and ex-inmates, those blacks who have never been incarcerated have grounds for complaint against the social reality of carceral expansion. Anderson explains that in the case of innocent and stigmatized group members, "the victim's complaint is rather that she has been inaccurately evaluated in an unfair way because her evaluator's judgements were distorted by racially stigmatizing ideas. This complaint, in contrast to complaints of prejudicial and statistical discrimination, does not require any imputation of discriminatory purposes or beliefs to the actor. It merely requires the practical engagement of stigmatizing ideas."⁴⁹

This is crucially important regarding the formulation of a normative response to the reality of mass imprisonment. Regardless of our ability to impute discriminatory purpose at the individual level, the fact that "at every stage, from arrests through sentencing, African American men were (and still are) treated more harshly than whites were for identical crimes"⁵⁰, can still be characterized as an injustice as it can be causally tied to the multitude of stigmatic and discriminatory wrongs. The social reality of mass incarceration characterized by the extreme over representation of blacks at all stages of the carceral pipeline induces unprecedented levels of engagement with these harmful stereotypes. This is particularly evident when you look at criminalizing black youth despite the lowest violent crime rates among them in recorded history.⁵¹ If not for these wide spread, racially flawed - often unconscious - perceptions, innocent blacks would be better off, and optimistic news such as the historic low of crime rates among young blacks would be more widely acknowledged.

Mass incarceration and the distinct character of racialized differential practices and the implications of this phenomenon, have served to stimulate and harden stereotypes and subsequently bolster discriminatory tendencies in America. It undermines blacks' access to important material and socio economic goods and has been conducive to the continued isolation of African Americans from the social body. Individuals who have served their sentences are permanently burdened by their criminal status and are forced to cope with major disadvantages in virtually all facets of life. Unprecedented levels of race-based differential punishment have impaired the realization of equality of opportunity by

⁴⁹ Anderson, Elizabeth. *The Imperative of Integration*. Princeton, NJ: Princeton UP, 2010. Print. pp. 60.

⁵⁰ Edelman, Peter B. *So Rich, so Poor: Why It's so Hard to End Poverty in America*. New York: New, 2012. Print. pp. 44.

⁵¹ Mike Males Published: August 15, 2013. "Why the Gigantic, Decades-Long Drop in Black Youth Crime Threatens Major Interests." *Why the Gigantic, Decades-Long Drop in Black Youth Crime Threatens Major Interests* — *Center on Juvenile and Criminal Justice*.

propagating stigmatic stereotypes which underlie unjust political distributions and social relations.

However uncontrollable, the deeply ingrained stigmatic reality of cognitive processes in the United States constitutes a harm to blacks as a group. Regardless of intent or purpose, discrimination of all forms has worsened the current standing of blacks and can be causally tied to the amplification of enduring racial inequality in America. The strength and appropriateness of Anderson's normative conclusions about racial inequality, and her depiction of society at large as normatively responsible for the deepening of persistent, social, economic, and political gaps, are reinforced by the salient differences between an isolated case of prosecutorial discretion, and a criminal justice system -- whether deliberately or not -- that is institutionally targeting a particular race for a specific class of crimes, thereby producing and proliferating a myriad of disabling disadvantages and burdens imposed on all members of that already marginalized racial group.

The rapid growth of the criminal justice system and the state's penal arm has not created, but has exacerbated these massive racial inequalities. But for mass incarceration, far fewer racial inequalities would exist. Just as Anderson asserts that integration should help dismantle longstanding injustices regarding socio economic opportunity, public recognition and democratic politics, I suggest that decarceration and an overall reduction in the immense force of the United States penal arm should be seen as the pragmatic solution to a broken and racially unjust system of punishment which continues to this day to inhibit "a restructuring of intergroup relations, from alienation, anxiety, awkwardness, and hostility to relaxed, competent civil association and even intimacy; from domination and subordination to cooperation as equals."⁵² Would the overall reduction of the state's punitive force allow for the realization of a political distribution more conducive and better suited to democratic values and racial justice? If so, we have good reason to support the logical extension of Anderson's position to cover and address considerations pertaining to race-based carceral inflation and its propagation of stigma-induced inequality.

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⁵² Anderson, Elizabeth. *The Imperative of Integration*. Princeton, NJ: Princeton UP, 2010. Print. pp. 117.

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