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## Criminal Selectivity in the United States: A History Plagued by Class & Race Bias

By Valeria Vegh Weis<sup>1</sup>

### Abstract

The United States is at a pivotal moment in terms of rethinking class and racial inequality within the criminal justice system. However, there is a lack of shared conceptual tools to frame this debate. First, there is no clear or comprehensive theoretical tool to describe, categorize, or analyze class and racial inequality *throughout* the criminal justice process. Current tools focus, separately, on the enactment of laws, on the performance of police officers, on the actions of judges, juries, and prosecutors, or on the administration of punishment. Second, scholars use different language to describe how inequality operates in each of the mentioned stages within the criminal justice process. Third, there is a lack of conceptual precision about the mechanisms through which inequality operates. These three problematic aspects of the conceptual framing result in ambiguity at the moment of discussing consistent crime policy. This study helps overcome this gap and offer conceptual tools that can serve as analytical categories to precisely describe and analyze inequality within the criminal justice system. This article also puts the suggested categories in practice to analyze the functioning of the criminal justice system in the United States since the 1970s. Overall, this article proposes that only a comprehensive, interdisciplinary and inter-sectorial approach to define and analyze crime control will help overcome the current situation of conceptual ambiguity, opening the path for thorough and lasting crime policies.

### 1. Introduction

The United States is at a pivotal point in terms of rethinking class and racial inequality within the criminal justice system. Although the financial and humanitarian crisis of the penal system has been escalating since the 1970s,<sup>2</sup> it was not until the beginning of the century that academics, politicians and think tanks started to intensively discuss the process of mass incarceration,<sup>3</sup> understanding it as part of

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<sup>1</sup> I am enormously grateful for the comments and suggestions of N.Y.U. Segal Family Professor of Regulatory Law and Policy, and Faculty Director of the Center on the Administration of Criminal Law Rachel Barkow, N.Y.U. Professor of Clinical Law Anthony Thompson, N.Y.U. Robert B. McKay Professor of Law Stephen Schulhofer and N.Y.U. Scholar in Residence Fernando Ribeiro Delgado.

<sup>2</sup> “After decades of stability (from the 1920s to the early 1970s), the rate of incarceration in the United States quadrupled in the past four decades.” JEREMY TRAVIS ET AL., *THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES* (2014).

<sup>3</sup> The United States went from having less than 400,000 prisoners in 1975 to 750,000 in 1985, and 2,000,000 in 1998. ALESSANDRO DE GIORGI, *EL GOBIERNO DE LA EXCEDENCIA – POSTFORDISMO Y GOBIERNO DE LA MULTITUD* (2006). In 2012, the total number of detainees reached 2,228,424 with an incarceration rate of 707 people per 100,000 citizens. *Highest to Lowest-Prison Population Total*, WORLD PRISON BRIEF, [http://www.prisonstudies.org/highest-to-lowest/prison-population-total?field\\_region\\_taxonomy\\_tid=All&=Apply](http://www.prisonstudies.org/highest-to-lowest/prison-population-total?field_region_taxonomy_tid=All&=Apply). In 2012, these numbers made the United States the country with the highest number of detainees: it has less than five percent of the world’s population and owns twenty-four percent of the detained population. MICHAEL TONRY, *Race, Ethnicity and Punishment*, in *THE OXFORD HANDBOOK OF SENTENCING AND CORRECTIONS* 53-82 (Joan Petersilia & Kevin R. Reitz eds., 2012). Although there are recent

a broader system of mass penal control.<sup>4</sup> This discussion has recently been radicalized by high tensions between law enforcement and communities of color. At the core of these debates, statistics evidence the demographic features of those targeted by crime control: the poor and communities of color.<sup>5</sup> These subsets are also over-represented among those killed by the police,<sup>6</sup> a phenomenon that has encouraged the emergence of the Black Lives Matter movement.<sup>7</sup>

However, there is a lack of shared conceptual tools to frame this debate. First, there is no clear or comprehensive theoretical tool to describe, categorize or analyze class and racial inequality *throughout* the criminal justice process. Instead, current tools focus, separately, on the enactment of laws, on the performance of police officers, on the actions of judges, juries and prosecutors, or on the administration of punishment. This means that there are notions to describe either inequality during the enactment of laws committed by legislators and the executive power (e.g. inequality under the law); or inequality during the enforcement of the law committed by police officers (e.g. racial profiling); or inequality during the judicial process committed by prosecutors (e.g. biased prosecutorial discretion); or inequality during the administration of punishment by correctional officers or parole boards (e.g. disparities in prison treatment, or disparities in the granting of parole). However, there is no conceptual tool to analyze the systematic pattern of unfairness throughout *all* those stages of the criminal justice process as a whole.

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policies aimed at reversing this process, it is still tough to overturn it. See Ashley Porter, *Drug Offenses, Not Violent Crime, Filling Up Federal Prisons*, INTERNATIONAL BUSINESS TIMES (Jan. 30, 2013, 11:52 AM), <http://www.ibtimes.com/drug-offenses-not-violent-crime-filling-federal-prisons-1047240>.

<sup>4</sup> Almost five million are on probation, and almost one million are on parole. Danielle Kaeble & Thomas P. Bonczar, *Probation and Parole in The United States, 2015*, BUREAU OF JUSTICE STATISTICS (Dec. 21, 2016), <https://www.bjs.gov/index.cfm?ty=pbdetail&iid=5784>.

<sup>5</sup> The ethnic composition of the U.S. prison population has reversed, turning over from 70% White at the mid-century point to nearly 70% Black and Luatino today, although ethnic patterns of criminal activity have not been fundamentally altered during that period. L  ic Wacquant, *Deadly Symbiosis: When Ghetto and Prison Meet and Merge*, 3 PUNISHMENT & SOC. 1, 95, 97 (2001). Today, the probability that a Black-American person ends in prison is about ten times higher than for Whites. *Mass Incarceration*, ACLU, <https://www.aclu.org/issues/mass-incarceration>. More African-Americans are under correctional control today than were enslaved in 1850, a decade before the civil war started. MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 175 (2010). Mass imprisonment then became a likely part of the experience of a social sector (young black unemployed males). Indeed, incarceration has become one of the social institutions that structure this group's experience. David Garland, *The American Penal State Seminar at New York University School of Law* (2016). Alexander describes 'mass incarceration' as a "criminal justice system, larger web of laws, rules, policies, and customs that control those labeled criminals both in and out of prison. Once released, former prisoners enter a hidden underworld of legalized discrimination and permanent social exclusion. They are members of America's new 'undercast.'" Alexander, at 13. In a vicious circle, punishment reinforces the concentration and exacerbation of inequality. Bruce Western, *Poverty Politics and Crime Control in Europe and America*, 40 CONTEMP. SOC. 3 (2013).

<sup>6</sup> From an average of 1,100 people annually killed by police officers, 95 % are male, 50% are 34-years-old or younger, Black-Americans are heavily over-represented at about one in four - doubling their percentage of the population -, and more than 250 victims suffer mental illness. As of December 16, 2016, Black-Americans on overall, were 2.5 times more likely to be killed than Whites. *The Counted, People killed by police in the US*, THE GUARDIAN, <https://www.theguardian.com/us-news/ng-interactive/2015/jun/01/the-counted-police-killings-us-database>.

<sup>7</sup> "Black Lives Matter emerged as a response to police killings that went viral through the internet. They have transformed an overlooked problem into a major political issue, employing a variety of tactics (demonstrations, traffic blockages and disruptions of highly visible political events). They helped inspire a broader movement with concrete proposals (Campaign Zero and Building Momentum from the Ground Up). One of the central goals of the movement is to register police killings, identifying the race and gender of victims, and if he or she was armed. Paradoxically, while every step in the U.S. criminal justice system is registered in a criminal record that can be accessed by private and public actors, police killings are not registered in a national database, and the civil movement has to develop tools from the ground up to detect and denounce them." VALERIA VEGH WEIS, *MARXISM AND CRIMINOLOGY. A HISTORY OF CRIMINAL SELECTIVITY* (2017).

Second, scholars use different language to describe how inequality operates in each of the mentioned stages within the criminal justice process. Thus, without shared and clearly defined conceptual tools, we are losing the potential to frame and elucidate the public discussion about how to change inequality in the criminal justice system.

Third, there is a lack of conceptual precision about the mechanisms through which inequality operates. For example, how does inequality take place at the level of statutes' drafting? Are there conceptual tools that could help us to identify a common pattern through which inequality operates at this stage? Is there any specific historical framework in which this pattern emerged or expanded in the United States?

These three problematic aspects of conceptual framing result in ambiguity of discussing consistent crime policy. Therefore, the aim of this study is to overcome this gap, and offer conceptual tools that can serve as analytical categories to precisely describe and analyze inequality in the criminal justice system. The conviction is that these categories will help avoid ambiguities and will offer shared tools to carry on the necessary discussions about how to change the unequal functioning of crime control. In short, this theoretical clarification will facilitate the public debate and the further development of more accurate public policies.

To do so, Part 2 approaches the first two problems. To overcome the first issue (lack of conceptual tools to describe inequality in *all* stages), this article proposes to deploy the concept of *criminal selectivity*. This notion provides a comprehensive understanding of the systematic unfairness of the criminal justice system, based on class and racial bias, but also on gender and age considerations. To overcome the second issue (lack of shared categories to analyze inequality in each of the criminal justice levels), Part 2 also systematizes different notions used by scholars. Against this background, this article proposes and defines most suitable conceptual tools to identify and analyze each of the stages of the criminal justice process in which criminal selectivity takes place. Upon this framework, Part 3 then offers a historical overview of the American criminal justice system to understand how criminal selectivity enhanced in the late 20<sup>th</sup> century. It is proposed that the 1970s represent a breaking point regarding class and racial bias in the United States criminal justice system. Part 4 puts the suggested categories in practice to answer the third identified problem. It analyzes how criminal selectivity has been functioning in the United States since the 1970s. This analysis helps conceptualize the drastic expansion of crime control over low-income young and undereducated Black-American and Latino males since the last third of the 20<sup>th</sup> century, as well as the current extreme situation in terms of racial and class inequality.<sup>8</sup> Lastly, Part 5 offers final reflections.

In sum, this article offers a theoretical scheme for a comprehensive understanding of the unfairness of the criminal justice system, particularly in relation to class and racial bias through the concept of criminal selectivity (and its mechanisms of primary and secondary over-criminalization and under-criminalization). The design, discussion and application of this conceptual tool must be carried on carefully. Therefore, only a comprehensive, interdisciplinary and intersectorial approach to define and analyze crime control will help overcome the current situation of conceptual ambiguity, opening the path for thorough and lasting crime policies.

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<sup>8</sup> See VEGH WEIS *supra* note 7 (for a broader analysis of the mechanism of under-criminalization and its functioning in the U.S. criminal justice system). The book also develops a full historical revision of the mechanism of over-criminalization in the aim of acknowledging that far from being a current phenomenon, it has a symbiotic nexus with the functioning of the criminal justice system.

## 2. Criminal Selectivity: A Necessary Concept

How do we describe inequality in the criminal justice system? Do we have a conceptual tool to refer to, and analyze the systematic application of crime control over the poor and the communities of color throughout all the stages of the criminal justice process (from the drafting of statutes, through police and judicial performance, and up to the administration of punishment)? Although criminology and criminal law have broadly acknowledged the unequal functioning of the criminal justice system, the lack of conceptual tools to analyze the comprehensive presence of unfairness throughout the different stages of the criminal justice process,<sup>9</sup> while taking into consideration not only race but also class, gender, age as well as religious membership, persists.<sup>10</sup>

As introduced above, this article aims to fill this gap by developing the notion of *criminal selectivity*. This notion describes the *phenomenon of inequality throughout all the stages of the criminal justice process (primary and secondary criminalization) and individualizes how it operates in each of these stages (mechanisms of under- and over-criminalization)*. *Over-criminalization refers to the overly-punitive treatment of behaviors committed by individuals in a vulnerable position because of their class and racial membership, but also their gender and age. Under-criminalization refers to the absence or minimization of the punitive treatment of behaviors committed by individuals who bear a socially advantageous position regarding their class and racial membership, but also their gender and*

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<sup>9</sup> Cole refers to ‘no equal justice’ and ‘inequality in criminal justice’ to refer to the different type of bias (and not only racial ones) that absorb distinct stages of the criminal justice system (police officers, legislature and the Supreme Court), but he fails to include the performance of other law enforcement agents besides police, the different actors of the judicial stage and the administration of punishment. Indeed, he argues that “while our criminal justice system is explicitly based on the premise and promise of equality before the law, the administration of criminal law—whether by the officer on the beat, the legislature, or the Supreme Court—is in fact predicated on the exploitation of inequality.” He points out that the “contend that our criminal justice system affirmatively depends on inequality. Absent race and class disparities, the privileged among us could not enjoy as much constitutional protection of our liberties as we do; and without those disparities, we could not afford the policy of mass incarceration that we have pursued over the past two decades.” David Cole, *No Equal Justice*, 1 CONN. PUB. INT. L.J. 19, 24-25 (2001).

<sup>10</sup> Different authors have raised different conceptual tools to analyze the unfair treatment at all the stages of the criminal justice process, but only in relation to race. However, and even considering the limitations of restricting the unfairness analysis to race, there is still a lack of consensus about a unique conceptual tool to describe this phenomenon. It has been called ‘racial disparity’ or ‘racial disproportionality,’ namely, the existence of racial disparities found at all stages of criminal justice processing, or, more extensively, “racial disparity exists whenever a racial or ethnic group is over-represented at any stage of criminal justice processing, relative to the number of persons of that group who are found in the general population.” Richard S. Frase, *Racial Disparities in the Criminal Justice System*, UNIVERSITY OF MINNESOTA LAW SCHOOL ROBINA IN CONVERSATION (Jun. 7, 2016), [https://robinainstitute.umn.edu/sites/robinainstitute.umn.edu/files/robinain\\_conversation-racial\\_disparities-7june2016-frase\\_slides.pdf](https://robinainstitute.umn.edu/sites/robinainstitute.umn.edu/files/robinain_conversation-racial_disparities-7june2016-frase_slides.pdf). Racial differences in all the stages of the criminal justice system have also been called ‘racial inequality.’ *Black Lives Matter: Eliminating Racial Inequality in the Criminal Justice System*, THE SENTENCING PROJECT (2015), [http://www.sentencingproject.org/doc/publications/rd\\_Black\\_Lives\\_Matter.pdf](http://www.sentencingproject.org/doc/publications/rd_Black_Lives_Matter.pdf). In another report, the Sentencing Project also refers to ‘racial disparity’ (defining it as the situation in which proportion of a racial or ethnic group within the control of the system is greater than the proportion of such groups in the general population) and ‘illegitimate or unwarranted racial disparity’ (resulting from the “dissimilar treatment of similarly situated people based on race”). *Reducing Racial Disparity in the Criminal Justice System. A Manual for Practitioners and Policymakers*, THE SENTENCING PROJECT (2016), <http://www.sentencingproject.org/wp-content/uploads/2016/01/Reducing-Racial-Disparity-in-the-Criminal-Justice-System-A-Manual-for-Practitioners-and-Policymakers.pdf>. Walker, Spohn, and Delone refer to ‘unequal justice’ to describe how “racial minorities, and particularly those suspected of crimes against Whites, remain the victims [of the criminal justice system].” SAMUEL WALKER ET AL., *THE COLOR OF JUSTICE. RACE, ETHNICITY, AND CRIME IN AMERICA* 198 (2012).

age. Thus, over-criminalization and under-criminalization are terms previously used by scholars, but from a different perspective than the one proposed here.<sup>11</sup>

The two central components of criminal selectivity, “primary criminalization” and “secondary criminalization,” were originally formulated by Becker – an exponent of the U.S. labeling approach theory – in the 1960s.<sup>12</sup> These notions have been later used by Baratta and other critical criminologists. Later, Latin American scholars offered a stricter conceptualization of these terms.<sup>13</sup> The present study

<sup>11</sup> The concept of ‘over-criminalization’ has been broadly explored in the last years. See, e.g., *Overcriminalization*, HERITAGE FOUNDATION, <http://www.heritage.org/issues/legal/overcriminalization> (the Heritage Foundation’s analysis understands it as an inflation of colorblind and class blind criminal law and its over-enforcement). However, the approach proposed in this article comes from a different legacy. As I had already developed in several papers for the Spanish-speaker public, the concept of over-criminalization that this article proposes is built in an intrinsic relationship with the analysis of class and racial bias as systematic elements of the U.S. criminal justice system. Moreover, scholars usually speak of over-criminalization mainly to refer to the legislative level, or the legislative level and law enforcement. Conversely, the suggested view of this study is that over-criminalization involves all the different stages of the criminal process: legislation (primary over-criminalization), and, also, law enforcement activity, judiciary, punishment, and collateral consequences (secondary over-criminalization). This research also understands that over-criminalization is not an isolated phenomenon, but that it needs to be analyzed in a comprehensive manner with the concept of under-criminalization, and both as part of criminal selectivity. Valeria Vegh Weis, *The History of Criminal Selectivity*, AMERICAN SOCIOLOGICAL ASSOCIATION, <http://marxistsociology.org/2015/12/the-history-of-criminal-selectivity/>; Valeria Vegh Weis, *La Cuestión Criminal en Marx* [The Criminal Matter in Marx], CENTRO CULTURAL DE LA COOPERACIÓN (2013); Valeria Vegh Weis, *Mercancía y Criminalización: La Selectividad Penal Originaria desde los Aportes de Marx y Engels* [Surplus and Criminalization: Criminal Selectivity in the Theoretical Contributions of Marx and Engels], CENTRO CULTURAL DE LA COOPERACIÓN (2012); Valeria Vegh Weis, *La Cuestión Judía en Marx* [The Jewish Question in Marx], RAZÓN Y REVOLUCIÓN 24 (2012); Valeria Vegh Weis, *El Hurto de Leña en Marx y las Usurpaciones de Terrenos en Buenos Aires Hoy* [The Theft of Firewood in Marx and the Encroachments of Land in Buenos Aires City today], REVISTA PENSAMIENTO PENAL (2012).

<sup>12</sup> HOWARD BECKER, *OUTSIDERS: STUDIES IN THE SOCIOLOGY OF DEVIANCE* (1966).

<sup>13</sup> Vold delineated the notion of ‘primary criminalization’ and described it as “the process in which powerful groups manage to influence legislation, using penal institutions as a weapon to combat and neutralize behaviors of opposing groups.” ALESSANDRO BARATTA, *CRIMINOLOGÍA CRÍTICA Y CRÍTICA DEL DERECHO PENAL* 133-34 (2001). Afterward, Becker noted that “the rules that these labels [referring to the process of labeling by penal agencies] generate and sustain do not respond to everyone’s opinion. On the contrary, they are subjected to conflicts and disagreements; they are part of the political process of society.” BECKER, *supra* note 12, at 37. Baratta argues that ‘primary criminalization’ refers to the rules that define the ‘criminalization and decriminalization’ processes, i.e. ‘production rules’ tend to preserve ‘antisocial actions.’ BARATTA, at 95, 168. These rules are made by those belonging to the hegemonic social class and are functional to the demands of capitalist accumulation. *Id.* at 185. Zaffaroni, Alagia and Slokar define ‘primary criminalization’ as “the act and the effect of a criminal law sanction that materially incriminates or permits the punishment of certain persons [by the] political agencies (parliament and executive branch).” RAÚL ZAFFARONI ET AL., *DERECHO PENAL-PARTE GENERAL* 9 (2002).

The notion of ‘secondary criminalization’ was outlined by Becker when he stated that the response of people to certain types of conduct, is what label them as ‘deviant.’ BECKER, *supra* note 12, at 37. He adds that, once the rule exists, it is applied to certain individuals of the underclass to increase the population that the norm has created. *Id.* at 181-82. Baratta defines the process of ‘secondary criminalization’ as “the criminal process involving the action of the bodies of inquiry and culminating in the judgment.” BARATTA, *supra* note 13, at 168. Zaffaroni, Alagia, and Slokar identify that ‘secondary criminalization’ is the punitive action that police officers, judges, and correctional officers exert on specific individuals. It includes the work of law enforcement agencies when they detect a person - whom performing is attributed to some primarily criminalized act -, investigate him/her - in some cases depriving him/her of his/her freedom of movement -, and subjects him/her to the judicial agency. The judiciary legitimizes the past proceedings, supports a process - namely the progress of series of secret or public events to establish whether he/she has performed the criminalized action - publicly discusses whether he/she has done it and, if so, allows the imposition of a punishment of a certain magnitude. When that punishment consists on deprivation of freedom of movement, it is executed by a correctional agency, in a process that can be called ‘prisonization.’ ZAFFARONI ET AL., at 7.

brings more accuracy and detail to these notions by proposing definitions, and by focusing on both the class and racial aspects of the criminalization process.

It is then possible to define primary criminalization as the filtering process for which only certain types of behaviors which are considered to be socially negative, are established as criminal offenses in statutes. From the universe of harmful conducts, only certain offenses are then subjected to criminal sanction. For example, refusing a seat to an elderly lady on the subway may be considered harmful behavior, although legislators do not consider such behavior criminal. The offenses passing the filter of “primary criminalization” are the grosser ones, committed with simple resources, demanding easier evidence gathering, producing low social-political conflict and typically perpetrated by class and racial minorities. In contrast, more complex behaviors which require higher levels of know-how to conduct the investigation, which do not produce social unrest, and which are usually committed by individuals from privileged racial and class strata, are not the core of the codification process, in spite of providing high levels of social harm.<sup>14</sup> This means that, although most laws appear to be facially neutral, they disproportionately target behaviors associated with the lower classes and racial minorities.<sup>15</sup> In short, *primary over-criminalization refers to the primary filtering process where only certain types of behaviors socially considered as negative are over-dimensionally legislated as crimes because of the status of the individuals that usually commit them, rather than because of the social harm they produce.* The outcome of the process of primary criminalization is the unequal treatment at the legislative and common law level of different negative social behaviors, which can be named *inequality under the law.*

Secondary criminalization appears as a result of the practical impossibility of prosecuting each and every offense perpetrated every day in a given jurisdiction. Then, secondary criminalization consists of a filtering process responsible for selecting which of the primarily criminalized behaviors are going to be effectively criminalized. This secondary filtering process is influenced by the class and racial characteristics of the offenders, and also by their age and gender. The targeted individuals are those who respond to “the aesthetic public image of the offender, with classist, racist, age and gender components.”<sup>16</sup> Conversely, at the opposite end of the selective process, perpetrators of white collar crimes, organized crimes or human rights violations, and any other offender who does not respond to the threatening stereotype of the usual targets, are rarely criminalized. This second filter has also been

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<sup>14</sup> The concept of ‘social harm’ problematizes what is conceived as ‘criminal.’ It suggests that we should conceive as ‘criminal’ “[the] practices of those in power who are seriously harmful to most of the humanity and are not defined and sanctioned by civil or criminal laws, such as genocide and economic exploitation.” Herman Schwendinger & Julia Schwendinger, *Defenders of Order or Guardians of Human Rights*, 5 *ISSUES IN CRIMINOLOGY* 2, 123, 168-69 (1970). Theories of ‘social harm’ propose to replace the notion of ‘crime’ with the broader concept of ‘social harm.’ Paddy Hillyard and Steve Tombs, *Beyond Criminology*, in *BEYOND CRIMINOLOGY: TAKING HARM SERIOUSLY* 10-29 (P. Hillyard, C. Pantazis & S. Tombs eds., 2004). This perspective argues that we should not reduce the discussion of crime only to the phenomena effectively receipted in criminal codes or the common law as such but to analyze all those conducts that produce social harm, regardless their official consideration as crimes. The clearest example is ‘genocide for political reasons’ which the Rome Statute does not include, but it is a highly harmful conduct that took place in our history.

<sup>15</sup> A clear example is a 100-to-1 law in 1986 that punishes sales of crack cocaine as severely as sales of a hundred times larger cocaine powder, even though both are harmful substances. The difference between both drugs has more to do with the racial subsets that consume them than with their intrinsic characteristics. Crack cocaine sales mostly involve Blacks and powder cocaine mostly involves Whites. Although this law was replaced by an 18-to-1 model in 2010, it only slightly reduces the disproportionate effects. TONRY, *supra* note 3, at 53-82. African Americans comprise more than 90% of those found guilty of crack cocaine crimes, but only 20% of those found guilty of powder cocaine crimes. COLE, *supra* note 9, at 26-7.

<sup>16</sup> ZAFFARONI ET AL., *supra* note, at 9.

conceptualized as “selective enforcement.”<sup>17</sup> In short, *secondary over-criminalization refers to the secondary filtering process where only certain types of criminalized behavior are targeted, under a biased process that particularly responds to the class and race features of the offender.*

But, which are the instances of this secondary filtering process and which are the involved agencies materializing it? It is suggested that secondary criminalization involves three different levels.

The first level is inequality in law enforcement practices. This level has most commonly been conceptualized as racial profiling. However, there is no common agreement as to the definition of racial profiling. While some authors understand racial profiling to be police discretion during stops and searches,<sup>18</sup> others see it as the broader performance of police to the detriment of racial minorities.<sup>19</sup> Despite this lack of a common definition of racial profiling, this notion fails to make it clear that profiling does not only follow race or ethnicity patterns, but also follows other patterns such as class, gender and age. Similar critiques are raised as to the concepts of “unlawful racial profiling” and “government-sponsored ethnic and racial profiling.”<sup>20</sup> This problem inspired the notion of “criminal

<sup>17</sup> Michal Tamir, *Public Law As a Whole and Normative Duality: Reclaiming Administrative Insights in Enforcement Review*, 12 TEX. J. ON C.L. AND CIV. RTS. 43-99 (2006). See also Michal Tamir, *Racial Profiling – Who is the Executioner and Does he have a Face?* 15 TEX. HISP. J. L. & POL’Y 71-91 (2009).

<sup>18</sup> Walker, Spohn, and Delone understand ‘racial profiling’ only in relation to the bias of police during traffic stops. They define this notion as “the use of race as an indicator in a profile of criminal suspects, with the result that drivers are stopped either entirely or in part because of their race or ethnicity and not because of any illegal activity.” WALKER ET AL., *supra* note 10, at 156. They argue that bias performance of law enforcement is broader than traffic stops and that includes “arrests, failure to provide service, and so forth.” *Id.* at 131. However, they do not suggest any a conceptual tool to identify that broader bias performance. Also, Kennedy defines ‘racial profiling’ as “police use of racial characteristics as probabilistic hints of suspiciousness” and contrasts it with the broader notion of ‘racially discriminatory police violence’ which describes the “allegations of racial discrimination in resort to violence by police.” Randall Kennedy, *Racial Trends in the Administration of Criminal Justice*, in AMERICA BECOMING: RACIAL TRENDS AND THEIR CONSEQUENCES II (William Julius Wilson et al. eds., 2001). Under the same logic, Tamir defines racial profiling as “the use of race to decide the probability of criminality or police officers who stop African-American male drivers because of the presumption that they are engaged in drugs or weapons activities.” Tamir, *supra* note 17, at 45-46. Callahan and Anderson agree that “[a]lthough there is no single, universally accepted definition of ‘racial profiling,’ we’re using the term to designate the practice of stopping and inspecting people who are passing through public places -- such as drivers on public highways or pedestrians in airports or urban areas -- where the reason for the stop is a statistical profile of the detainee’s race or ethnicity.” Gene Callahan & William Anderson, *The Roots of Racial Profiling*, REASON ON LINE (Aug.-Sept. 2001), <http://reason.com/0108/fe.gc.th.shtml>. The precedent *Flowers v. Fiore* also understands racial profiling as the “selective enforcement of motor vehicle laws on the basis of race.” 239 F. Supp. 2d 173, 179 (D. R.I., 2004).

<sup>19</sup> Ramirez, McDevitt, and Farrell understand racial profiling as “any police-initiated action that relies on the race, ethnicity, or national origin rather than the behavior of an individual or information that leads the police to a particular individual who has been identified as being, or having been, engaged in criminal activity.” Deborah Ramirez et al., *A Resource Guide on Racial Profiling Data Collection Systems – Promising Practices and Lessons Learned* 3 (2000), available at

[https://www.researchgate.net/profile/Amy\\_Farrell/publication/228187960\\_A\\_Resource\\_Guide\\_on\\_Racial\\_Profiling\\_Data\\_Collection\\_Systems\\_Promising\\_Practices\\_and\\_Lessons\\_Learned/links/0a85e532f247120d64000000/A-Resource-Guide-on-Racial-Profiling-Data-Collection-Systems-Promising-Practices-and-Lessons-Learned.pdf?origin=publication\\_detail](https://www.researchgate.net/profile/Amy_Farrell/publication/228187960_A_Resource_Guide_on_Racial_Profiling_Data_Collection_Systems_Promising_Practices_and_Lessons_Learned/links/0a85e532f247120d64000000/A-Resource-Guide-on-Racial-Profiling-Data-Collection-Systems-Promising-Practices-and-Lessons-Learned.pdf?origin=publication_detail).

Under the same logic, the Inter-American Commission of Human Rights (I.A.C.H.R.) defined racial profiling as: “a tactic [...] adopted for supposed reasons of public safety and protection and [...] motivated by stereotypes based on race, color, ethnicity, language, descent, religion, nationality, place of birth, or a combination of these factors, rather than on objective suspicions, [tending] to single out individuals or groups in a discriminatory way based on the erroneous assumption that people with such characteristics are prone to engage in specific types of crimes.” *De Almeida v. Brazil*, Case No. 12.440, Inter-Am. Comm’n H.R., Report No. 26/09, ¶ 134 (Mar. 20, 2009).

<sup>20</sup> ‘Unlawful racial profiling’ (or ‘race-based immigration enforcement’) includes the targeting of ethnic and religious minorities after 9/11. It describes the “increase of arrest and detention of immigrants by immigration enforcement authorities after -9/11 as an extension of race-based criminal enforcement justified by the War on Drugs. Sameer M.



profiling,” which addresses the broader discriminatory pattern, although is still restricted to stops and searches.<sup>21</sup>

Other authors have described the biased performance of law enforcement as “selective law enforcement,”<sup>22</sup> which uses the notion of “selectivity” broadly, and fails to address the specific profiling action carried on by law enforcement. This phenomenon was also named “harassment policing”<sup>23</sup> which highlights one aspect of law enforcement performance, i.e. the harassment against vulnerable individuals, but not the broader functioning of this agency. “Discriminatory enforcement” includes not only race but also class and political affiliation, but lacks a clear definition.<sup>24</sup> The notion of “selective enforcement” describes the “uneven enforcement of neutral law that demands to prove intentional discrimination based on illegitimate classification,”<sup>25</sup> failing to include the equal application of biased statutes by law enforcement, the implicit bias of law enforcement, and biased performance not related to race.<sup>26</sup>

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Ashar, *Immigration Enforcement, and Subordination: The Consequences of Racial Profiling after September 11*, 34 CONN. L. REV. 1185 (2002). Also, Kleiner refers to ‘government-sponsored ethnic and racial profiling’ to describe the disparity in scrutiny received by minority travelers against the race-blind standard. Yevgenia S. Kleiner, *Racial Profiling in the Name of National Security: Protecting Minority Travelers’ Civil Liberties in the Age of Terrorism*, 30 B.C. THIRD WORLD L.J. 103 (2010).

<sup>21</sup> Harcourt proposes the notion of ‘criminal profiling’ and affirms that “... the problem is about profiling, not about race. The problem has to do with comparative elasticities and offending rates and may plague any criminal profiling scheme, not just racial profiling. Bernard Harcourt, *Rethinking Racial Profiling: A Critique of the Economics, Civil Liberties, and Constitutional Literature, and of Criminal Profiling More Generally*, 71 U. CHI. L. REV. 4, 1281 (2004). See also *supra* note 17. Harcourt continues: “criminal profiling it is important to rethink racial profiling through the lens of criminal profiling—to reduce race to the role that it purportedly plays in racial profiling, namely a predictive factor; to treat race no differently than we would gender, class, age, or any other profile that works; to take the focus away from race and place it on criminal profiling more generally [...] What criminal profiling does, in effect, is to leverage any structural tilt and exploit any associations between crimes and identifiable or profitable traits. It magnifies these correlations into carceral distortions. Racial profiling on the highways is a good example of this, but it is by no means the only example. The same would hold true for other forms of profiling, whether profiling the wealthy for tax evasion or single mothers for welfare fraud.” *Id.* at 1283-84. Cf. FREDERICK SCHAUER, PROFILES, PROBABILITIES, AND STEREOTYPES 197–8 (2003) (insisting on the fact that “the problems with racial profiling . . . are not problems of profiling, with race being merely an example. Rather, . . . the problem is about race and not about profiling”).

<sup>22</sup> Randall G. Shelden, *Assessing “Broken Windows”: A Brief Critique*, CENTER ON JUV. AND CRIM. JUST. 1,7, <http://www.cjcj.org/uploads/cjcj/documents/broken.pdf> (defining the notion as “whereby administrative policies prioritize the types of laws to be enforced. Selective law enforcement is also linked to police discretionary power and practices who will be arrested and who will simply receive a warning”).

<sup>23</sup> R. Panzarella, *Bratton Reinvents ‘Harassment Model’ of Policing*, LAW ENFORCEMENT NEWS, June 1998.

<sup>24</sup> The author expresses that there is no formal definition of ‘discriminatory enforcement’ in the academic field but that the content of this notion is clear in the newspapers. He refers to it as a “capricious exercise of unreviewable discretion by the policeman on the beat [that affects] the poor, the Black, the culturally-deviant, and the politically-activist minorities.” Joseph H. Tieger, *Police Discretion and Discriminatory Enforcement*, DUKE L. REV., 717, 718-19 (1971).

<sup>25</sup> Tamir, *Public Law As a Whole and Normative Duality: Reclaiming Administrative Insights in Enforcement Review*, *supra* note 17, at 45. Tamir explains that the term applies to a situation in which even though the law seems fair and impartial, it is applied, administered and enforced by the public authority in a discriminating way, in that the law is enforced only against certain individuals or groups, or in that there are different enforcement policies depending on the identity or affiliation of the person or entity involved. Selective enforcement is not the opposite of complete enforcement, since complete enforcement is neither feasible nor desirable, given the scarcity of resources. Nor is it, necessarily, identical with the term ‘partial enforcement,’ though the latter can be selective and hence wrong and illegitimate. Selective enforcement is, thus, a specific kind of partial enforcement, the selectivity feature of which makes it illegitimate. *Id.* at 45.

<sup>26</sup> Tamir understands that “while the practice of racial profiling regarding pretext stops is generally illegitimate, it can be legitimate in some situations in the context of counter-terrorism activity, and hence, not necessarily perceived as selective enforcement.” Tamir, *Racial Profiling: Who is the executioner and does he have a mask* *supra* note 17, at.

Because the above-mentioned notions fail to address the complexity of the phenomenon, it is more appropriate to refer to unfairness at this stage as *law enforcement profiling*. This notion does not suffer from the conceptual problems as those mentioned above mentioned because it makes explicit that profiling is not just racially oriented, but also follows class, gender and age patterns. Additionally, this avoids using the term “police,” which elucidates that this level of biased enforcement of the law is perpetuated by police officers as well as by other law enforcement agencies (special units, border patrol, etc.).<sup>27</sup> In short, *law enforcement profiling* conceptualizes *how the work of police officers, patrol boards, special units and other law enforcement agencies (mainly, investigating crimes and apprehending offenders) is particularly plagued by a class and race-based explicit and implicit selective orientation*.

After analyzing law enforcement profiling, the second level of secondary over-criminalization focuses on inequality at the judicial stage. This phenomenon is commonly described as “(biased) prosecutorial discretion,”<sup>28</sup> referring to the irregular exercise of prosecutorial legal authority to bring or decline charges, and to decide how to pursue a case. However, the extension of racial, class, gender and age bias penetrates the practices of both the judicial and prosecutorial agencies. The selectivity that characterizes judge, jury and defense attorney activity also has several consequences in the unfair application of crime control against the most vulnerable subsets of the population. Therefore, the term “(biased) prosecutorial discretion” is not clear enough, as it focuses exclusively on the work of prosecutors. Additionally, notions such as “selective prosecution,”<sup>29</sup> “abuse of discretion,”<sup>30</sup> “prosecutorial overreach,”<sup>31</sup> and “discriminatory prosecution”<sup>32</sup> fall short in the same aspect.

The phrase “over-enforcement” seems to include other relevant actors of the judicial stage, but in an insufficiently clear manner. In addition, over-enforcement fails to expose that not all crimes are over-enforced. Instead, only coarse crimes committed by the most vulnerable subsets are the over-enforced ones. “Over-enforcement” is also restricted to the sentencing aspect (ignoring pretrial detention, plea bargain, use of alternatives to traditional punishment, length of prison time, etc.).

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<sup>27</sup> 42% of people impacted by a S.W.A.T. deployment to execute a search warrant were Blacks and 12% were Latinos. 61% of all the people impacted by S.W.A.T. raids in drug cases were minorities. WAR COMES HOME. THE EXCESSIVE MILITARIZATION OF AMERICAN POLICING, ACLU (June 2014), <https://www.aclu.org/report/war-comes-home-excessive-militarization-american-police>. Also, Border Patrol agents systematically target communities of color on a discriminatory basis and at least 33 deaths resulted from the unreasonable use of lethal force. *Border Patrol Abuse Since 2010: 40 Killed by Customs and Border Protection*, SOUTH BORDER COMMUNITIES COALITION (Sept. 27, 2015), <http://soboco.org/border-patrol-brutality-since-2010/>.

<sup>28</sup> WALKER ET AL., *supra* note 10, at 218 (explaining that “prosecutorial discretion is systematically exercised to the disadvantage of Black- and Hispanic-Americans”). Also, Davis explains that the problem is not prosecutorial discretion per se but “unchecked exercise of prosecutorial discretion.” ANGELA J. DAVIS, *ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR* (2007).

<sup>29</sup> ‘Selective prosecution’ is described as the opposite to racial neutrality in prosecution. WALKER ET AL., at 225. “A selective prosecution claim is not a defense on the merits to the criminal charge itself, but an independent assertion that the prosecutor has brought the charge for reasons forbidden by the Constitution.” *United States v. Armstrong*, 517 U.S. 456 (1996).

<sup>30</sup> *Enforcement Gone Amok: The Many Faces of Over-Enforcement in the United States*, U.S. CHAMBER INSTITUTE FOR LEGAL REFORM (May 2016), [http://www.instituteforlegalreform.com/uploads/sites/1/Enforcement\\_Gone\\_Amok\\_Web1.pdf](http://www.instituteforlegalreform.com/uploads/sites/1/Enforcement_Gone_Amok_Web1.pdf).

<sup>31</sup> *Id.*

<sup>32</sup> Ziegler uses the terms ‘discriminatory prosecution,’ ‘discriminatory enforcement,’ and ‘selective enforcement’ to mean “deliberate selection of a defendant for prosecution on the basis of some unjustifiable standard, as distinguished from the mere conscious selection between suspects for reasons that are permissible.” Fritz B. Ziegler, *The Right to Nondiscriminatory Prosecution: The Effect of Announced Screening Policies*, 36 LA. L. REV., 1108 note 8 (1976).

Finally, it refers to the imposition of punishment in a discretionary manner in specific cases, failing to address the fact that the unequal and inconsistent performance by the courts constitutes a systematic characteristic in the functioning of the criminal justice system.<sup>33</sup> The last two critiques (restriction of the definition to the sentencing level and lack of denouncement of the systematic character of judicial bias) can also be attributed to other notions such as “unwarranted disparity.”<sup>34</sup> Unfairness at the judicial stage has also been referred to as “(unlawful) racial discrimination”<sup>35</sup> and “racial discrimination in punishment,”<sup>36</sup> which only approach race-based bias.

Addressing these concerns and suggesting that bias should be analyzed in a systematic manner, targeting court performance as a whole (also considering the role of judges, juries and defense attorneys) and including all the aspects of the judicial level, this study proposes to name this stage of unfairness as *courts’ discretion*. This notion describes *how the work of prosecutors, judges, juries and even defense attorneys are also plagued by explicit and implicit selectivity particularly based on the class and race of the defendant throughout the judicial stage (from pretrial and plea bargaining to sentencing, and pertinence and length of prison time)*.

Lastly, the third level of secondary over-criminalization rests on the inequality in the administration of punishment. This aspect has been called “racial prejudice,”<sup>37</sup> “racial discrimination in parole release,”<sup>38</sup> or “racial bias in the decision to grant parole,”<sup>39</sup> referring only to race-based bias and only to the performance of parole boards. “Racial disparities among prisoners,”<sup>40</sup> “racial disparities in prisons,”<sup>41</sup> “racial bias in the state prison system,” “racial inequity in the prison system” or “bias in prison discipline”<sup>42</sup> are notions also referring to bias in the administration of punishment, but only in terms of racial selectivity and only in relation to prison conditions. Finally, notions such as “racial

<sup>33</sup> Alex Stein & Richard A. Bierschbach, *Overenforcement*, 93 GEO. L.J. 1743, 1744 (2004-2005) (defining over-enforcement as disproportional punishment at the sentencing level. Over-enforcement is what occurs when the total sanction suffered by the violator of a legal rule exceeds the amount optimal for deterrence). See also *supra* note 30 and Dorothy E. Roberts, *Criminal Justice and Black Families: The Collateral Damage of Over-Enforcement*, FACULTY SCHOLARSHIP, PAPER NO. 1344 (2001), [http://scholarship.law.upenn.edu/faculty\\_scholarship/1344](http://scholarship.law.upenn.edu/faculty_scholarship/1344).

<sup>34</sup> Unwarranted disparity is defined as “different treatment of individual offenders who are similar in relevant ways, or similar treatment of individual offenders who differ in characteristics that are relevant to the purposes of sentencing. Membership in a particular demographic group is not relevant to the purposes of sentencing, and there is no reason to expect—and some might argue no to reason to care—if the average sentence of different demographic groups is the same or different.” *Racial, Ethnic, and Gender Disparities in Federal Sentencing Today*, in FIFTEEN YEARS OF GUIDELINES SENTENCING (United States Sentencing Commission ed., Nov. 2004).

<sup>35</sup> KENNEDY, *supra* note 18, at 8.

<sup>36</sup> ‘Racial discrimination in punishment’ describes bias during sentencing and application of capital punishment. *Id.* at 12.

<sup>37</sup> ‘Racial prejudice’ refers to racial disparities in parole release time. Shamena Anwar & Hanming Fang, *Testing for Racial Prejudice in the Parole Board Release Process: Theory and Evidence*, 44 J. LEGAL STUD. 16 (Jan. 2015).

<sup>38</sup> Stephane Mechoulan Dalhousie, *Assessing Racial Discrimination in Parole Release*, U. NICOLAS SAHUGUET HEC MONTRÉAL, CEPR AND CIRPEE, Nov. 19, 2011.

<sup>39</sup> Leo Carroll & Margaret E. Mondrick, *Racial Bias in the Decision to Grant Parole*, 11 LAW & SOC’Y. REV. 1, 93 (Oct. 1976).

<sup>40</sup> Kathryn M. Nowotny, Jason D. Boardman & Richard G. Rogers, *Racial Disparities in Health Conditions among Prisoners Compared with the General Population* (unpublished manuscript) (on file with the University of Colorado Boulder) (describing differential health selection into prison for Whites and Blacks, and population health estimates for adult black men, in particular, are underreporting the true health burden for U.S. adults).

<sup>41</sup> Margo Schlanger, *Prison Segregation and Racial Disparities*, SOLITARY WATCH (Nov. 2, 2013), <http://solitarywatch.com/2013/11/02/prison-segregation-racial-disparities/> (describing that in many states the harsh conditions of solitary confinement are probably disproportionately affecting prisoners of color).

<sup>42</sup> Michael Schwirtz et al., *The Scourge of Racial Bias in New York State’s Prisons*, N.Y. TIMES (Dec. 3, 2016), <https://www.nytimes.com/2016/12/03/nyregion/new-york-state-prisons-inmates-racial-bias.html>.

discrimination on the imposition of collateral consequences,”<sup>43</sup> “disparate impact of the adverse collateral consequences of conviction and punishment”<sup>44</sup> or “invisible inequality”<sup>45</sup> are also restricted notions, as they only absorb the administration of collateral consequences and they mostly refer to racial bias.

Therefore, it is suggested that *differential punishment* might be an accurate notion because punishment is not just serving prison time strictly decided during the judicial stage. Conversely, the modality of incarceration, the conditions of release or probation and the harshness of the collateral consequences of convictions, are all subjected to selective decisions made by correctional officers, police boards and administrative agents on the basis of racial, class, gender and age bias. In short, *differential punishment* conceptualizes how parole boards<sup>46</sup> (and their decisions on early release, probation, and parole revocation), prison managers and correctional officers (and their influence on prison conditions) as well as bureaucratic agents (in charge of welfare programs and the administration of criminal records and its associated collateral consequences) conduct unequal practices, conditioning an explicit and implicit racial and class biased administration of punishment.

In sum, the proposed concept of *criminal selectivity* conceptualizes the phenomenon of inequality throughout all the stages of the criminal process (primary and secondary criminalization). Criminal selectivity explains, on the one hand, how certain types of conduct are minimally legislated (primary under-criminalization) and minimally enforced (secondary under-criminalization), although they produce social harm. This demonstrates that under-criminalization is not connected with the harmfulness of the behavior but with the socio-economic and racial situation of the subset of the population associated with it. On the other hand, criminal selectivity exposes the mechanism of over-criminalization, explaining how coarse activities are subjected to an over-dimensioned legislation (primary over-criminalization) and over-dimensioned targeting (secondary over-criminalization)-because of the socio-economic and racial subset associated with them, although these activities are not necessarily the most harmful ones.

### 3. The Focus in the 1970s

Although criminal selectivity has been intrinsically related to the functioning of the criminal justice system since its birth,<sup>47</sup> the 1970s were a breaking point in its mode of operation in the United States justice system.

In terms of class, the 1970s witnessed a drastic economic crisis. Financial businesses grew to the detriment of productive investments, fostering the expulsion of labor and the increasing automation in

<sup>43</sup> Gabriel Chin, *Race, The War on Drugs, and the Collateral Consequences of Criminal Conviction*, 6 J. GENDER, RACE & JUST. 253 (2002) (describing racial discrimination on the imposition of collateral consequences on those convicted of crime).

<sup>44</sup> The Sentencing Project, *supra* note 10.

<sup>45</sup> Bruce Western & Becky Pettit, *Incarceration & Social Inequality*, AMERICAN ACADEMY OF ARTS & SCIENCE (Summer 2010), <https://www.amacad.org/content/publications/pubContent.aspx?d=808> (describing ‘invisible inequality’ as “the inequality created by incarceration [...] The segregation and social concentration of incarceration thus help conceal its effects. This fact is particularly important for public policy because in assessing the social and economic well-being of the population, the incarcerated fraction is frequently overlooked, and inequality is underestimated as a result.” They distinguish it from ‘cumulative inequality’ (namely, serving time in prison or jail diminishes social and economic opportunities) and ‘intergenerational inequality’ (namely, the effects of the prison boom extend also to the families of those who are incarcerated)).

<sup>46</sup> However, in some states the sentencing judge is the one that holds discretionary release authority.

<sup>47</sup> VEGH WEIS, *supra* note 7.

the remaining productive investments (with its effects on the removal of labor, of which only a small number is required for the control of machinery). This favored an expansion of the distribution gap,<sup>48</sup> insecurity for employees<sup>49</sup> and increasing pauperism for unemployed sectors.<sup>50</sup> This transformation raised questions about what happened to the economically excluded sectors, in a framework for lack of access to social mechanisms for containing poverty (welfare policies): what kind of control has operated over them? Or, as Christie argues, “we have a surplus population [those who are out of production], and we have the classic problem of how to control the dangerous classes.”<sup>51</sup>

The answer is that at the end of the 20<sup>th</sup> century, the country “managed” the situation with criminal repression devices.<sup>52</sup> Following a Western tendency, crime control expanded and occupied spaces formerly filled by social policies.<sup>53</sup> This phenomenon was described as the passage from the “welfare state” to the “badfare state,”<sup>54</sup> from the “social state” or “providence state” to the “criminal state” or “penance state”<sup>55</sup> from a “social state” to a “security state.”<sup>56</sup> Social integration policies have been

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<sup>48</sup> Emmanuel Saez, *Striking it Richer: The Evolution of Top Incomes in the United States* (Jan. 23 2013), <http://eml.berkeley.edu/~saez/saez-UStopincomes-2011.pdf> (since 1993, the incomes of the top 1% grew almost 60% while the incomes of everyone else grew less than 6%). In Europe and the United States, the most advantaged sector reached 65% of assets in 2010, a level of prosperity unknown since 1913. Currently, 10% of the most economically advantaged globally own between 80% and 90% of the world’s wealth, while the 50% poorest population have less than 5%. On this basis, it is predicted that the 21<sup>st</sup> century will hold even greater levels of inequality and, therefore, more social discord. THOMAS PIKETTY, *CAPITAL IN THE TWENTY-FIRST CENTURY* (2014).

<sup>49</sup> Classic industrial and rural workers (dominant sectors in the disciplining social order) are in severe retraction and configure a privileged category about the whole working class with precarious and temporary jobs. On the other hand, the number of workers in the service-sector is steadily increasing. These workers lack strong unions and full labor rights, they are intermittently employed, and they receive asymmetric salaries in comparison with the formally employed worker. JOCK YOUNG, *THE VERTIGO OF LATE MODERNITY* 49 (2007).

<sup>50</sup> The restructure of the labor market works “systematically expulsing low-skilled, poorly educated, young, urban and minority population for whom long-term unemployment was the prospect.” DAVID GARLAND, *THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY* 83 (2001).

<sup>51</sup> NILS CHRISTIE *CRIME, CONTROL AS INDUSTRY* 67 (1993).

<sup>52</sup> DE GIORGI, *supra* note 3, at 127.

<sup>53</sup> Studies show that the seven countries with the highest incarceration rates spend below-average proportions of their G.D.P. on welfare, while the eight countries with the lowest incarceration rates all spend above average percentage of their G.D.P. on welfare, except Japan. Denmark, Sweden, and Finland spend the highest proportion of their G.D.P. on welfare and have the lowest incarceration rates. Meanwhile, the United States spends the smallest proportion of its G.D.P. on welfare and has the highest incarceration rate. David Downes & Kirstine Hansen, *Welfare and Punishment in Comparative Perspective*, in *PERSPECTIVE ON PUNISHMENT* 133, 144-45 (S. Armstrong & L. McAra eds., 2005). Inside the country, state governments that provide more generous welfare benefits also have lower incarceration rates, while those with less generous welfare programs have higher incarceration rates. Katherine Beckett & Bruce Western, *Governing Social Marginality: Welfare, Incarceration and the Transformation of State Policy*, 3 *PUNISHMENT & SOC’Y*. 1, 43, 47 (2001). See also Amy E. Lerman & Vesla Weaver, *The Carceral State and American Political Development*, in *THE OXFORD HANDBOOK OF AMERICAN POLITICAL DEVELOPMENT* (Robert Lieberman et al. eds., 2015) (affirming that the United States has developed an exceptionally small - or private - welfare state, which is correlated with the trajectory of punishment and policing). The numbers confirm that the reduction of the U.S. budget allocated to social assistance was inversely proportional to the increase in the budget for security purposes. Bratton in New York increased its police budget by 40% over five years, bringing the number of local police to 12,000. In the same period, social services suffered an amputation of one-third of their loans and 8,000 jobs were lost. LÓIC WACQUANT, *PUNISHING THE POOR: THE NEOLIBERAL GOVERNMENT OF SOCIAL INSECURITY* 31 (2009).

<sup>54</sup> ESTEBAN RODRÍGUEZ, *VIDA LUMPEN BESTIARIO DE LA MULTITUD* (2008).

<sup>55</sup> WACQUANT, *supra* note 53.

<sup>56</sup> ROBERT CASTEL, *LA INSEGURIDAD SOCIAL. ¿QUÉ ES ESTAR PROTEGIDO?* 73 (2003).

replaced by governance strategies to contain and segregate those left over<sup>57</sup> and, through them, the penal system survived as an instrument of class terror.<sup>58</sup>

Far from being an exclusive response to criminal unrest, this punitive transformation was a response to social insecurity generated by the increasing precariousness of wage labor.<sup>59</sup> The criminal justice system worked as support for social control to contain poverty. Clear evidence of this use of criminal control is that, although an increase in crime rates initially fueled crime control, most of the tough-on-crime policies were implemented when crime rates were already stable or even lower than before.<sup>60</sup> Additionally, drug offenses were overwhelmingly expanded at the federal level under propaganda coverage of a “war on drugs,” despite the fact that this war was announced *before* crack became an issue in the media or a crisis in poor black neighborhoods.<sup>61</sup> So, is there a direct relationship between economic surplus and crime control? As initially noted by Rusche and Kirchheimer, and other authors,<sup>62</sup> there is a close nexus between unemployment rates and the exercise of crime control.

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<sup>57</sup> ROBERT CASTEL, FROM MANUAL WORKERS TO WAGE LABORERS: TRANSFORMATION OF THE SOCIAL QUESTION (2003). In numbers, “the United States spends over \$80 billion on incarceration each year, while local state and federal governments spend anywhere from \$20,000 to \$50,000 annually to keep an individual behind bars.” ACLU, *supra* note 5. Kaaryn Gustafson, *The Criminalization of Poverty*, 99 THE J. CRIM. L. & CRIMINOLOGY 643, 644-60 (2009) (conversely, since 1967 and especially since 1988, ‘Aid to Families with Dependent Children’ (A.F.D.C.) (the largest subsidy program for families) went from \$854 in 1969 (in 2001 dollars) to \$ 456 in 2001).

<sup>58</sup> MASSIMO PAVARINI, CONTROL Y DOMINACIÓN: TEORÍAS CRIMINOLÓGICAS BURGUESAS Y PROYECTO HEGEMÓNICO 87 (2003).

<sup>59</sup> WACQUANT, *supra* note 53.

<sup>60</sup> Garland explains that since 1996 crime rates have decreased in all Western Societies, and not just particularly in the United States. Garland, *supra* note 5. Indeed, in Britain, crime rates also fell, imposing a high level of concern and prosecution for less severe violations. Jock Young, *Entrevista*, 33 DELITO Y SOCIEDAD 21 (2012). Also, while crime in New York has been declining since 1992, the number of people arrested and convicted kept on increasing. Lóic Wacquant, *supra* note 53, at 39. For example, in 1998, the 77 judges of the criminal courts of New York that exercise jurisdiction over offenses and minor infractions attended 275,379 cases, or more than 3,500 each, twice the amount of cases than in 1993. The average delay was 284 days per case (against 208 in 1991), even for trivial cases such as a simple shoplifting. Another argument that show that crime rates and incarceration are not necessarily related is that although the incidence of crime victimization (outside homicidal violence) in Canada is similar to the United States, the incarceration rate in Canada has stagnated at around 110 prisoners per 100,000 inhabitants, in comparison with 740 per 100,000 in the United States. Lóic Wacquant, *Foreword to The Globalization of Supermax Prisons* (Jeffrey Ian Ross ed., 2013).

<sup>61</sup> This ‘war’ operated as “a stunningly comprehensive and well-disguised system of racialized social control” and not as a response to a drug problem. The aftermath result was leaving a drug epidemic in the hands of the criminal justice system, instead of the social and health assistance. ALEXANDER, *supra* note 5, at 12.

<sup>62</sup> Just to name some of them, Chiricos and Delone examined 44 empirical studies that confirm the importance of surplus labor in punishment increases. They also found that this process was often independent of crime rates, giving evidence that state criminal practices had a direct role in controlling surplus labor. Theodore Chiricos & Miriam Delone, *Labor Surplus and Punishment, A Review and Assessment of Theory and Evidence*, 39 SOCIAL PROBLEMS 421, 432 (1992). Box and Hale confirm the same trend in England. Steven Box & Chris Hale, *Economic Crisis and the Rising Prisoner Population in England and Wales*, 17 CRIME AND SOCIAL JUSTICE 20 (1982). On the contrary, Jankovic could not prove Rusche and Kirchheimer's hypothesis of an immediate effect of increased incarceration on unemployment rates, as prison population is numerically depreciable in connection with the numbers of the unemployed population. Ivan Jankovic, *Labor Market and Imprisonment*, in PUNISHMENT AND PENAL DISCIPLINE (Tony Platt and Paul Takagi eds., 1980). The only exception against it could be the United States, where incarceration rates are so high, particularly since the 1970s, that they have influenced statistics, by hiding part of the unemployed population: incarceration decreased by two points U.S. unemployment rates. LOÏC WACQUANT, PRISONS OF POVERTY 103 (1999). About the African-American population, if prisoners were included in the unemployment statistics, unemployment would reach seven percent. DE GIORGI, *supra* note 3, at 77-8. Of course, prison hypertrophy is a double-edged mechanism: while in the short-term, it beautifies the employment situation by cutting labor supply, in the long term it aggravates it, making millions of people less than unemployable. See WACQUANT, PRISONS OF POVERTY, at 103.

Although this connection is not unequivocal, the government could have addressed the surplus population by developing more comprehensive social programs oriented to their support and control (as occurred during Roosevelt's welfare period). Simon suggests that social control could have been conducted through empowerment of labor unions, environmentalism and the civil rights movement.<sup>63</sup> The government could have even resorted to medical devices, pathologizing poverty and expanding the scope of the asylums to include the poor (as it happened in the late 19<sup>th</sup> century and beginning of the 20<sup>th</sup> century). However, the surplus population (mostly composed of the poor and racial minorities) was addressed by the criminal justice system because welfare policies were restricted and the labor market shrank. In addition, cultural, social, institutional and political variables also conditioned the use of crime control to manage the surplus population.

At a cultural level, overwhelming use of punitive tools responded to the emergence of a new culture of control. As Garland exposes, underlying the debate about crime and punishment, there was a fundamental shift in the interests and sensibilities of the public, highly charged by emotions of fear, resentment and hostility. Televised images of urban race riots, violent civil rights struggle, anti-war demonstrations, political assassinations and worsening street crime reshaped the attitudes of the middle-class U.S. public.<sup>64</sup> The experience of the public was that experts (such as judges and parole boards) were not doing a good job because crime was increasing. While 80 to 90% of people were not re-offending, public tolerance for any new risk waned significantly.<sup>65</sup> Welfare policies for the poor were represented as an expensive luxury, while penal-welfare measures for offenders were depicted as absurdly indulgent and self-defeating.<sup>66</sup> Thus, a new "morality" emerged, becoming a fertile input for "law and order" campaigns.<sup>67</sup> When public policies abandoned the goal of rehabilitation, the new morality became exacerbated, encouraging a generalized and defensive cultural attitude.<sup>68</sup> Indeed, there have been rising levels of punitiveness from the mid-1960s into the 1990s,<sup>69</sup> and support for being "tough on crime" explains over 30% of the changes in the incarceration rate.<sup>70</sup> The public's rising punitiveness appears to be a fundamental determinant of the incarceration rate, mediating the relationship between the latter and the crime rate.

With respect to social and institutional components, states with lower levels of trust in individuals, and lower levels of distrust in the criminal justice system, show to have higher incarceration rates. Moreover, these levels of trust have decreased since the 1980s.<sup>71</sup> To further this reasoning, the fact that a part of the population has not protested against the reduction of welfare, which left the lower-classes unprotected, constitutes an expression of low levels of solidarity and social commitment. Acceptance of a lack of social assistance to their fellow citizen inculcates a culture of individualism in which people do not think that they have an obligation to the other. An explanation of this can be found in the majority of the population's belief of the American Dream: everything is

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<sup>63</sup> SIMON, *supra* note 3, at 26-29.

<sup>64</sup> GARLAND, *supra* note 50.

<sup>65</sup> William Stuntz, *The Rise and Fall of Crime; The Rise and Fall of Punishment*, in *THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE* 244-281 (2011).

<sup>66</sup> GARLAND, *supra* note 50.

<sup>67</sup> DE GIORGI, *supra* note 3, at 84.

<sup>68</sup> CASTEL, *supra* note 1995, at 6.

<sup>69</sup> Enns, *supra* note, at 862.

<sup>70</sup> *Id.* at 865.

<sup>71</sup> Tapio Lappi-Seppälä, *American Exceptionalism and Penal Severity Elsewhere in the Industrialized World* presented at the 2nd Annual Robina Institute Conference (Apr. 23, 2013), [https://wn.com/american\\_exceptionalism\\_and\\_penal\\_severity\\_elsewhere\\_in\\_the\\_industrialized\\_world](https://wn.com/american_exceptionalism_and_penal_severity_elsewhere_in_the_industrialized_world).

possible if you “work hard and play fair.” As getting what you want only requires true effort,<sup>72</sup> it is understandable that housing, education or healthcare are not universally available but only granted to those people who work hard to succeed in the market. This equation leads to the characterization of recipients of social assistance as “lazy.” By the same logic, if it is tolerable that “good citizens” lack basic rights because they did not put in enough effort to deserve them, the burden is double for those who break the social contract: they must be punished. This reasoning reduces failure to a wholly individual explanation, without connection to structural barriers. Indeed, the reduction of the welfare state rises on the same basis than the prior development of the welfare state. In both, social and criminal outbreaks are explained as being individually-based and voluntarily chosen – as integration difficulties likely to be addressed by welfare policies; and as laziness that post-welfare state must discourage.

Within the political order, social discontent encouraged right-wing realignments and tougher approaches to social problems in response to the perceived crisis of the welfare state. Presidents Reagan, Bush and Clinton (1981-2000) conducted these policies through a governance technique that consists of “governing through crime,” by raising the fear of crime to the level of a hegemonic concern. Thus, crime became the core of governance.<sup>73</sup>

Overall, since the 1970s, drastic economic changes and the undermining of welfare, accompanied by cultural, social, institutional and political variables nurtured an expansion of the criminal justice system, over-criminalizing the poor in order to exercise social control over them.

When analyzing racial issues, it can be upheld that the 1970s were for race what the 18<sup>th</sup> century Enlightenment was for class.<sup>74</sup> More than two centuries must be transited to achieve a similar progress

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<sup>72</sup> However, studies show that the American Dream is just that, a dream. Indeed, if you are born in poverty in America, you are likely to stay there. A Harvard and California-Berkeley study examined how often children born into families in the bottom fifth of the income scale make it the top fifth. The results show that in the most economically mobile cities in America, Salt Lake and San Francisco, barely more than 1 in 10 children will escape poverty. In some places like Atlanta, it's only 1 in 25. Raj Chetty et al., *Childhood Environment and Gender Gaps in Adulthood*, in NATIONAL BUREAU OF ECONOMIC RESEARCH WORKING PAPER SERIES (Jan. 2016), [http://www.equality-of-opportunity.org/assets/documents/gender\\_paper.pdf](http://www.equality-of-opportunity.org/assets/documents/gender_paper.pdf). Education is often touted as the way out of poverty, but U.S. students mostly attend neighborhood public schools funded heavily by property taxes, so if you're born in a low-income area, your school is often subpar. Although education is pointed out as a key element to achieving the American Dream, studies show that a quarter of black students attend ‘dropout factories,’ which are high schools where close to half (or more) of the students aren't graduating in four years. Even high-achieving poor students rarely applied to top schools. *Building a Grad Nation Report 2016*, AMERICA'S PROMISE ALLIANCE (2016), <http://www.americaspromise.org/building-grad-nation-report>.

<sup>73</sup> JONATHAN SIMON, *GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR* (2009)

<sup>74</sup> The 18<sup>th</sup>-century-Enlightenment was the historic breaking point in which social status stop being a valid factor to differentiate criminalization and punishment in the letter of the law. From then on, all individuals became formally equal under the law and punishment became consistent with every crime in the abstract, without making distinctions based on the socio-economic standard of the offender. The key point was that both the citizen and the noble should receive the same sentence when they had committed the same offense. Convictions have to be based on the seriousness of the offense, and not on the status of the perpetrator, or the discretion of the judge. See THOMAS MATHIESEN, *PRISON ON TRIAL 180* (2000). Class selectivity became, then, slightly less explicit in the process of criminalization: as it was not possible anymore to differentiate offenses and punishments according to the *socio-economic status of the individual*, criminal selectivity started to differently operate about *behaviors associated with certain socio-economic subsets of the population*. At the level of primary criminalization, those behaviors that were usually associated with the higher classes became limited legislated. Those behaviors that were committed by the lower classes became increasingly accepted in the law. However, the most important change was that criminal selectivity started to operate with greater intensity at the level of secondary criminalization, i.e., at the time of effective enforcement of the law. In other words, the core of criminal selectivity survived in the everyday application of the laws to distinctive social subsets.



than the one obtained in terms of class, but with regard to race. The 1970s' *racial enlightenment* can be understood as a *formal* breaking point to understand the relations between race and criminal justice. Jim Crow Laws in many parts of the United States imposed a strict color line to govern all aspects of life which only seriously began to break down in 1965. The color line included the most central and important ones, such as public education (segregated throughout the South) and marriage (interracial unions were criminalized in Southern states), and also the most mundane and tedious ones (e.g. different fountains in restaurants, stores, parks and public places).<sup>75</sup> With the end of Jim Crow Laws, Whites and Blacks were considered *formally* equals under the law for the first time (although the Fourteenth Amendment gave all persons equal protection in front of the law in 1868, this achievement was neglected by the following sanction of Jim Crow legislation).

Since the end of Jim Crow, racial selectivity could not be explicit in the letter of the law anymore. This does not mean that race-based criminal selectivity disappeared, but it had to adapt to the formal equality prescribed by the law. Therefore, over-criminalization of communities of color began to operate in a very different manner than in the previous periods of U.S. history. From then on, racially-oriented criminal selectivity stopped regulating behaviors as offenses depending on the *race of the perpetrator or the victim* and adopted a more surreptitious modality. Race-based selectivity began to take place through the unequal regulation of the *behaviors usually associated to one and another race* (primary over-criminalization). An obvious example is the above mentioned "100-to-1 Law" (1986), which set out harsher punishment for behaviors associated with Black-Americans.

The racial Enlightenment period also transformed secondary criminalization, in a striking parallel with the 18<sup>th</sup> century Enlightenment. The latter fostered the equal recognition of individuals in terms of class in the letter of the law, and, therefore, criminal selectivity became more clear at the level of law enforcement. Laws stopped prescribing differences according to social status and started to be discretionally *enforced* against the poorest subsets of the population. Accordingly, the Amendments to the Constitution brought racial equality in the letter of the law. Therefore, since Jim Crow, criminal selectivity began to operate with greater intensity at the level of secondary criminalization. This means that, from then on, racial selectivity specifically operated through the activity of law enforcement, the judiciary, correctional officers, parole boards and bureaucrats (secondary over-criminalization agencies), who targeted Black-Americans under a colorblind appearance in harmony with the racial Enlightenment. In short, colorblind laws were particularly *enforced* to the detriment of people of color.

Overall, racial Enlightenment implicated a breaking point in terms of racial equality recognition at the formal level. As introduced earlier, racial bias is still an essential character of the functioning of the U.S. criminal justice system, although it is not as obvious in the letter of the law anymore. This means that the formal achievement of racial equality in criminal law also hides a sensible aspect: there is an inversion of the burden of proof, consisting of pushing over-criminalized communities of color to show that even though they are the most criminalized group, they are not the most serious or biggest subset of offenders in the country.<sup>76</sup>

Finally, racial Enlightenment changed the interrelation between race and class. Jim Crow laws made no exception based on class and, conversely, they tried to impose the idea that no matter how

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<sup>75</sup> LÓIC WACQUANT, *From Slavery to Incarceration: Rethinking Incarceration in the U.S.*, 13 NEW LEFT REVIEW 41 (2012).

<sup>76</sup> Actuarial criminology helps confirm the perception that the overrepresentation of communities of color in prisons is a real over-representation of them in the crime rates: the detainee - and, in particular, the African-American detainee - is the offender. RENÉ VAN SWAANINGEN, *PERSPECTIVAS EUROPEAS PARA UNA CRIMINOLOGÍA CRÍTICA* 291 (2011). In other words, far from illuminating how criminal selectivity operates, actuarial criminology reinforces that the enclosed Black-American population effectively represents the real offenders.

educated, wealthy or respectable Black-Americans might be, it did nothing to entitle them to equal treatment with the poorest Whites.<sup>77</sup> The end of this explicitly racially unequal legislation brought up new perceptions of race and class. Not all Black-Americans became equally criminalized. The criminal justice system started to particularly target a select subset: the young, under-educated and under-employed Black-American males. This subset was mostly situated in a specific area of the U.S. geography. Migration of Black-Americans to Northern and Mid-Western cities from 1915 to 1968 prompted many White city residents to move away, which condemned Black-Americans to confined ghettos. These ghettos were a resource of Black labor for the Fordism system demands and a space of informal control and solidarity networks for their members. However, with the end of the Fordism and the economic crisis, the 1970s racial Enlightenment fostered a transformation of the ghettos into hyper-ghettos, as they became areas of absolute socio-economic exclusion, where the majority of the population lacked any form of formal income, and where the nets of solidarity disappeared. The people of the hyper-ghetto became demonized, and the demands for greater control over them increased. The pipeline from hyper-ghetto to prison became the rule for young unemployed and under-educated Black-American males, particularly through the self-legitimizing secondary over-criminalization mechanism, which amalgamates this subset with the real and harder offenders.<sup>78</sup>

#### 4. Criminal Selectivity and Over-Criminalization

Having acknowledged that the 1970s was a pivotal decade regarding class and race legal bias in the United States, the following will inquire how criminal selectivity has been operating from then on.

This analysis requires exploring the mechanisms of primary and secondary over-criminalization. Further research is required to explore the mechanism of under-criminalization, and the functioning of crime control in earlier U.S. criminal justice history.<sup>79</sup>

##### 4.1. Primary Over-Criminalization

At the level of primary over-criminalization, the 1970s punitive transformation rested on a triple phenomenon: an expansion of criminal provisions and their punishment, a transformation of the welfare system, and a toughening of criminal procedures. Combined, these changes increased the over-criminalization of the poor and people of color.

In terms of expansion of criminal provisions, the “war on drugs” fostered the imprisonment of Black-Americans, despite self-reported polls demonstrating that, with the exception of crack cocaine, Whites consume and ingest drugs at a rate three to five times more than Black-Americans.<sup>80</sup> By the end of the 20<sup>th</sup> century, while Black-Americans accounted for 13% of drug users (which corresponds to their demographic weight), three-quarters of them were imprisoned for drug offenses.<sup>81</sup> In fact, young Black men were more likely to go to prison than to college and, as an example, while only 992 Black men received a bachelor's degree from Illinois state universities in 1999, roughly 7,000 Black men were released from the state prison system the following year for drug offenses alone.<sup>82</sup> In short,

<sup>77</sup> Wacquant, *supra* note 75, at 46.

<sup>78</sup> WACQUANT, *supra* note 62, at 104.

<sup>79</sup> See generally VEGH WEIS, *supra* note 7.

<sup>80</sup> *Id.*

<sup>81</sup> WACQUANT, *supra* note 62, at 101.

<sup>82</sup> ALEXANDER, *supra* note 5, at 184-5.

the “war on drugs” is more dependent on law enforcement profiling than on actual crime rates, and it has changed the criminal justice system's demography. Drug crimes make offenders particularly sensitive to law enforcement profiling because these types of offenses do not need to be triggered by a victim denouncement in the way that violent crimes do. In terms of class, possession of drugs mostly consumed by middle and upper classes, such as synthetic drugs, constitutes only 3.3 % of total arrests nationwide between 1982 and 1997.<sup>83</sup> In 2015, the percentage of total arrests nationwide was 5.1%.<sup>84</sup> Regarding crime severity, of the 1,488,707 arrests for drug law violations in 2015, 83.9% (1,249,025) were for possession of a controlled substance, whereas only 16.1% (239,682) were for the sale or manufacturing of drugs.<sup>85</sup>

Besides the “war on drugs,” the broader “war on crime” has included the rising of many other criminal provisions, fostering the over-criminalization of the poor and communities of color. In terms of race, the sanction of mandatory minimums<sup>86</sup> particularly affected violent and gun crimes for which Blacks are more likely than Whites to be arrested and prosecuted.<sup>87</sup> Breaches of immigration regulations, which mostly affect Latinos, became increasingly regulated through criminal provisions, including dispositions of internment in expulsion centers or detention centers for migrants. With regard to class, severe behaviors such as domestic and gender violence went beyond the private sphere and became public policy issues, raising the criminalization of low-income families who are unable to settle these disputes through private counseling or safety nets of contention.<sup>88</sup> Finally, states expanded the criminal treatment of status-based behaviors such as hawking, misuse of public space, the occupation of public roads, encroachments, car care without legal authorization, prostitution, vagrancy, drinking alcohol in public, loitering, panhandling, playing loud music, marijuana possession and sleeping on the subway, among other surviving strategies of the poor, promoting their over-criminalization.

The criminalization of drugs, domestic violence, immigration and informal activities suggest that the state's failure to provide health and social rights, far from being treated as a crime<sup>89</sup> (or even challenged) was translated into the over-criminalization of the individuals whose rights have been neglected. Indeed, it is possible to describe this process as a transformation of the fundamental and unsatisfied rights of the population into crimes, or, in other words, the over-criminalization of

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<sup>83</sup> Tina L. Dorsey, *Drugs and Crime Facts*, U.S. Department of Justice Office of Justice Programs BUREAU OF JUSTICE STATISTICS, <https://www.bjs.gov/content/pub/pdf/DCF.pdf>.

<sup>84</sup> *Crime, Arrests, and US Law Enforcement*, GET THE FACTS DRUGWARFACTS.ORG, <http://www.drugwarfacts.org/cms/Crime#sthash.Tt8SQ4dL.dpbs>.

<sup>85</sup> *Id.*

<sup>86</sup> States incorporated statutes requiring offenders to be sentenced to a minimum specified amount of prison time, as part of a withdrawal of trust in decision-making by judicial actors or parole boards, and a stronger trust in the political sphere to decide a ‘fair’ punishment. Mandatory minimums involve the abandonment of individualization as a requirement for punishment imposition because they establish fixed sentences about the committed offense. It is notable that the growth of incarceration at the federal level in the United States has been attributed to the increased number of federal crimes subjected to mandatory minimum sentences.

<sup>87</sup> TONRY, *supra* note 3, at 67.

<sup>88</sup> Without ignoring that the latter is delicate and seriously problematic, these laws are applied in a selective manner that over-criminalize the impoverished sectors involved in those situations, while the included people might resolve them through mental health assistance in the private sphere. A punitive approach to domestic and gender violence is not likely to improve the situation of victims, but mostly constitutes a new form of criminal selectivity. In this sense, it is enriching resort to the concept of a ‘Pyrrhic victory.’ Willis uses it to describe how young working class creates a myogenic and vigorous culture to protect themselves from the humiliation of being economically excluded and how this culture harms their interest. YOUNG, *supra* note 49, at 84. It is possible to add that these features facilitate the over-criminalization of these sectors through the creation of new offenses that persecute the violent culture.

<sup>89</sup> For example, if a public servant in charge of social security fails to provide help to individuals that lack basic support, that action could be treated as a crime of omission, such as not affording help or assistance to a helpless person.

individuals precariously seeking to meet their basic needs through informal means. Belonging to the targeted class and racial subsets makes them a privileged flank of criminal legislation, awarding “criminal” character to behaviors that were once addressed through health care, therapeutic or administrative services.

Concerning the absorption of social assistance from a criminal perspective, it formed what may be called *punitive welfare*. Accordingly, increased parts of the population had to request social assistance, while public resources for these provisions shrank and, in the rare cases where social support was still provided, it linked its recipients with crime control. Punitive welfare relies on two mechanisms; the first one refers to the imposition of criminal consequences for non-compliance with obligations or administrative requirements imposed within social assistance.<sup>90</sup> Murray, as an exponent of the demands for welfare transformation, notes that it was necessary to prevent the poor to live at “our” expense, and bury the welfare state, to save society from the underclass who was causing social ruin and moral desolation.<sup>91</sup> The challenge was to overcome the “passivity” of the poor, and particularly Black-Americans, through labor discipline and authoritarian remodeling of their dysfunctional “lifestyle.” Thus, a reverse of the innocence principle took shape. Individuals demanding social assistance were the ones obliged to prove they were not simply lazy and that they sincerely needed and deserved help. For those who succeeded in this undertaking, they had to follow strictly regulated obligations in return for the provided help.<sup>92</sup>

The second mechanism of punitive welfare was based on the consideration of the criminal justice system as a latent and constant threat in the everyday life of the assisted. It was cemented in the discourses of the 1990s, characterizing social assistance bearers as criminals. It was intolerable that public resources were used for people who were not only lazy, but criminals. Investigations of possible fraud increased and urged the analysis of the criminal background of applicants as a requirement for granting aid.<sup>93</sup> Those convicted of crimes related to drugs were banned from receiving aid in their

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<sup>90</sup> This mechanism has its origin in the break with, and mistrust of, social support. Public and authorities claimed that welfare state had failed because its aid programs were too ‘permissive’ and imposed no strict obligations on the conduct of its beneficiaries. President Reagan categorized the assisted population as ‘welfare queens’: the image of the widespread and criminal depravity among low-income women of color. The stigmatizing effects reverberated such that, by 1984, two-thirds of adults living below the poverty line were female and single mothers were five times more likely to live in poverty than two-parent families. Gustafson, *supra* note 57, at 653-58.

<sup>91</sup> WACQUANT, *supra* note 62, at 42.

<sup>92</sup> The new social paradigm is ‘compensatory’ as it is no longer free but requires return duties. In a later work. The concept of ‘workfare’ designates the public assistance programs that condition the acceptance of low-wage jobs by the potential assisted population, or their engagement in unpaid activities under the promise of future employment, such as training or internships. *Id.* at 45. Also, the A.F.D.C. lost its character of federal law and introduced an income qualification through another federal program known as ‘Temporary Assistance for Needy Families.’ This Program includes the obligation to follow rules of behavior and report all details of income and household composition. Failing to comply with these requirements after receiving the benefit includes penalties and exclusion from the program, often permanently. Gustafson, *supra* note 57.

<sup>93</sup> In the United States in 1993, twenty states had established fraud investigation units as a pre-condition of eligibility, including interviews with family, friends, neighbors, employees and owners of the housing of applicants. To illustrate, in the case of California, the assisted population have to inform about their criminal records, report on their partner status, immunize their children, and refrain from consuming drugs. The financial information provided is contrasted with the free access to multiple databases and personal information (along with photograph and fingerprints) available for any public official. In 1997, the County of San Diego, California, established a program that subjects assisted people to home visits without notice, directed by a fraud investigator that can present criminal evidence against the petitioner. At the federal level, the ‘Personal Responsibility and Work Opportunity Reconciliation Act’ (1996) imposed severe measures to control fraud. Gustafson, *supra* note 57, at 659-60.

lifetime. They became excluded from their right to receive assistance as individuals, although their crimes did not affect others' rights but supra-individual interests such as public health.<sup>94</sup> The ones who passed the background check and received assistance became exposed to a permanent control by the social care agencies. This includes extreme situations such as phone calling fugitives and inviting them to pick up food stamps for the purpose of capturing them, making the punitive welfare an extension of the criminal justice system, and transforming the welfare system into a trap for hungry violators of the law.<sup>95</sup>

Finally, primary over-criminalization involved stiffer punishments and the introduction of more rigorous procedural mechanisms through different institutions grounded in the U.S. abandonment of rehabilitation as the goal of punishment, as contrasted with the European law, which still preserves this paradigm.<sup>96</sup> These institutions include sentencing guidelines, truth in sentencing, life-without-parole and harsher regulations such as the notorious "Three Strikes And You Are Out" policy. The discretionary application of the Federal Sentencing Guidelines<sup>97</sup> and truth in sentencing schemes<sup>98</sup> allows discriminatory application of departures, facilitating the disparate charging decisions by prosecutors of different districts (while no offender was charged with mandatory minimums in some districts, as much as 75% received it in other districts). This discretion is highly characterized by racial inequality, increasing the criminalization of Black-Americans and Hispanics.<sup>99</sup> Life-without-parole

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<sup>94</sup> In 15 U.S. states, any charges related to drug offenses - including possession of small quantities - is sufficient for lifetime disqualification from public assistance. As a result, approximately 92,000 adults were excluded from the welfare rolls between 1997 and 2002. *Id.* at 671-72. Moreover, the 'Fugitive Felon Prohibitions' (1996) prohibits those who have an arrest warrant or those who violate the terms of probation or parole from receiving any social assistance. Based on this legislation, the General Accounting Office reported that in 2002 110,000 people were identified as fugitives. *Id.* at 665.

<sup>95</sup> This program, entitled 'Talon Operation,' was created to expedite the implementation of outstanding warrant, enable the offices that provide food stamps to conduct covert operations to arrest fugitives, citing them under the guise of providing a benefit. *Id.* at 667-69. Between early 1997 and September 2006, this mechanism led to the arrest of 10,980 people across the United States: 31% were for misdemeanors such as turning dud checks. *Id.* at 668-70.

<sup>96</sup> Ram Subramanian & Alison Shames, *Sentencing and Prison Practice in Germany and the Netherlands: Implication for the United States*, VERA INSTITUTE (Oct. 2013), <http://archive.vera.org/sites/default/files/resources/downloads/european-american-prison-report-v3.pdf>.

<sup>97</sup> The U.S. passage from indeterminate to determinate sentences was aimed at ensuring uniformity in sentencing, responding to demands that came from conservative and liberal positions. On the one hand, liberal critics argued that indeterminate sentencing was discriminatory and biased because most of the people released sooner by the parole board were white middle class. On the other hand, conservatives also alleged that indeterminate sentences were inappropriate because they were soft on crime and unfair because people did not serve the time that their sentence was established. Then, states introduced fixed prison terms - which could be reduced by good time or earned-time credits - and sentencing guidelines - states established sentencing commissions and created ranges of sentences for given offenses and offender characteristics. Some states set 'presumptive guidelines' (the judge could decide something different from the guidelines, and they can be appealed) and some others gave 'strict guidelines' (the judge could not decide something different from them). At the Federal level, since *United States v. Booker*, the guidelines are applied as advisory. 543 U.S. 220 (2005)..

<sup>98</sup> They were first enacted in 1984, and they made it mandatory to serve a substantial portion of the sentence - generally, 85% of the years and month that the judge imposed in the sentencings, while parole eligibility and good-time credits were restricted or eliminated. Their emergence had to do with claims from the public and the representatives that understood that it was a scandal that offenders were charged with long sentences but only served a short period. To promote and extend the truth in sentencing schemes, the U.S. Congress passed the Violent Offender Incarceration and Truth-in-Sentencing Incentive Grants Program in 1994. This program gave grants to build or expand correctional facilities only to those states could demonstrate that the average time served in prison was not less than 85% of the sentence. Paula M. Ditton et al., *Truth in Sentencing in State Prisons*, BUREAU OF JUSTICE STATISTICS SPECIAL REPORT (Jan. 1999), <http://bjs.gov/content/pub/pdf/tssp.pdf>.

<sup>99</sup> Judge Patti B. Saris, Statement for the Hearing on "Reevaluating the Effectiveness of Federal Mandatory Minimum Sentences" Before the Committee on the Judiciary United States Senate (Sept. 18, 2013), <http://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and->

sentences<sup>100</sup> do not concentrate on the most severe crimes, but on non-violent crimes committed by the poor. Across the country, defendants have been given life-without-parole for crimes like having a crack pipe, siphoning gasoline from a truck or even for shoplifting a \$159 jacket. An American Civil Liberties Union (ACLU) report found that 3,278 prisoners were serving life-without-parole sentences in 2012 for nonviolent crimes, of which 79% were convicted for drug crimes.<sup>101</sup> Regarding race, Black prisoners comprise 91.4% of the nonviolent life-without-parole sentences in Louisiana, despite the fact that “[B]lacks make up only about one-third of the general population in the state.”<sup>102</sup> In other words, Blacks in Louisiana “were 23 times more likely than Whites to be sentenced to LWOP (life without parole) for a nonviolent crime.”<sup>103</sup> The sanction of the “Three Strikes And You Are Out” rule<sup>104</sup> was another key element that increased primary overcriminalization of the poor and people of color. Two years after this law was passed in California, statistics showed that Black-Americans were 13 times more likely to receive sentences of life without parole than their White peers.<sup>105</sup> In terms of class, the Three-Strikes rule did not focus on the triple repetition of white collar or organized offenses. Instead, people are serving lifetime sentences for petty crimes like stealing a pair of socks, a slice of pizza or baby shoes.<sup>106</sup>

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reports/submissions/20130918\_SJC\_Mandatory\_Minimums.pdf. (“The rate with which these groups of offenders qualified for relief from mandatory minimum penalties varied greatly. Black offenders qualified for relief under the safety valve in 11.6 percent of cases in which a mandatory minimum penalty applied, compared to white offenders in 29.0 percent of cases, and Hispanic offenders in 42.9 percent. Because of this, although Black offenders in 2012 made up 26.3 percent of drug offenders convicted of an offense carrying a mandatory minimum penalty, they accounted for 35.2 percent of the drug offenders still subject to that mandatory minimum at sentencing”).

<sup>100</sup> This institution cannot be understood without referring to capital punishment. It is incontestable that death penalty involves a tiny number of cases of the entire criminal justice system. See *The Death Penalty in 2015: Year End Report*, DEATH PENALTY INFORMATION CENTER (2015), <http://deathpenaltyinfo.org/documents/2015YrEnd.pdf>. However, the notion that a person can be killed by the state has been symbolically relevant and has been working as a standard for other punishments. Even when life-without-parole consists on a punishment without the possibility of early release, appears as lenient in comparison with capital punishment (the lesser of evils). Moreover, far from operating as a replacement of death penalty, life without parole implicates an expansion of the criminal justice system: it increased from 12,453 people to 33,633 people from 1992 to 2003, while death row population grew 31% from 1992 to 2003, with many researchers concluding that “instead of saving lives, [it] toughens the sentencing of criminals who would not have received the death penalty under the sentencing structure beforehand.” CHARLES J. OGLETREE & AGUSTIN SARAT, *Introduction: Lives on the Line: From Capital Punishment to Life without Parole*, in LIFE WITHOUT PAROLE: AMERICA’S NEW DEATH PENALTY 1-24 (2012).

<sup>101</sup> *A Living Death: Life Without Parole For Nonviolent Offenses*, ACLU (Nov. 2013), <https://www.aclu.org/files/assets/111813-lwop-complete-report.pdf#page=4>.

<sup>102</sup> *Id.* at 6.

<sup>103</sup> *A Living Death: Life Without Parole For Nonviolent Offenses*, ACLU (Nov. 2013), <https://www.aclu.org/files/assets/111813-lwop-complete-report.pdf#page=4>.

<sup>104</sup> It establishes lifetime incarceration as a response to the commission of three consecutive crimes, regardless of their severity.

<sup>105</sup> Greg Krikorian, *More Blacks Imprisoned Under '3 Strikes,' Study Says*, L.A. TIMES (Mar. 5, 1996), [http://articles.latimes.com/1996-03-05/news/mn-43270\\_1\\_african-american-men](http://articles.latimes.com/1996-03-05/news/mn-43270_1_african-american-men).

<sup>106</sup> Matt Taibbi, *Cruel and Unusual Punishment: The Shame of Three Strikes Laws*, ROLLING STONE (Mar. 27, 2013), <http://www.rollingstone.com/politics/news/cruel-and-unusual-punishment-the-shame-of-three-strikes-laws-20130327>.

## 4.2. Secondary Over-Criminalization: Law Enforcement Profiling

Moving on to the analysis of secondary over-criminalization, law enforcement adjusts their practices not only regarding race but also in terms of class<sup>107</sup> gender<sup>108</sup> and age.<sup>109</sup> These subsets of the population with high levels of fragility and vulnerability, and fewer safety nets of contention, are more likely to be stalked by law enforcement. This is encouraged by “law and order” type policies, resulting in an exponential increase in the number of preventive agents in the public space, thus granting greater discretion to them, in line with the principles of the Broken Windows Theory.<sup>110</sup> By this logic, law enforcement polices the smallest acts of daily life and the most trivial behaviors with a “zero tolerance” policy. Of course, this “zero tolerance” policy does not involve the strict application of all laws (which would be impossible), but rather a highly discriminatory taxation against certain groups in particular areas.<sup>111</sup>

Despite the broad scope of law enforcement profiling, race is still the core of criminal selectivity at this level. Police primarily conduct operations in poor communities of color, and there is no meaningful check on their discretion.<sup>112</sup> Statistics also support this claim. Studies from the New York Special Police Unit, the Street Crime Unit, show that 63% of controlled individuals were Black-Americans when they only constituted a quarter of the population and four out of ten arrests lacked a clear justification. This Unit arrested more than 16 Black-Americans for every individual accused of a

<sup>107</sup> It is important to highlight that class is interconnected with race. Blacks, Latinos, and families headed by single mothers are far more likely to earn lower wages than average and live below the poverty line. Fletcher Michael, *Fifty Years After March on Washington, Economic Gap Between Blacks, Whites Persists*, THE WASHINGTON POST (Aug. 28, 2013), [https://www.washingtonpost.com/business/economy/50-years-after-the-march-the-economic-racial-gap-persists/2013/08/27/9081f012-0e66-11e3-8cdd-bcdc09410972\\_story.html](https://www.washingtonpost.com/business/economy/50-years-after-the-march-the-economic-racial-gap-persists/2013/08/27/9081f012-0e66-11e3-8cdd-bcdc09410972_story.html). Under the same logic, in 2010, Whites on average had two times the income of Blacks and Hispanics, but six times the wealth. Mary McKernan et al., *Transitioning In and Out of Poverty*, URBAN INSTITUTE (Sept. 10, 2009), <http://www.urban.org/research/publication/transitioning-and-out-poverty>.

<sup>108</sup> Males are more arrested than women, although the arrests of women increased nearly 12% from 1999 to 2008. Federal Bureau of Investigations, *Crime in the United States, 2008* (Sept. 2009). When gender mixes with class and race, studies show that women of color and low-income women are disproportionately affected by mandatory arrest policies for domestic violence. Of survivors in a New York City study who had been arrested along with their abusers (dual arrest cases) or arrested as a result of a complaint lodged by their abuser (retaliatory arrest cases), 66% were African American or Latina, 43% were living below the poverty line, and 19% percent were receiving public assistance at the time. INCITE-NATIONAL, *POLICE VIOLENCE & DOMESTIC VIOLENCE 38* (2016), *available at* <http://www.incite-national.org/>.

<sup>109</sup> Police focus investigatory stops on younger people, and so as people grow older they are less likely to be stopped in this way. However, class is still a key factor: a black man must reach fifty—well into the graying years—before his risk of an investigatory stop drops below that of a white man under age twenty-five. Charles Epp & Steven Maynard-Moody, *Driving While Black*, WASH. MONTHLY (Jan./Feb. 2014), *available at* <http://washingtonmonthly.com/magazine/janfeb-2014/driving-while-black/>.

<sup>110</sup> The authors of the ‘broken windows theory’ explain that situational crime policies should focus on the deterioration of urban areas. They sustain that, if degradation is allowed, greater opportunities are given to offenders to act with less risk; this promotes the feeling of insecurity in the population, which renews the cycle. An opposite effect can be achieved by maintaining the urban space since in non-deteriorated areas offenders shall not dare to act so efficiently, and citizens can regain that space for themselves. James Wilson & George Kelling, *Broken Windows. The Police and Neighborhood Safety*, THE ATLANTIC MONTHLY 3, 29-38 (1982). They also say that the actions that must be avoided are those that involved risky situations in which “scruffy, obstreperous or unpredictable people engage beggars, drunks, addicts, rowdy teenagers, prostitutes, vagrants, mentally disturbed people.” *Id.* at 30.

<sup>111</sup> Wacquant wonders where is the ‘zero tolerance’ toward administrative crimes, commercial fraud, illegal pollution and violations against health and safety? It would be more accurate to describe forms of police activity carried out on behalf of ‘zero tolerance’ as strategies of selective intolerance. WACQUANT, *supra* note 62, at 17.

<sup>112</sup> ALEXANDER, *supra* note 5, at 180.

crime, compared to ten in the case of White people.<sup>113</sup> From 175,000 people in 1998 who were subjected to “stop and frisk,” Black-Americans accounted for half. An investigation by the *New York Daily News* suggested that about 80% of young Black-Americans and Latinos in the city were arrested and registered at least once in their life. The reasons registered to justify their arrests included crossing the street by disregarding the crosswalk, walking dogs off-leash or not having a bell on their bicycle.<sup>114</sup>

Concerning traffic stops, the ACLU of Illinois found that at 3 a.m., Black drivers in Minneapolis were two times more likely than White drivers to be pulled over and arrested for an active driving violation. However, at 2 p.m., when officers could better identify the driver’s race during daylight, Black drivers were nine times more likely to be stopped.<sup>115</sup> The ACLU’s research in traffic stops in Chicago confirms the same trends: Black drivers represent 46% of those stopped even though they are only 32% of the city population.<sup>116</sup> At the federal level, a Black driver is about 31% more likely to be pulled over than a White driver and about 23% more likely than a Hispanic driver. Additionally, Native American drivers are also more likely to be pulled over (15%). Moreover, Blacks are nearly twice as likely not to be given any reason for the traffic stop.<sup>117</sup> Once stopped, police officers are also more likely to use five categories of force (including Tasers and hand/body weapons) against Blacks.<sup>118</sup> In Oakland, Black-American men are more likely to be handcuffed (1 out of 4 times versus 1 out of 15 times for Whites), searched (1 in 5 times versus 1 in 20 times for Whites) and arrested (1 in every 6 for Blacks versus 1 in 14 for Whites).<sup>119</sup>

Overall, the number of traffic stops for people of color do not correlate with the number of people effectively committing a crime. Or, as one researcher, Hetey, says: “[w]e found a consistent and persistent pattern of racial disparity, even when we controlled for variables such as crime rate.”<sup>120</sup> Weapons and drugs were more often found on White New Yorkers during stops than on minorities.<sup>121</sup> Black youth are arrested for drug crimes at a rate ten times higher than Whites, even though they are less likely to use drugs and less likely to develop substance use disorders, compared to Whites, Native

<sup>113</sup> WACQUANT, *supra* note 62, at 15-16.

<sup>114</sup> *Id.* at 37-38.

<sup>115</sup> Taylor Gee, *Something Is Rotten in the State of Minnesota*, POLITICO (Jul. 16, 2016), <http://www.politico.com/magazine/story/2016/07/minnesota-race-inequality-philando-castile-214053>.

<sup>116</sup> ACLU ILLINOIS, CPD TRAFFIC STOPS AND RESULTING SEARCHES IN 2013 (Dec. 26, 2014), <http://www.aclu-il.org/cpd-traffic-stops-and-resulting-searches-in-2013/>.

<sup>117</sup> Lynn Langton & Matthew Durose, *Special Report: Police Behavior during Traffic and Street Stops*, 2011, U.S. DEPARTMENT OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, BUREAU OF JUSTICE STATISTICS, <http://www.bjs.gov/content/pub/pdf/pbtss11.pdf>.

<sup>118</sup> Phillip Goff et al., *The Science of Justice: Race, Arrests, and Police Use of Force*, UCLA CENTER FOR POLICING EQUITY (Aug. 2016), [http://policingequity.org/wp-content/uploads/2016/07/CPE\\_SoJ\\_Race-Arrests-UoF\\_2016-07-08-1130.pdf](http://policingequity.org/wp-content/uploads/2016/07/CPE_SoJ_Race-Arrests-UoF_2016-07-08-1130.pdf).

<sup>119</sup> Clifton B. Parker, *Stanford Big Data Study Finds Racial Disparities in Oakland, Calif., Police Behavior, Offers Solutions*, STANFORD NEWS, June 15, 2016, available at <http://news.stanford.edu/2016/06/15/stanford-big-data-study-finds-racial-disparities-oakland-calif-police-behavior-offers-solutions/>.

<sup>120</sup> SPARQ - Scientists Release Oakland Police Findings (2016), <https://sparq.stanford.edu/opd-reports>.

<sup>121</sup> Aviva Shen, *White People Stopped By New York Police Are More Likely To Have Guns Or Drugs Than Minorities*, THINK PROGRESS, May 22, 2013, available at <http://thinkprogress.org/justice/2013/05/22/2046451/white-people-stopped-by-new-york-police-are-more-likely-to-have-guns-or-drugs-than-minorities/> (describing that the likelihood that a stop of an African American New Yorker yielded a weapon was half that of white New Yorkers stopped. The N.Y.P.D. uncovered a weapon in one out every 49 stops of Whites, one of every 71 stops of Latinos and one in every 93 stops of African-Americans. The likelihood a stop of an African American New Yorker yielded contraband was one-third less than that of white New Yorkers stopped: one out every 43 stops of white New Yorkers; one out of every 57 stops of Latinos and one out of every 61 stops of African Americans).



Americans, Hispanics and people of mixed race.<sup>122</sup> The more extreme and painful version of this overdimensioned, racially-biased way of policing are police killings, which particularly affects communities of color.<sup>123</sup>

#### 4.2.b. Courts' Discretion

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<sup>122</sup> Maia Szalavitz, *Study: Whites More Likely to Abuse Drugs than Blacks*, TIM (Nov. 7, 2011), <http://healthland.time.com/2011/11/07/study-whites-more-likely-to-abuse-drugs-than-blacks/> (analyzing law enforcement performance about drug crimes and using data from 72,561 youth interviewed for the National Survey on Drug Use and Health). However, in the first eight months of 2014, African-American and Latino communities accounted for 86% of those arrested for marijuana possession in New York City. Joseph Goldstein, *Marijuana May Mean Ticket, Not Arrest*, in *New York City*, N. Y. TIMES (Nov. 9, 2014).

<sup>123</sup> See *supra* 6 and 7.

When analyzing judicial and prosecutorial performance, racial minorities and poor males are over-criminalized throughout the different instances of the judicial stage, from pretrial<sup>124</sup> to sentencing<sup>125</sup> and pertinence,<sup>126</sup> as well as length of prison time.<sup>127</sup>

<sup>124</sup> In terms of race, Spohn compares pretrial detention rates and sentences for black and white offenders convicted of drug trafficking offenses in three U.S. district courts, finding that Blacks had significantly higher odds of custody than Whites. Cassia Spohn, *Race, Sex, and Pretrial Detention in Federal Courts: Indirect Effects and Cumulative Disadvantage*, 57 UNIVERSITY OF KANSAS. REV. 879, 898 (2009). See also Stephen Demuth and Darrell Steffensmeier, *Ethnicity Effects on Sentencing Outcomes in Large Urban Courts: Comparisons among White, Black, and Hispanic Defendants*, 85 SOC. SCI. QUARTERLY (2004). Class plays with race against African Americans: Blacks 18 to 29 years-old pay more to get out of jail than Whites and Latinos. The problem is that the person may have had difficulty getting a job due to his race, and thus, was rated as a higher flight risk due to an unstable income. Pinto Nick, *Bail is Busted: How Jail Really Works*, THE VOICE, Apr. 25, 2012, available at <http://www.villagevoice.com/news/bail-is-busted-how-jail-really-works-6434704>. Deepening in the class analysis, studies show that the factors that determined whether the offender would be detained during pretrial respect the legislative prescriptions with the exception of financial resources (as measured by the type of attorney who represented the offender). *Id.* In New York City in 2008, nearly 17,000 people accused of no more than a misdemeanor couldn't make bail of \$1,000 or less. They averaged almost 16 days in jail. Most were accused of nonviolent crimes such as possession of marijuana or jumping a subway turnstile. HUMAN RIGHTS WATCH, *THE PRICE OF FREEDOM. BAIL AND PRETRIAL DETENTION OF LOW-INCOME NON-FELONY DEFENDANTS IN NEW YORK CITY* (2010), [https://www.hrw.org/sites/default/files/reports/us1210webwcover\\_0.pdf](https://www.hrw.org/sites/default/files/reports/us1210webwcover_0.pdf). The Bronx Defenders spun off a nonprofit called the Bronx Freedom Fund and, after raising around \$200,000, the fund began to pay for the defendants' bail. 93% of the fund's clients showed up for every single one of their subsequent court hearings—a return rate higher than that of defendants who post their bail or get commercial bail bonds. Pinto, *supra* note 121. Finally, regarding gender, male offenders were more likely than female offenders to be held in custody before the sentencing hearing. Spohn, *supra* note 121, at 898. Pretrial detention has drastic spillover effects that increase the burden of those that come from lower classes. More than half of the Bronx Freedom Fund's clients eventually saw their cases either completely dismissed or knocked down to some noncriminal disposition. None of them went back to jail on the charges for which they were bailed out. Without access to a bail fund, defendants in similar positions pleaded guilty to criminal charges 95% of the time. Pinto, *supra* note 121. This means that the 'spillover effects' of this disproportionate pretrial detention rates includes effects on conviction and sentencing. Offenders who were in custody at the time of the sentencing hearing received sentences that averaged eight months longer than those who were not detained before the hearing. Cassia Spohn, *Racial Disparities in Prosecution, Sentencing, and Punishment*, in THE OXFORD HANDBOOK OF ETHNICITY, CRIME, AND IMMIGRATION (2014). People who are in the community are more likely to be able to help their defense lawyer to develop the facts needed to contest the case. Robert Lewis, *No Bail Money Keeps Poor People Behind Bars*, WNYC, (Sept. 19, 2013), <http://www.wnyc.org/story/bail-keeps-poor-people-behind-bars/>. According to Tim Murray: "Studies going back as far as the 1960s show that defendants who are held pretrial are offered harsher plea offers than similarly situated defendants who are out on bail." Sadhbh Walshe, *America's Bail System: One Law for The Rich, Another for Poor*, THE GUARDIAN, (Feb. 14, 2013), <https://www.theguardian.com/commentisfree/2013/feb/14/america-bail-system-law-rich-poor>.

<sup>125</sup> Racially speaking, the race of the victim plays a major role in charging and sentencing decisions in capital cases. Those who victimize Whites—and especially racial minorities who victimize Whites—are more likely to be accused of capital crimes, to proceed to trial before death-qualified juries, and to be sentenced to death. particularly those who are young and male—pay a "punishment penalty" in both state and federal courts. Also, there is convincing evidence that Blacks and Hispanics are more likely than similarly situated Whites to be sentenced to prison, and, among offenders prosecuted in federal courts, receive longer sentences than Whites, especially for drug offenses. Yanick Charette & Koppen Vere van, *A Capture-Recapture Model to Estimate the Effects of Extra-Legal Disparities on Crime Funnel Selectivity and Punishment Avoidance*, SEC. J. (Nov. 2, 2015). When gender plays with race, male and black offenders are more likely to be punished. *Id.* Analyzing statewide sentencing outcomes in Pennsylvania for 1989–1992, studies show that (1) young black males are sentenced more harshly than any other group, (2) race is most influential in the sentencing of younger rather than older males, (3) the influence of offender's age on sentencing is greater among males than females, and (4) the main effects of race, gender, and age are more modest compared to the very significant differences in sentencing outcomes across certain age-race-gender combinations. Darrell Steffensmeier et al., *The Interaction of Race, Gender, and Age in Criminal Sentencing: The Punishment Cost of Being Young, Black, and Male*, 36 CRIMINOLOGY 4, Nov. 1998.

<sup>126</sup> In terms of prison times, Mustard examines 77,236 federal offenders sentenced under the Sentencing Reform Act of 1984 and concludes that Blacks and males are less likely to get no prison term when that option is available. David

This unfairness was particularly promoted by the elective character of prosecutors and judges, the extension of the plea bargain, the right-restrictive jurisprudence of the Supreme Court, and the racial composition and mentality of prosecutors, judges, juries and defense attorneys.

In other words, in those jurisdictions where prosecutors and judges face elections, they tend to follow the thoughts of the local community and the local donors to ensure their vacancies, which

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Mustard, *Racial, Ethnic, and Gender Disparities in Sentencing: Evidence. From the U.S. Federal Courts*, 44 J. L. & ECON. 285. In terms of gender, even though the female prison population is smaller than the male one, it has grown more emphatically: exactly, by 832% from 1977 to 2007, the male prison population increased 416% during the same period. West Heather & William Sabol, *Prisoners in 2007*, BUREAU OF JUST. STAT., (Dec. 2008). Property and drug crimes – non-violent offenses – make up nearly 2/3 of the population of women in prison West Heather & William Sabol, *Prison Inmates at Midyear 2008 – Statistical Tables*, BUREAU OF JUST. STAT. 11 (Mar. 2009). When combining race and gender, white women made up the majority of women in custody at 45.5%, black women account for 32.6% of incarcerated women and Hispanic women represent 16% of this population at midyear 2008. *Id.* at 17. 93 out of every 100,000 white women were incarcerated at midyear 2008. During the same time period, 349 out every 100,000 black women and 147 out of every 100,000 Hispanic women were incarcerated. *Id.* at 18.

<sup>127</sup> In terms of length of prison time and the influence of race, Everett and Wojtkiewicz find that African Americans, Hispanics, and Native Americans receive relatively harsher sentences than Whites and that these differentials are only partly explained by offense-related characteristics. Using data on white, black and hispanic male drug offenders sentenced in three U.S. district courts, Spohn and Sample find that fitting the stereotype of a dangerous federal drug offender (i.e., a male drug trafficker with a prior trafficking conviction who used a weapon to commit the current offense) affected the length of the prison sentence for black offenders but not for white or hispanic offenders. Cassia Spohn & Lisa L. Sample, *THE DANGEROUS DRUG OFFENDER IN FEDERAL COURT: INTERSECTIONS OF RACE, ETHNICITY, AND CULPABILITY, CRIME & DELINQUENCY* (2008). Further analysis revealed that this effect was confined to black offenders convicted of drug offenses involving crack cocaine. Ronald S. Everett & Roger Wojtkiewicz, *Difference, Disparity, and Race/Ethnic Bias in Federal Sentencing*, 18 J. QUANTITATIVE CRIMINOLOGY 2 (2008). A July 2009 report by the Sentencing Project found that two-thirds of the people in the US with life sentences are non-White. In New York, it is 83%. Bill Quigley, *Fourteen Examples of Racism in Criminal Justice System*, THE HUFFINGTON POST, (May 25, 2011), [http://www.huffingtonpost.com/bill-quigley/fourteen-examples-of-raci\\_b\\_658947.html](http://www.huffingtonpost.com/bill-quigley/fourteen-examples-of-raci_b_658947.html).

In terms of gender, the average sentence for males is 278.4 percent greater than that of females (51.5 versus 18.5 months). Mustard, *supra* note 123, at 296. Females receive even shorter sentences relative to men than Whites about Blacks. *Id.* at 302.

In the relation between class and gender, a consistent pattern of preferential treatment of female offenders is irrespective of their family situations or childcare responsibilities. Arguments for this defer from judges' paternalistic decision-making, the type of offenses committed by women, and the judges' conviction that women have more forms of informal social control in their lives than men, among others. Cassia Spohn & Ann Martin Stacey, *Gender and the Social Costs of Sentencing: An Analysis of Sentences Imposed on Male and Female Offenders in Three U.S. District Courts*, 11 BERK. J. CRIM. L., 43, 49-51 (2006).

Black offenders would receive more severe sentences than white offenders because of their race and also because they are more likely than Whites to be held in custody prior to trial. Similarly, male offenders would receive more severe sentences than female offenders because of their sex and, also, because they are more likely than females to be held in custody before trial. Spohn, *supra* note 121, at 881.

In terms of class, even though the guidelines indicate that economic factors should not affect the sentence length, they have a significant impact on the length of the sentence. Offenders who did not graduate from high school received longer sentences, and offenders with college degrees received shorter sentences than high school graduates. Having no high school diploma resulted in an additional sentence of 1.2 months. Income had a significant impact on the sentence length. 53 Offenders with incomes of less than \$5,000 were sentenced more harshly. This group received sentences 6.2 months longer than people who had incomes between \$25,000 and \$35,000. Those with U.S. citizenship receive lower sentences by about 1.7 months, perhaps because they take advantage of their greater knowledge about the court systems and legal representation. Age is positively related to the sentence length. Mustard, *supra* note 123, at 300-1.

Gender, race, and class altogether show that blacks males offenders with low levels of education and income receive substantially longer sentences. This difference is primarily generated by departures from the guidelines, rather than differential sentencing within the guidelines. The largest difference is in trafficking and bank robbery crimes. *Id.* at 312.

reduces their independence and increases bias in their decisions.<sup>128</sup> Concerning plea bargains,<sup>129</sup> Black defendants have a higher likelihood to be convicted of more charges and to receive more severe sentences during negotiations.<sup>130</sup> When discussing class, the poor receive counseling from public defense attorneys, who are under-funded for their assigned workload. This situation undermines the quality of their legal representation, and pushes poor defendants to plead guilty.<sup>131</sup> Analyzing the role of the United States Supreme Court during the past 30 years, it is of interest that the court has systematically reduced procedural protections (e.g., weakening controls over police searches and seizures, limiting or eliminating habeas corpus protections, reducing jury trial rights, greatly narrowing the ability of prisoners to challenge prison conditions).<sup>132</sup> By disregarding race and class as key elements conditioning the criminalization process, the court's precedents have been operating as an instance of legitimization of the selective application of the law by the lower courts and law enforcement. In *Terry*,<sup>133</sup> *Delaware*,<sup>134</sup> *Whren*,<sup>135</sup> *Utah*<sup>136</sup> and *Birchfield*,<sup>137</sup> the U.S. Supreme Court refused to consider racial motivation as a factor that can undermine the validity of a search, seizure, stop or frisk that rests on facts sufficient to satisfy the applicable quantum of suspicion.<sup>138</sup> Finally, class

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<sup>128</sup> Concerning prosecutors, there is a correlation between capital indictments - which is discretionary - and electoral years. Garland, *supra* note 5. This is complemented by the lack of accountability: there is low turnover, and chief prosecutors rarely face effective challengers; the incumbent success rate when running for office is 95%. Ronald Wright, *How Prosecutor Elections Fail US*, 6 OHIO STATE J. CRIM. L., 581, 592. In general election campaigns, prosecutors run unopposed in 85% of all races. *Id.* at 593. About judges, 87% of state court judges face elections. The Brennan Center found that "the pressures of upcoming re-election and retention election campaigns make judges more punitive toward defendants in criminal cases." Kate Berry, *How Judicial Elections Impact Criminal Cases*, BRENNAN CENTER FOR JUST. 1 (2015). In strict relation to the influence of donors, "Far-right groups and powerful special interests are working to game the system by stacking state courts with judges who will rule in accordance with their agendas." Eric Lesh, *Justice Out of Balance*, LAMBDA LEGAL 3 (2015).

<sup>129</sup> Plea bargain exponentially increases the amount of convicted people serving time in prison, in comparison with the amount that could be achieved through trials (which would take more money and time). In numbers, 97.1% of defendants who were sentenced at the federal level in 2014 pled guilty. By far the most common type of plea agreement is the charge bargain, where the prosecutor agrees to dismiss (or not to bring) certain charges in return for a plea of guilty to one charge. The Sentence Bargain allow the parties to agree to a particular sentence (or sentencing range) and are very uncommon. Finally, there are Agreement to Recommend Sentence, but they are also rare. William Stuntz, *The Rise and Fall of Crime; the Rise and Fall of Punishment*, in THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE 244-281 (2011).

<sup>130</sup> Charette & Vere van, *supra* note 122. See also Penn Law Quattrone Center for the Fair Adm. of Just. Plea, <https://www.law.upenn.edu/institutes/quattronecenter/>.

<sup>131</sup> The American Bar Association reviewed the U.S. public defender system in 2004 and concluded: "All too often, defendants plead guilty, even if they are innocent, without really understanding their legal rights or what is occurring...The fundamental right to a lawyer that America assumes applies to everyone accused of criminal conduct effectively does not exist in practice for countless people across the U.S." MARY STOHR & ANTHONY WALSH, CORRECTIONS: THE ESSENTIALS (2016)

<sup>132</sup> Michael Tonry, *Determinants of Penal Policies*, 36 CRIM. AND JUST. 1, 1-48 (2007).

<sup>133</sup> *Terry v. Ohio*, 392 U.S. 1 (1968).

<sup>134</sup> *Delaware v. New York*, 507 U.S. 490 (1993).

<sup>135</sup> *Whren v. United States*, 517 U.S. 806 (1996).

<sup>136</sup> *Utah v. Strieff*, 579 U.S. 136 S. Ct. 2056 (2016).

<sup>137</sup> *Birchfield v. North Dakota*, 579 U.S. (2016).

<sup>138</sup> In *Terry*, the court rejected considerations of race because the Fourth Amendment could not provide a useful tool for combating racism by police officers. Since *Terry*, the police can conduct limited seizures and patdowns of a person based on a quantum of suspicion, which is less than the 'probable cause' standard required for arresting a person. In *Whren*, the court invoked a doctrinal barrier, declaring illicit racial motivation categorically irrelevant to Fourth Amendment analysis and only province of the Equal Protection Clause. As Thompson clarifies: "The Supreme Court's Fourth Amendment decisions treat race as a subject that can be antiseptically removed from a suppression hearing judge's review of whether a police officer had probable cause for an arrest or warrantless search or reasonable suspicion for a stop or frisk. The

and racial bias in the judicial stage is exacerbated by the lack of diversity among prosecutors,<sup>139</sup> judges,<sup>140</sup> juries<sup>141</sup> and defense attorneys;<sup>142</sup> in other words, by the fact that “the criminal justice system principally involves white decision-makers determining the fate of people of color.”<sup>143</sup>

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decisions imagine the world in which some officers are wholly unaffected by racial considerations and in which even biased officers may make objectively valid judgments that courts can sustain despite the underlying racial motivations of the officer.” Anthony C. Thompson, *Stopping the Usual Suspects: Race and the Fourth Amendment*, 74 NYU L. REV. 4, 956, 981-83 (1999). In other words, it is not humanly possible for the police to leave their biased considerations aside to determine the quantum of suspicion necessary to proceed regarding the Fourth Amendment. Conversely, in a dissent in the case *Utah v. Strieff*, Justice Sotomayor expressed: “This case allows the police to stop you on the street, demand your identification, and check it for outstanding traffic warrant — even if you are doing nothing wrong [...] In many communities the tactics the court endorsed will allow the police to search people almost at will. It is no secret that people of color are disproportionately victims of this type of scrutiny.” Three days later, in another dissent in the case *Birchfield v. North Dakota*, Sotomayor stated: “I fear that if the court continues down this road, the Fourth Amendment’s warrant requirement will become nothing more than a suggestion [...] For generations, black and brown parents have given their children ‘the talk’ — instructing them never to run down the street; always keep your hands where they can be seen; do not even think of talking back to a stranger — all out of fear of how an officer with a gun will react to them.”

<sup>139</sup> 88% of the attorneys are white. See Harvard University Project Implicit, <https://implicit.harvard.edu/implicit/selectatest.html>. Conversely, racial diversity in the prosecution office does not only offer the possibility of having prosecutors assuming more lenient positions, but it also increases the confidence of the defendants: “I have become very fond of the look of pride, especially on the faces of older African Americans, who never thought someone like them could be in my position.” Melba Pearson, *My Life as a Black Prosecutor*, THE MARSHALL PROJECT (July 21, 2016), [https://www.themarshallproject.org/2016/07/21/my-life-as-a-black-prosecutor?utm\\_medium=email&utm\\_campaign=newsletter&utm\\_source=opening-statement&utm\\_term=newsletter-20160721-547#.TNbMfPs3H](https://www.themarshallproject.org/2016/07/21/my-life-as-a-black-prosecutor?utm_medium=email&utm_campaign=newsletter&utm_source=opening-statement&utm_term=newsletter-20160721-547#.TNbMfPs3H).

<sup>140</sup> Most judges attribute disparities, in part, to differential treatment by themselves and other criminal justice officials, whereas some judges attribute discrepancies only to the disparate impact of poverty and differences in offending rates. Non-interventionist strategies used by most judges unintentionally reproduces disparities. Matthew Clair & Alix S. Winter, *How Judges Think About Racial Disparities: Situational Decision-Making in The Criminal Justice System*, CRIMINOLOGY 1 (2016).

<sup>141</sup> Racial disproportion in the juries mainly affects the outcomes of the trials. As Taylor-Thompson expresses: “people of color may bring distinctive experiences into deliberations and may prod an otherwise all-white jury into confronting common assumptions and approaching evidence from a different analytical position.” Race also affects the considerations about police attitudes: white jurors tend to credit police officers’ testimony, while jurors of color are more likely to approach their testimony with skepticism or even mistrust. Kim Taylor-Thompson, *The Politics of Common Ground*, 111 HARV. L. REV. 5, 1306, 1313, Mar. 1998. Juries of color have been systematically excluded from juries through the racially biased use of peremptory strikes and illegal racial discrimination in jury selection, particularly in serious criminal cases and capital cases. Even though the Supreme Court limited this discriminatory practice in *Batson v. Kentucky* (1968), the decision was not applied retroactively, and the southern states have never granted *Batson relief* in a criminal case. Felony records and ‘silly’ reasons are still used to strike black jurors ALEXANDER, *supra* note 5, at 189. In extreme cases, as it happens in Houston County, Alabama, 80% of African Americans qualified for jury service but have been struck by prosecutors in capital punishment cases. EQUAL JUST. INITIATIVE, ILLEGAL RACIAL DISCRIMINATION IN JURY SELECTION: A CONTINUING LEGACY 5 (2010). The problem is even deeper because people of color continue to be underrepresented in the pools from which jurors are selected. The underrepresentation is an effect of the ‘absolute disparity’ method (if a group constitutes less than 10% of the population, the 10% absolute disparity requirement allows even the most blatant and intentional exclusion of every member of that group to go unremedied). This method affects the African Americans’ possibility to challenge under-representation in 75% of counties in the United States. *Id.* at 36. See also Clair & Winter, *supra* note 140.

<sup>142</sup> It has been proved that “public defender may try harder for a client that he or she perceives as more educated or likely to be successful because of their race.” The vast majority of lawyers have “automatic reactions that make associating white with good easier than associating white with bad.” Harvard University Project Implicit, *supra* note 136.

<sup>143</sup> See *supra* note 141.

#### 4.2.c. Differential Punishment

At the level of punishment's administration, criminal selectivity is still powerfully operating. The main instances in which selectivity is expressed are the administration of prison conditions by correctional officers, the activity of parole boards in the approval of parole, and the administration of criminal records and its associated collateral consequences of convictions by bureaucratic agents.

During imprisonment, the number of visits, the conditions of the cell, as well as the access to goods and sanctions are subjected to the discretion of correctional officers. The last aspect is particularly sensible, and the numbers show that Blacks and Latinos are disciplined at higher rates than Whites in most prisons. People of color are also sent to solitary confinement more frequently and for longer durations.<sup>144</sup> To exemplify, in Clinton, a prison near the Canadian border where only one of the 998 guards are Black-American, Black prisoners are nearly four times more likely to be sent to isolation than Whites, where they are held there for an average of 125 days, compared with only 90 days for Whites. Furthermore, disparities in sanctions are greater for those infractions that depend on officer discretion, like disobeying a direct order.<sup>145</sup>

The assessment of parole boards are also severely affected by bias. Because of their lack of professional background<sup>146</sup> and the actuarial methodology that they use,<sup>147</sup> offenders who have racial and socio-economic advantages are benefited by parole boards, in what has been called the "Matthew Effect."<sup>148</sup> Instrumental factors such as prison overcrowding also condition the amount or periodicity of releases, facilitating the discretion of a parole board to choose who is going to be released. Bias in the performance of parole boards is also affected by their obligation to take into consideration a victim's opinion. The Victim's Rights Movement achieved the right to be informed and to recommend the sentence to the parole board. When parole is granted, it includes obligations such as the prohibition of leaving the country, duty of informing the parole board regarding residence, drug testing, mandatory participation in rehabilitation programs, and the obligation of avoiding certain people or places. Parolees with tougher socio-economic conditions are more likely to violate one of the many rules governing their conditional release and are more likely, then, to be re-incarcerated, following an administrative revocation hearing at which there are no due process guarantees. In 2014, 14 of 53 people on parole returned to incarceration, and 8 of the 14 returned as a result of parole revocation.<sup>149</sup> In California, which accounts for 15% of all individuals on parole at the national level, "on any given day, six out of ten admissions to California prisons are returning parolee[s]."<sup>150</sup>

Even afterwards, when the path through the criminal justice system is over, the offender has a life time sentence called a "criminal record."<sup>151</sup> Because impoverished Black-Americans are convicted

<sup>144</sup> Schwirtz, *supra* note 42.

<sup>145</sup> See *supra* note 42.

<sup>146</sup> Parole boards do not need a particular background to become a parole officer, and in some states they are elected and re-elected by the Government, politicizing the position. See *supra* note 95.

<sup>147</sup> Through actuarial techniques, parole boards aggregate the history of a large population of former offenders to obtain patrons that can predict the features of those with greater proclivities for recidivism.

<sup>148</sup> Robert K. Merton, *The Matthew Effect in Science*, 159 *Science* 3810 (Jan. 5, 1968), available at <http://www.garfield.library.upenn.edu/merton/matthew1.pdf>.

<sup>149</sup> Danielle Kaeble et al., *Probation and Parole in the United States, 2014*, BUREAU OF JUST. STAT., (Nov. 2015). See also Katherine Beckett & Naomi Murakawa, *Mapping the Shadow Carceral State: Toward an Institutionally Capacious Approach to Punishment*, 16 *THEORETICAL CRIMINOLOGY* 2, 221, 244.

<sup>150</sup> Ryken Grattet et al., *Parole Violations and Revocations in California*, NATIONAL INSTITUTE OF JUSTICE (2008).

<sup>151</sup> Collateral consequences are so harsh that they have been described as an 'invisible punishment' that impose the diminution of the rights and privileges of citizenship and legal residence; as the "[...] invisible ingredients in the

at disproportionately higher rates, they also suffer more from the collateral consequences associated with their criminal record. As a result, the racial gap becomes unbridgeable. More Black-Americans are disenfranchised today than in 1870, when the Fifteenth Amendment was ratified, prohibiting laws that explicitly deny the right to vote on the basis of race.<sup>152</sup> In terms of numbers, more than one in seven Black men in the United States are disenfranchised because of their criminal record, raising fundamental questions about how we define (and redefine) citizenship.<sup>153</sup> Also, the census' usual residence rule removes prisoners from their urban districts and counts them in rural or suburban areas where they are serving time, which tends to decrease the voting power of African-Americans in their home communities.<sup>154</sup> In a symbolic production of race, while slavery defined Black people as slaves and Jim Crow defined them as second-class citizens, mass incarceration now defines them as eternal criminals.<sup>155</sup> Also, 17% of White job applicants with criminal records received callbacks from employers while only 5% of Black job applicants with criminal records received callbacks. Race is so prominent that Whites with criminal records received better treatment than Blacks without criminal records.<sup>156</sup> Regarding class, criminal records leave the person in an even more vulnerable situation than before entering the criminal justice system, redoubling inequality.<sup>157</sup>

## 5. Final Reflections

A better understanding of criminal inequality to effectively change it forms the premise of this article. Inequality in the U.S. criminal justice system is an uncontested fact. However, a strict conceptualization of how it operates is still missing. Clarification and definitions of notions to describe and understand how this unfairness takes place constitutes a necessary step to challenge, dispute and change the current biased functioning of the U.S. criminal justice system.

Following this path, this article proposes the concept of *criminal selectivity* to understand how inequality plagued each of the instances of the criminal justice system. It is not about racial profiling

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legislative menu of criminal sanctions;" as an 'internal exile' or 'civil death', a 'mark of Cain', a transformation in a 'non-citizen' or a 'parish.' They are instruments of 'social exclusion' that create a permanent diminution in the social status of convicted offenders, and a distancing between 'us' and 'them.' In the case of prisoners, collateral consequences include denial of the right to vote, removal from public housing, termination of parental rights (19 states), prohibition of adoption, limitation of the right to hold public office (25 states), restriction of the right to own guns (33 states), limitation of the right to circulate in some locations (for example, schools), and rejection from welfare assistance. Felons cannot vote in 14 states, and their conviction is an argument to ask for a divorce in other 29 states. Particularly in drug-related crimes, they cannot possess driving licenses, and they cannot receive loans for education, public assistant, & food stamps during their lifetime. Concerning immigrants, the Immigration Reform and Control Act (1986) and the Illegal Immigration Reform and Immigrant Responsibility Act (1996) allow their deportation. About stalker, domestic violence, and sex offenses, they have an obligation to register with the police upon release, and they cannot ask for assisted housing. Jeremy Travis, *Invisible Punishment: An Instrument of Social Exclusion*, in *INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT* 15-21 (M. Mauer & Chesney-Lind eds., 2002).

<sup>152</sup> ALEXANDER, *supra* note 5, at 175-76.

<sup>153</sup> Marie Gottschalk, *Hiding in Plain Sight: American Politics and the Carceral State*, ANN. REV. OF POL. SCI. 235, 243 (2008). See also MARIE GOTTSCHALK, *CAUGHT: THE PRISON STATE AND THE LOCKDOWN OF AMERICAN POLITICS* (2015).

<sup>154</sup> Anthony C. Thompson, *Unlocking Democracy: Examining the Collateral Consequences of Mass Incarceration on Black Political Power*, 54 HOW. L. J. (2011).

<sup>155</sup> ALEXANDER, *supra* note 5, at 192. However, a clear difference is that, while slavery and Jim Crow were explicitly race-based, mass incarceration is facially colorblind, and it is practically enforced in a highly discriminatory fashion. This has a double effect: on the one hand, it contributes to the impunity of mass incarceration as a racial caste system; but, on the other hand, it makes available the possibility of pursuing legal strategies to demonstrate that the system has to be driven by racial bias, and overturning a sentencing or a police by legal advocacy & grounded-based activism.

<sup>156</sup> Devah Pager, *The Mark of a Criminal Record*, 108 AM. J. SOC. 5, 937-75 (2003).

<sup>157</sup> Bruce Western, *supra* note 5.

or prosecutorial discretion as isolated practices. Conversely, the article shows that it is necessary to understand unfairness as a pattern afflicting each of the stages of the criminal justice process. The article explored each of these stages (from the sanction of substantive and procedural legislation, through law enforcement activity, the judicial stage, and administration of punishment), and demonstrates how criminal selectivity operates distinctively in each of them. The article also shows that criminal selectivity has not operated uniformly over time. Instead, it has operated differently at each stage and also according to the characteristics of the evolving socio-economic contexts. The research exposes that the 1970s were a transformative time period, including socio-economic changes, which pushed entire subsets of the population to impoverishment, while calling for the expansion of the criminal justice system to exercise social control over them. Additionally, the 1970s were a crucial decade in which racism was not more tolerated in the explicit letter of the law, and started to operate through a selective application of apparently color blind laws.

As this is the first time that the concept of criminal selectivity is conceptualized, there might be aspects needing to be perfected. Also, further research must be conducted to continue exploring how each of the aspects of criminal selectivity (primary and secondary over-criminalization, and primary and secondary under-criminalization) influences the everyday functioning of the U.S. legal system. However, introducing the concept of criminal selectivity is already helpful to develop a better understanding of the unfairness of the criminal justice system as a holistic and complex phenomenon. The conviction of this article is that theoretical clarification of this unfairness can serve to craft comprehensive responses to analyze and overturn it. In short, conceptual clarification constitutes a privileged tool to achieve material transformation.