

"should employ community-policing and problem-solving tactics to improve relations with immigrant communities and resolve tension caused by expanding immigration."⁹¹

Police chiefs are also concerned that giving police officers responsibility for immigration enforcement will strain their resources and make it difficult to perform their basic responsibilities. This problem has become worse in the economic recession of 2008–2014, when police departments were unable to hire to replace retiring officers and in some cases have been forced to lay off officers. Local jails, moreover, often do not have the space to hold large numbers of unauthorized immigrants. (Remember, there are about 11.3 million undocumented immigrants across the country [2014 estimate], down from 12.2 a peak of 12.2 in 2007.) Local courts are also overburdened with cases, and they are facing cutbacks because of the recession. Iowa state courts, for example, were closed one day a week as a cost-saving measure. In short, many police chiefs fear that immigration enforcement could harm their traditional law enforcement mission. In 2009, the Police Foundation, after an extensive review, concluded that the various costs of participating in federal immigration enforcement "outweigh the benefits."⁹²

"Insecure Communities": The Impact of Immigration Enforcement on the Hispanic Community

A 2013 report found that immigration enforcement had an adverse effect on the attitudes of Hispanics toward law enforcement and public safety among Hispanic Americans.⁹³ The study was based on a telephone survey of 2004 Latinos in the Chicago, Houston, Los Angeles, and Phoenix metropolitan areas. The survey found that:

- 44 percent of Hispanics were less likely to contact the police if they were the victims of crime, because they were afraid that the responding officers would ask about their immigration status or the status of people they know.
- 45 percent of Hispanics were less likely to "voluntarily offer information about crimes, because the officer might ask about their immigration status."
- 70 percent of undocumented immigrants said they were less likely to contact the police if they were the victims of a crime.
- 28 percent of U.S.-born Hispanics said they were less likely to contact the police if they were the victims of crime, because they were afraid the police would inquire about immigration status.

Not calling the police puts both individuals and communities at risk. It is well established in American policing that the police cannot serve the public alone. They depend on members of the public to report crimes, to provide information about criminal activity or disorder in their neighborhoods, and to serve as witnesses in criminal cases. The important role of citizens in working with the police is called the "co-production" of police services.⁹⁴ Co-production is one of the foundations of community policing, and the need to build good relations, trust, and cooperation. The victim of a domestic assault who does not call the police is

more likely to be assaulted again by the same person. Burglars and robbers will remain at large and be able to commit more crimes.

THE GEOGRAPHY OF RACIAL AND ETHNIC JUSTICE

The "geography of justice" in the United States with respect to race and ethnicity varies across the country. African Americans, Hispanics, Asians, and Native Americans are very unevenly distributed. The population of California was estimated to be 38 percent Hispanic in 2010, compared with 5 percent for Iowa and 1.3 percent for Maine. Mississippi was 37 percent African American in 2010, compared with less than one percent for Vermont and Montana. Asian Americans represented 57 percent of the population of Hawaii, 15 percent of California, and 9 percent of Nevada, the state with the third highest percentage. As a result, issues of race and ethnicity are far more salient in some areas compared with others.

One study concluded that "most communities lack true racial and ethnic diversity."⁹⁵ In 1996, only 745 of the 3,142 counties or county equivalents had a white population that was below the national average. Only 21 metropolitan areas qualified as true "melting pots" (with the percentage of the white population below the national average and at least two minority groups with a greater percentage than the national average).

The uneven distribution of the major racial and ethnic groups is extremely important for criminal justice. Crime is primarily the responsibility of state and local governments. Thus, racial and ethnic issues are especially salient in those cities where racial minorities are heavily concentrated. For example, the context of policing is very different in Detroit, which is 82 percent African American, than in Minneapolis, where African Americans are only 18 percent of the population. Similarly, Hispanic issues are different in San Antonio, which is 59 percent Hispanic, than in many other cities where few Hispanics live.

These disparities illustrate the point we made earlier that in some areas the traditional "minority" has become the majority. This has important implications for criminal justice. Population concentration translates into votes, political power, and the ability to control police departments, sheriff's departments, courts, and correctional agencies. Mayors, for example, appoint police chiefs. If a county is a majority African American or Hispanic, those groups are able to control the election of the sheriff. African Americans have served as mayors of most of the major cities: New York; Los Angeles; Chicago; Philadelphia; Detroit; Atlanta; Washington, DC; and others.

The concentration of African Americans in the Southeast has at least two important effects. This concentration gives this group a certain degree of political power that translates into elected African-American sheriffs and mayors. These officials, in turn, may appoint African-American police chiefs. By 2002, for instance, Mississippi had 950 elected African-American officials, more than any other state, including several elected sheriffs. As a result, criminal justice in Mississippi is vastly different from what it was in the segregation era.

The number of Hispanic elected officials, meanwhile, is growing rapidly. The National Latino Elected Officials Organization reported that there were 6,084 Hispanic elected officials in 2014, a 25 percent increase since 2004. Population growth leads to more voting and political power, particularly at the local level, and greater influence over criminal justice policy and practices.⁹⁷

DISPARITY VERSUS DISCRIMINATION

Perhaps the most difficult question we will encounter throughout this book is whether certain data indicate a pattern of racial or ethnic discrimination. Debates over discrimination are often unproductive because of confusion over the meaning of “discrimination.” It is, therefore, important to make two important distinctions. First, there is a significant difference between disparity and discrimination. Second, discrimination can take different forms and involve different degrees of seriousness. To help clarify this issue, Box 1.5 offers a schematic diagram of a disparity/discrimination continuum, which illustrates the various forms that each of the two can take.

Disparity

A disparity involves a *difference*, but one that does not necessarily involve discrimination. Look around your classroom. If you are in a conventional college program, almost all of the students will be relatively young (between the ages 18 and 25). This represents a disparity in age compared with the general population. There are no children, few middle-aged people, and probably no elderly students. This is not a result of discrimination, however. No law, policy or person keeps

Box 1.5 Discrimination–Disparity Continuum

Systematic Discrimination	Institutionalized Discrimination	Contextual Discrimination	Individual Acts of Discrimination	Pure Justice
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Definitions

Systematic discrimination—Discrimination at all stages of the criminal justice system, at all times, and at all places.

Institutionalized discrimination—Racial and ethnic disparities in outcomes that are the result of the application of racially neutral factors, such as prior criminal record, employment status, and demeanor.

Contextual discrimination—Discrimination found in particular contexts or circumstances (e.g., certain regions, particular crimes, or special victim–offender relationships).

Individual acts of discrimination—Discrimination that results from the acts of particular individuals but is not characteristic of entire agencies or the criminal justice system as a whole.

Pure justice—No racial or ethnic discrimination at all.

older people from enrolling in the class. Older groups are not enrolled in the class mainly because of the typical life course of most people, which involves attending college immediately after high school. The age disparity, therefore, is the result of factors other than discrimination.

The example of education illustrates the point that a disparity is a difference that can be explained by legitimate factors that are reasonable and do not raise any legal issues.

In criminal justice, there is a crucial distinction between legal and extralegal factors. *Legal factors* are those embodied in the law. They include the seriousness of the offense, aggravating or mitigating circumstances in a crime, or an offender's prior criminal record. The criminal law defines murder as a more serious crime than burglary by setting more severe punishments. The law reflects the accepted social norm that taking someone's life is far more serious than taking someone's property. Thus, sentencing most murderers to prison and the majority of burglars to probation is a legitimate, legally based difference, and not a case of discrimination.

Extralegal factors are those that have no legitimate legal basis. They include race, ethnicity, gender, social class, and lifestyle (e.g., clothing, grooming, and dress). Because they are not recognized in the law, they are not legitimate bases for decisions by criminal justice officials. It is not legitimate, for example, for the police to stop only African-American drivers for suspected crimes and to not stop white drivers. When that happens, we call it racial profiling. It is not legitimate for a judge to sentence all convicted male burglars to prison but place all convicted female burglars on probation, despite the fact that both groups had similar criminal records (a legal factor). In short, differences based on extra-legal factors constitute discrimination.

Discrimination

Discrimination involves a difference in outcome based on *differential treatment* of individuals or groups without reference to behavior, qualifications, or some other legal factor. Excluding women, African Americans, or Hispanics from juries is discrimination based on gender, race, or ethnicity, respectively. Sentencing all males to prison for possession of a gram of cocaine, while sentencing all women to probation for possessing the same amount of the drug, is discrimination.

Many debates over discrimination turn on the distinction between intent and result. Where there is a clear intent to treat groups of people differently, discrimination clearly exists. If a prosecutor clearly intended to exclude Hispanics from juries during jury selection—and there was evidence to support that—that would be intentional discrimination.

Many controversies, however, involve allegations of discrimination based on disparities in the results. The National Police–Public Contact Survey has consistently found racial disparities in traffic stops. In 2011, for example, 12.8 percent of African-American drivers were stopped by the police, compared with 10.4 percent of Hispanic drivers and 9.8 percent of white drivers. Clearly racial and ethnic disparities exist. The difficult question is whether these disparities constitute

discrimination in violation of the law. Several factors could explain the disparities. It is possible that African-American and Hispanic drivers speed, drive while drunk, or otherwise violate the law more often than whites. Or, given the higher rate of poverty among both African Americans and Hispanics, it is possible that they more often drive cars with expired license plates, broken tail lights, or other violations that would justify a traffic stop. But it is also possible that the police department in a city has an aggressive anticrime or antigang policy that involves a high rate of traffic stops. It is also possible that officers have unconscious biases regarding race, ethnicity, and crime and are more likely to see potential "danger" in drivers of color.⁹⁹

Courts have found discrimination on the basis of extreme disparities in outcomes in some cases. The most famous recent example is the 2013 decision in *Floyd v. New York City*, where a federal court found that the disparities in African Americans and Hispanics violated the Equal Protection Clause of the Fourteenth Amendment. (It needs to be said, however, that proving discrimination based on statistical disparities is extremely difficult and requires both extreme disparities and powerful statistical analyses.)¹⁰⁰

We should add that the word *discrimination* has at least two different meanings. One has a positive connotation. It is a compliment to say that someone has "discriminating taste" in music, food, or clothes. The person discriminates against bad food and bad music. Our choices in music, food, or clothes, however, are not covered by the law. The other meaning of *discrimination* has a negative connotation. When we say that someone "discriminates" against African Americans or Hispanics, we mean invidious distinctions based on negative judgments about an entire group of people. That is, someone treats Hispanics differently without any reference to a person's qualifications (as in a job application) or conduct (as in an arrest). Acts that involve racial or ethnic discrimination in employment, housing, or the administration of justice are illegal.

The Problem of Unconscious Bias

Not all forms of bias are conscious. People often act on the basis of unconscious assumptions or stereotypes that are the result of their upbringing or are deeply embedded in American culture. This problem is particularly true with respect to race, ethnicity, and crime. Deeply embedded stereotypes that equate young African-American men with "crime" and "dangerousness" are widespread. Similarly deeply embedded stereotypes about Hispanics and "illegal immigrants" are also common. Unconscious stereotypes also operate in the other direction, for example, in equating females with no threat of danger. Lorie Fridell, who directs the Fair and Impartial Policing project, explained that in their training scenarios police recruits "are consistently under-vigilant with women—not finding the gun in the small of the back." That is, they do not associate women with dangerousness and a threat to their safety.¹⁰¹

The President's Task Force on 21st Century Policing strongly endorsed officer training on unconscious or implicit bias in order to avoid discriminatory actions by the police.¹⁰²

The Law of Discrimination

Discrimination occurs whenever people are treated differently in violation of a local, state, or federal law, or a constitutionally protected right. Several different parts of the American legal system make discrimination illegal. The Equal Protection Clause of the Fourteenth Amendment to the Constitution declares that "nor shall any state ... deny to any person within its jurisdiction the equal protection of the law." If a state barred African Americans or women from serving on juries (as some states once did), it would be a violation of the Fourteenth Amendment.

A number of federal laws also forbid discrimination. The most important is Title VII of the 1964 Civil Rights Act, which holds that "It shall be an unlawful employment practice for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or, privileges of employment, because of such individual's race, color, religion, sex, or national origin" This law covers employment discrimination by private employers and government agencies, which would include police, court, and correctional agencies. Other federal laws prohibit other forms of discrimination, such as in housing (the 1968 Fair Housing Act), age (the 1967 Age Discrimination Act), or disability (the 1990 Americans with Disabilities Act).

State constitutions and laws also prohibit discrimination. The constitution of each of the 50 states has a provision similar to the Fourteenth Amendment guaranteeing equal protection of the laws. All states also have laws prohibiting discrimination in employment, housing, and other areas. Finally, cities have municipal ordinances that also make various forms of discrimination illegal.

When someone feels that he or she has been discriminated against on the basis of race, ethnicity, or other factor covered by the law, that person bears the burden of proving in court that the disparate treatment involved illegal discrimination. The person's attorneys need to enlist experts in, for example, police policy and the law to prove that the disparities cannot be explained by legitimate factors.

The Discrimination-Disparity Continuum

To help clarify the debate over disparity versus discrimination, let us examine Box 1.5, which puts the different possible outcomes on a continuum.

Systematic discrimination means that discrimination occurs at all stages of the criminal justice system, in all places, and at all times. That is to say, there is discrimination in arrest, prosecution, and sentencing (stages); in all parts of the country (places); and without any significant variation over time. The clearest example of systematic discrimination involved the southeastern states prior to the Civil Rights Era of the 1950s and 1960s. There was systematic discrimination against African Americans in voting, employment, education, housing, and all phases of the criminal justice system.

Institutionalized discrimination involves disparities in outcomes that are based on an organization's policies. Marc Maurer of the Sentencing Project lists this as one of the four major factors contributing to racial disparities in the criminal justice system.¹⁰³ One example would be the old police department employment

standards that required recruits to be at least five feet, six inches tall. This policy reflected the now discredited belief that if officers were too short they would not have a commanding presence, and their authority would be more likely to be challenged. A more recent example is the aggressive “stop and frisk” policy of the New York City Police Department. In 2011, the NYPD stopped 685,724 people. Over half (52.9 percent) were African American and 33.7 percent were Hispanic. The NYPD policy did not mention either race or ethnicity, but a U.S. District Court in 2013 found that the result of the policy violated the Fourteenth Amendment Equal Protection Clause.¹⁰⁴ In Chapter 4 (pp. 155), we will discuss an important recent study of traffic stops in the Kansas City metropolitan area, in which investigatory stops (where the police are looking for guns, weapons, or an outstanding warrant) disproportionately affect African Americans. Investigatory stops are typically part of an institutionalized crime-fighting strategy of a police department, and the resulting racial disparities do not reflect bias on the part of individual officers.¹⁰⁵

Bail policies in most criminal courts institutionalize preferences in granting nonmonetary pretrial release for defendants who are currently employed. This policy is based on the reasonable assumption that an employed person has a greater stake in the community and is less likely to flee than an unemployed person. Yet, the policy discriminates against people who are unemployed or have been intermittently employed. And because African Americans experience higher unemployment rates, they are more likely to be denied bail.¹⁰⁶ Thus, the bail policy has a race effect: a racial disparity in the outcomes that is the result of a criterion other than race. We will discuss bail-setting policies in detail in Chapter 5.

Contextual discrimination involves discrimination in certain situations or contexts. There are a number of examples of different practices within the same agency. Racial profiling involves discrimination in the context of traffic enforcement. A police department’s anticrime program may include a high level of traffic stops, which in practice has the effect of racial profiling. This was the case in the NYPD stop and frisk policy we discussed above. That same department, however, may have no pattern of race discrimination in arrests or the handling of domestic violence incidents. The federal sentencing guidelines had very harsh sentences people convicted of possession and/or sale of the drug crack, which was very controversial. The result was a pattern of sentencing that had a very adverse effect on African Americans (who are more likely to use that drug than whites). Research on the death penalty has consistently found racial disparities in death sentences for African Americans compared with whites to a degree that does not exist with noncapital crimes.¹⁰⁷

Individual acts of discrimination involve those carried out by particular person: a police officer, a judge, a parole officer, and so on. These are discriminatory acts by a person, and they do not represent general patterns of how the criminal justice system operates.

Finally, at the far end of the spectrum in Box 1.5 is the condition we label *pure justice*. This means that there is no discrimination at any time or place in the criminal justice system. No one seriously argues that, in an imperfect world, such a situation exists anywhere in the American criminal justice system.

As we discussed earlier, MacDonald argues that the idea that the criminal justice system is racist is a "myth." Using our discrimination-disparity continuum, her analysis concedes individual discrimination but not broader patterns of discrimination in the criminal justice system.

Throughout the chapters in *The Color of Justice* that follow, we will grapple with the question of whether the disparities that exist represent discrimination. For example, there are racial and ethnic disparities in arrests by the police. In Chapter 4, we examine the evidence on whether these data indicate a clear pattern of discrimination, and if so, what kind of discrimination (contextual, individual, or systematic). Chapter 4 also examines the difficulties in interpreting traffic stop data to determine whether there is a pattern of illegal racial profiling. There is also evidence of disparities in plea bargaining and sentencing. Chapters 5, 6, and 7 wrestle with the problem of interpreting the data to determine whether there are patterns of discrimination. Chapter 8 examines the data on the death penalty and the race of persons executed.

A THEORETICAL PERSPECTIVE ON RACE, ETHNICITY, AND CRIME

There are many different theories of crime and criminal justice. We believe that the available evidence on race, ethnicity, and crime is best explained by a theoretical perspective known as *conflict theory*.¹⁰⁸

The basic premise of conflict theory is that the law is used to maintain the power of the dominant group in society and to control the behavior of individuals who threaten that power.¹⁰⁹ A classic illustration of conflict theory involves the law of vagrancy. Vagrancy involves merely being out in public with little or no money and no clear "purpose" for being there. Vagrancy is something engaged in only by the poor. To make vagrancy a criminal act and to enforce vagrancy laws are means by which the powerful attempt to control the poor.¹¹⁰

Conflict theory explains racial disparities in the administration of justice as products of broader patterns of social, economic, and political inequality in U.S. society. These inequalities are the result of prejudicial attitudes on the part of the white majority and discrimination against minorities in employment, education, housing, and other aspects of society. Chapter 3 explores these inequalities in detail. Conflict theory explains the overrepresentation of racial and ethnic minorities in arrest, prosecution, imprisonment, and capital punishment as both the product of these inequalities and an expression of prejudice against minorities.

Conflict theory has often been oversimplified by both advocates and opponents. Criminal justice research has found certain "anomalies" in which racial minorities are not always treated more harshly than whites. For example, there are certain situations in which African-American suspects are less likely to be arrested than white suspects. Hawkins argues that these anomalies can be explained through a revised and more sophisticated conflict theory that takes into account relevant contingencies and contests.¹¹¹

One contingency is crime type. Hawkins claims that African Americans may be treated more leniently for some crimes because officials believe that these crimes are "more normal or appropriate for some racial and social class groups than for others." In the South during the segregation era, for example, African Americans often were not arrested for certain crimes, particularly crimes against other African Americans. The dominant white power structure viewed this behavior as "appropriate" for African Americans.¹¹² The fact that minority offenders were being treated leniently in these situations is consistent with conflict theory because the outcomes represent a racist view of racial minorities as essentially "childlike" people who cannot control their behavior. Leniency also represents another form of discrimination, in the form of denying justice to African-American victims.

A second contingency identified by Hawkins involves the race or ethnicity of both the offender and the victim. Much research has found that the criminal justice system responds more harshly when the offender is a person of color and the victim is white, particularly in rape and potential death penalty murder cases. According to conflict theory, such crimes are viewed as challenges to the pattern of racial dominance in society. The same crime is not perceived as a threat when it is intraracial (e.g., white offender/white victim, African-American offender/African-American victim). A relatively lenient response to crimes by minorities against minorities or crimes in which a racial or ethnic minority is the victim is explained by conflict theory in terms of devaluing of the lives of minority victims.

There may also be important contingencies based on population variables. It may be that crimes by racial minorities are treated more harshly when minorities represent a relatively large percentage of the population and therefore are perceived as a social and political threat. A substantial body of research has explored the "minority threat" thesis, which holds that racial or ethnic disparities will be greater where the white majority feels threatened by a large or growing racial or ethnic minority population in that jurisdiction.¹¹³ At the same time, some research on imprisonment has found that the disparity between white and African-American incarceration rates is greatest in states with small minority populations.¹¹⁴ In this context, minorities have little political power.

Alternative Theories

Conflict theory is a sociological explanation of criminal behavior and the administration of justice in that it holds that social factors explain which kinds of behavior are defined as criminal; which people commit crime; and how crimes are investigated, prosecuted, and punished. Sociological explanations of crime are alternatives to biological, psychological, and economic explanations. These other factors may contribute in some way to explaining crime but, according to the sociological perspective, do not provide an adequate general theory of crime. Conflict theory also differs from other sociological theories of crime. Consensus theory, for example, holds that all groups in society share the same values and that criminal behavior can be explained by individual acts of deviance. Conflict

theory does not see consensus in society regarding the goals or operation of the criminal justice system.

Conflict theory also differs from Marxist theory, although there are some areas of agreement. Conflict theory and Marxist theory both emphasize differences in power between groups. Marxist theory, however, holds that there is a rigid class structure with a ruling class.¹¹⁵ Conflict theory, meanwhile, maintains a pluralistic view of society in which there are different centers of power—business and labor, farmers and consumers, government officials and the news media, religious organizations, public interest groups, and so forth—although they are not necessarily equal. The pluralistic view also allows for changes in the relative power of different groups.

CONCLUSION

The question of race and ethnicity is a central issue in American criminal justice—perhaps the central issue. The starting point for this book is the overrepresentation of racial and ethnic minorities in the criminal justice system. This chapter sets the framework for a critical analysis of this fact about contemporary American society. We have learned that the subject is extremely complex. First, the categories of race and ethnicity are extremely problematic. Much of the data we use are not as good as we would like. Second, we have learned that there is much controversy over the issue of discrimination. An important distinction exists between disparity and discrimination. Also, there are different kinds of discrimination. Finally, we have indicated the theoretical perspective about crime and criminal justice that guides the chapters that follow.

DISCUSSION QUESTIONS

1. Is there systematic discrimination in the criminal justice system or not? You have read brief statements on two sides of the issue. Which ones did you find most interesting? What do you most want to learn more about in the chapters ahead?
2. What are the differences between *race* and *ethnicity*? Give some examples that illustrate the differences.
3. When social scientists say that the concept of race is a “social construct,” what exactly do they mean?
4. What are the most recent developments in the debate over immigration and crime? Search the Web and see if there is any new important evidence.
5. Do you think the U.S. census should have a category of “multicultural” for race and ethnicity? Explain why or why not. Would it make a difference in the accuracy of the census? Would it make a difference to you?
6. Explain the difference between *discrimination* and *disparity*. Give one example from some other area of life.