Punishment, Deterrence and Social Control: The Paradox of Punishment in Minority Communities[†]

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Since the early 1970s, the number of individuals in jails and state and federal prisons has grown exponentially. Today, nearly two million people are currently incarcerated in state and federal prisons and local jails. The growth of imprisonment has been borne disproportionately by African-American and Hispanic men from poor communities in urban areas. Rising incarceration should have greatly reduced the crime rate. After all, incapacitated offenders were no longer free to rob, assault, steal, or commit other crimes. However, no large-scale reduction in crime was detected until the mid-1990s. The failure of crime rates to decline commensurately with increases in the rate and severity of punishment reveals a paradox of punishment: recent experiments have shown that among persons of color, especially those who are poor or reside in poor neighborhoods, harsher punishment has produced iatrogenic or counterdeterrent effects.

We identify two processes that produce punishment paradoxes or defiance of legal sanctions. First, the long-term and spatially concentrated shift of social and economic resources from informal social controls to formal legal controls, particularly incarceration, weakens localized informal social controls and creates recurring cycles of discontrol. Neighborhood and work contexts offer social status and mete out shame and social opprobria for wrongdoing. However, stable rates of inequality and deprivation in minority communities compromise three dimensions of social control: social capital or regulation, "stakes in conformity" through marriage and work, and participation in political institutions. Second, high rates of punishment produce "stigma erosion" where punishment loses its contingent value that lends credibility to its claims of fairness and proportionality. As the social and cultural

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distance between the punishers and the punished widens, respect for the legitimacy of punishment suffers. Dissatisfaction with both procedural and distributive justice can motivate legal cynicism and noncompliance, and these processes are intensified in contexts of weak social control and high legal control.

As legal control replaces informal social control, the state's role in socialization and the fostering of moral communities diminishes. The devolving of the public sector involvement in socialization further moots the reintegrative functions of punishment. This restructuring and devaluation of government, accompanied by the restructuring and fragmentation of economic activity in poor communities, complicates the achievement of a social consensus on the rationale of punishment in a broader context of social control, and limits the efficacy of informal processes of social regulation.

I. INTRODUCTION 175
II. PUNISHMENT, DETERRENCE AND INFORMAL CONTROLS 180
III. DETERRENCE AND THE STRUCTURAL CONTEXTS OF PUNISHMENT 185
A. *Community Social Organization* 186
B. *Communities of Limited Liability* 190
C. *The Social Meaning and Economic Structure of Work* 192
D. *The Devaluation of Family* 196
1. Social Controls 197
2. Social Networks and Social Isolation 198
3. Social Capital 201
IV. THE PARADOXICAL EFFECTS OF FORMAL PUNISHMENT ON SOCIAL ORGANIZATION 202
A. *Family Disruption* 204
B. *Low Economic Status and Joblessness* 206
V. THE IMPACT OF FORMAL PUNISHMENT AND PERCEPTIONS OF LEGITIMACY 212
A. *Stigma* 213
B. *Linked Fate and Multiple Roles* 222
VI. DETERRENCE AND THE POLITICS OF PUNISHMENT 224
VII. CONCLUSION 228

I. INTRODUCTION

Beginning in the 1980s and continuing today, the number of persons incarcerated in the U.S. increased massively, incapacitating many criminals and increasing the risk of punishment for those still active.[1] Between 1975 and 1989, the total annual prison population of the United States nearly tripled, growing from 240,593 to 683,367 inmates in custody, an increase of 184%.[2] The trend continued uninterrupted, albeit at a slower pace, through 2006, when the prison population rose to 1,492,973.[3] Put another way, the incarceration rate rose from about 145 per 100,000 population in 1980 to 499 per 100,000 in 2006.[4] Both the likelihood of being committed to prison, and the average sentence length of those committed, increased dramatically over that time.[5] These factors should have greatly reduced the crime rate.

Punishment on a scale of this sort had never before been attempted or achieved in the United States, and its proponents anticipated large reductions in crime rates. After all, the large number of active offenders incapacitated were no longer free to rob, assault, steal, or commit other crimes—at least against those outside of penitentiary walls. Also, a downward demographic bulge in the 1980s shrunk the population group whose crime rates traditionally have been highest, reducing the pool of potential replacements for incarcerated offenders. Deterrence theory suggested that would-be offenders were likely to rate the likely punishment costs of crime as significantly higher, reducing their incentives to risk imprisonment for highly variable gains from crime. And, there was also reason to think that at least some would-be offenders were getting the message as the *rhetoric* of punishment escalated during this time. Well-publicized legal reforms and popular culture communicated new messages of intolerance for crime and threats of new draconian forms of punishment.

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[1] *See* Alfred Blumstein & Allen J. Beck, *Population Growth in U.S. Prisons, 1980–1996*, *in* PRISONS 17 (Michael Tonry & Joan Petersilia eds., 1999); Jacqueline Cohen & Jose A. Canela-Cacho, *Incarceration and Violent Crime: 1965–1988*, *in* UNDERSTANDING AND PREVENTING VIOLENCE 296 (Albert J. Reiss, Jr. & Jeffrey A. Roth eds., 1994); Steven D. Levitt, *The Effect of Prison Population Size on Crime Rates: Evidence from Prison Overcrowding Litigation*, 111 Q. J. ECON. 319 (1996).

[2] *See* BUREAU OF JUST. STAT., U.S. DEP'T OF JUST., CORRECTIONAL POPULATIONS IN THE UNITED STATES, 1996 (1999).

[3] BUREAU OF JUST. STAT., U.S. DEP'T OF JUST., CORRECTIONAL SURVEYS (2005), *available at* http://www.ojp.usdoj.gov/bjs/glance/tables/corr2tab.htm. *See also* Blumstein & Beck, *supra* note 1, at 22 (citing data from the BUREAU OF JUST. STAT., *supra* note 2, and the Bureau of the Census (various years)).

[4] Blumstein & Beck, *supra* note 1, at 18. This includes both state and federal prisoners but excludes persons in county jails. I took the 1,492,973 prison population information data and divided it by the population of 298,754,819, as estimated by the U.S. Census Bureau for July 2006, *available at* http://www.census.gov/popest/states/NST-ann-est.html.

[5] *See generally* MARC MAUER, RACE TO INCARCERATE (1999); BRUCE WESTERN, PUNISHMENT AND INEQUALITY IN AMERICA (2006).

Despite the many reasons to expect significant crime reduction from the expansion in punishment, no large-scale reduction in crime was detected. Through the early 1990s, both officially recorded crime and self-reports of victimization failed to decline even as the incarceration rate increased.[6] Homicides rose steadily in U.S. cities beginning in 1985, with record rates measured nationally as well as in fourteen large cities in 1991.[7] Other crimes remained stable, while the victimization rate declined only slightly.[8] Although crime rates have declined in recent years from their peak in the early 1990s, they remain at high levels in the face of increasing costs of crime, especially considering the unprecedented increases in incarceration rates in recent decades.

The failure of crime rates to decline commensurately with increases in the rate and severity of punishment reveals a paradox of punishment: higher incarceration rates resulted in stable if not *higher* levels of crime.

Several explanations could be fashioned. First, despite the stochastic selectivity of incarceration policies (that is, the highest rate offenders were likely to be over-represented among prison populations), only modest incapacitation effects, estimated at less than ten percent of potential violent crimes, were achieved.[9] This means that in order to achieve measurable decreases in crime through incapacitation, we would have to further commit to an unrealistically expensive increase in incarceration rates.[10]

Second, it is possible that punishment backfired. That is, there is growing evidence from several small-scale studies that incarceration may have iatrogenic effects with respect to offending rates.[11]

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[6] *See* MAUER, *supra* note 5; MICHAEL TONRY, MALIGN NEGLECT—RACE, CRIME, AND PUNISHMENT IN AMERICA (1995); FRANKLIN E. ZIMRING & GORDON HAWKINS, INCAPACITATION: PENAL CONFINEMENT AND THE RESTRAINT OF CRIME (1995); Richard B. Freeman, *Why Do So Many Young American Men Commit Crimes and What Might We Do About It?*, 10 J. ECON. PERSP. 25 (1996).

[7] *See* FRANKLIN E. ZIMRING & GORDON HAWKINS, CRIME IS NOT THE PROBLEM: LETHAL VIOLENCE IN AMERICA (1997); Phillip J. Cook & John H. Laub, *The Unprecedented Epidemic in Youth Violence*, *in* YOUTH VIOLENCE 27 (Michael Tonry & Mark H. Moore eds., 1998).

[8] *See* ZIMRING & HAWKINS, *supra* note 6; Cohen & Canela-Cacho, *supra* note 1.

[9] *See* Cohen & Canela-Cacho, *supra* note 1, at 371 n.56. Even as crime rates have declined from their peaks in the early 1990s, incarceration played a minor role in that reduction. The "66-percent increase in the state prison population, from 725,000 to more than 1.2 million prisoners reduced the rate of serious crime by 2 to 5 percent—one-tenth of the fall in crime between 1993 and 2001. Fully 90 percent would have happened without the 480,000 new inmates in the system." WESTERN, *supra* note 5, at 186–87.

[10] *See* Cohen & Canela-Cacho, *supra* note 1. They claim that the prison population would have to nearly triple before crime declines would increase to 20 percent.

[11] *See, e.g.*, Jeffrey A. Fagan, *Do Criminal Sanctions Deter Drug Crimes?*, *in* DRUGS AND CRIME 188 (Doris Layton MacKenzie & Craig D. Uchida eds., 1994); Jeffrey Fagan, *The Comparative Advantage of Juvenile Versus Criminal Court Sanctions on Recidivism among Adolescent Felony Offenders*, 18 LAW & POL'Y 77 (1996); Lawrence W. Sherman, *Defiance, Deterrence and Irrelevance: A Theory of the Criminal Sanction*, 30 J. RES. CRIME & DELINQ. 445 (1993).

Third, motivations and incentives among would-be offenders for crime commission may have increased over this period, or the general and specific deterrent effects of incarceration may have been weak or ineffective.[12] Under this scenario, less active offenders replaced incarcerated ones at the higher offending rates; those released from prison quickly returned to crime at rates equal to or higher than before; and, quite possibly, new people joined the ranks of offenders.[13]

Whatever the effects, the lack of further crime reductions over a period of expanding incarceration suggest that punishment was ineffective, irrelevant, or even provocative with respect to crime.[14]

The story we tell in this essay is not confined to an explanation of this punishment paradox, however. Rather, we emphasize the special impact that the dramatic increase in punishment has had on African Americans. While the increase in American punishment is impressive as a general matter, the involvement of African Americans is staggering.[15] The growth in incarceration, by population especially but also by rates, has been far greater for African Americans than for any other ethnic or racial group.[16] A few statistics illustrate: While the number of African Americans incarcerated in state correctional facilities has long been disproportionate to the percentage of African Americans in the population, African Americans comprised 45% of state prison populations.[17] From 1980 to

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[12] *See* Daniel S. Nagin, *Criminal Deterrence Research at the Outset of the Twenty-First Century*, 23 CRIME & JUST. 1 (1998) (discussing the loss of contingent threat of criminal punishment under conditions of mass incarceration).

[13] *See* Freeman, *supra* note 6.

[14] *But see* Levitt, *supra* note 1 (showing deterrent effects of incarceration based on natural experiments of states that have released offender cohorts following litigation and court intervention).

[15] Robert J. Sampson & Janet Lauritsen, *Racial and Ethnic Disparities in Crime and Criminal Justice in the United States*, *in* ETHNICITY, CRIME AND IMMIGRATION: COMPARATIVE AND CROSS-NATIONAL PERSPECTIVES 311 (Michael Tonry ed., 1997).

[16] *See* Blumstein & Beck, *supra* note 1; DAVID COLE, NO EQUAL JUSTICE: RACE AND CLASS IN THE AMERICAN CRIMINAL JUSTICE SYSTEM (2000); MAUER, *supra* note 5; TONRY, *supra* note 6 (claiming that racial animus in the development of law and policy since the early 1970s has fueled disparate trajectories of incarceration by race).

[17] For a historical look at racial differences in incarceration, *see* TONRY, *supra* note 6; Samuel L. Myers, Jr. & William J. Sabol, *Unemployment and Racial Differences in Imprisonment*, *in* THE ECONOMICS OF RACE AND CRIME 189, 194 (Margaret C. Simms & Samuel L. Myers, Jr. eds., 1988); (demonstrating average incarceration rates, by decade, of whites and blacks from 1850 to 1980). In 2005, blacks represented 39.5% and whites represented 34.6% of the prison populations. BUREAU OF JUST. STAT., U.S. DEP'T OF JUST., PRISONERS IN 2005, at 8 (2006), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/p05.pdf. In 1993, Blacks represented 49.7% of the state prison population and 33.7% of the federal population, while Whites represented 45.6% and 63.1%, respectively. *See* BUREAU OF JUST. STAT., U.S. DEP'T OF JUST., SOURCEBOOK OF CRIMINAL JUST. STAT. 1994, at 546 (1994). In December 2007, the Bureau of Justice Statistics released a report stating that from 2000 through 2006, the number of sentenced Black male prisoners increased slightly, from an estimated 528,300 to 534,200 but that the percentage of African-American men among all sentenced male prisoners actually declined to 38% from 43%. BUREAU OF JUST. STAT., U.S. DEP'T OF JUST., PRISONERS IN 2006, at 7 (2007), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/p06.pdf.

2003, the number of African-American inmates in state and federal prisons rose from 145,300 to 577,100, an increase of 297%. The incarceration rate for African Americans rose from 554 per 100,000 persons in 1980 to 1,574 per 100,000 in 1996, an increase of 184%.[18] The rate increased to 2,531 per 100,000 in 2004, an additional 61% increase over eight years.[19] The Sentencing Project, a nonprofit organization supporting alternatives to prison, studied the demographics of criminal justice control and recently estimated that nearly one third of young African-American men between the ages of twenty and twenty-nine are in prison, jail, or on probation or parole.[20] Additional studies indicate that these numbers were as high as 40% of young African-American men in the cities of Baltimore and Washington, D.C.[21] The number of such supervised males exceeded the number who were legally working.[22]

These high rates of African-American involvement with the criminal justice system clearly are tied to drug offending. Data show that by 1993 drug offenders accounted for about one quarter of all prison and jail incarcerations, compared to 8.8% one decade earlier, and African Americans have borne the brunt of law enforcement efforts targeted at illegal drug use and trafficking.[23] Examination of

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[18] Blumstein & Beck, *supra* note 1, at 22. By comparison, the increase in Hispanic sentenced prisoners was far greater, at 554%, but their incarceration rate in 1996 was 690 per 100,000 residents, less than half the rate for African Americans. The number of White prisoners rose by 185% during this period, and the White incarceration rate rose by 164%, but at 193 per 100,000 residents, it was less than one-eighth the African-American rate.

[19] PRISON POLICY INITIATIVE, U.S. INCARCERATION RATES BY RACE, http://www.prisonpolicy.org/graphs/raceinc.html (citing BUREAU OF JUST. STAT., U.S. DEP'T OF JUST., PRISON AND JAIL INMATES AT MIDYEAR 2004, *available at* http://www.ojp.usdoj.gov/bjs/abstract/pjim04.htm). *See also* BUREAU OF JUST. STAT., U.S. DEP'T OF JUST., PRISON AND JAIL INMATES AT MIDYEAR 2006, at 9 (2007), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/pjim06.pdf, (listing rates of 4,789 incarcerated persons for every 100,000 African-American males and 358 incarcerated persons for every 100,000 African-American females).

[20] MARC MAUER & TRACY HULING, THE SENTENCING PROJECT, YOUNG BLACK AMERICANS AND THE CRIMINAL JUSTICE SYSTEM: FIVE YEARS LATER 3 (1995). *See also* JEREMY TRAVIS, BUT THEY ALL COME BACK 24 (2005) ("In 2002, slightly more than 10 percent of African-American men between the ages of 25 and 29 years old were in prison, compared with 2.4 percent of Hispanic men and 1.2 percent of white men.").

[21] *See* MAUER, *supra* note 5.

[22] *Id*.

[23] *See, e.g.*, Ronald Weitzer & Stephen A. Tuch, *Racially Biased Policing: Determinants of Citizen Perceptions*, 83 SOC. FORCES 1009 (2005) (presenting survey data showing that perceptions of racial bias by police are highest among African-American respondents than Hispanic respondents, but that both groups perceive higher rates of racial bias than do Whites, and that attitudes towards the legality and acceptance of racially-biased policing practices are largely shaped by citizens' race, personal experiences with police discrimination, and exposure to news media reporting on incidents of police misconduct); *See also*, MAUER & HULING, *supra* note 20, at 11; *See also* TONRY, *supra* note 6. Drug offenders continue to represent about one-fifth of incarcerations. *See* BUREAU OF JUST. STAT., PRISONERS IN 2006, *supra* note 17 at 8; MARC MAUER & RYAN S. KING, THE SENTENCING PROJECT, A 25-YEAR QUAGMIRE: THE WAR ON DRUGS AND ITS IMPACT ON AMERICAN SOCIETY 2

the Bureau of Justice Statistics Surveys of Inmates of State Correctional Facilities for 1979, 1986, and 1991 reveals that the number of African-American prisoners incarcerated for drug offenses jumped from 13,974 in 1986 to 73,932 in 1991, an increase of 429%.[24] By 2003, 133,100 African Americans were incarcerated for drug offenses, an increase of 80% in twelve years.[25] From 1980 to 1996, incarceration rates for African Americans for drug offenses increased an average of 20.3% annually, compared to 12% for Whites and 16% for Hispanics.[26] And, as the numbers of those incarcerated for drug offenses have grown over time, the racial gap in the demographics of prisoners has widened.[27] Analysis of Bureau of Justice Statistics data indicates that incarceration for drug offenses of African Americans with less than a high school education increased from 60 in 100,000 in 1979 to 800 in 100,000 in 1991. The same rates for Whites with a high school education increased from 6 in 100,000 in 1979 to 20 in 100,000 in 1991.[28] Accordingly, one cannot discuss the rise of American imprisonment without a special look at African-American imprisonment and punishment generally. The aim of this paper is to make sense of the punishment paradox and the experience of African Americans by exploring two questions. First, what has been the impact of the criminalization of African-American males on society as a whole and on the

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(2007) (stating that there has been a 1100% increase in the amount of drug offenders in prisons and jails since 1990 and that 493,800 people are in prison for a drug offense, compared to 41,100 in 1980).

[24] MAUER & HULING, *supra* note 20, at 20.

[25] BUREAU OF JUST. STAT., PRISONERS IN 2006, *supra* note 17, at 9.

[26] Blumstein & Beck, *supra* note 1, at 24–25. Note that the number of African Americans incarcerated in state prisons for drug convictions declined from 134,000 in 1995 to 133,100 in 2003. BUREAU OF JUST. STAT., U.S. DEP'T OF JUST., PRISONERS IN 1996, at 10 (1997), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/p96.pdf; BUREAU OF JUST. STAT., PRISONERS IN 2005, *supra* note 17, at 9. However, this decrease may have resulted in methodological changes, most notably separation of Hispanics in later data.

[27] Among those convicted for drug offenses in state courts, 33% of convicted White defendants versus 51% of African-American defendants received prison sentences. MATTHEW R. DUROSE & PATRICK A. LANGAN, U.S. DEP'T OF JUST., STATE COURT SENTENCING OF CONVICTED FELONS, 1998 STATISTICAL TABLES, Tbl. 2.5 (2001), *available at* http:www.ojp.usdoj.gov/bjs/abstract/scsc98st.htm. Moreover, the cocaine-crack discrepancy has subverted the consistency that mandatory minimum sentences at the federal level were supposed to promote; in 1986, the average federal drug offense sentence was 11% longer for African Americans than for Whites. By 1990, African Americans faced an average sentence that was 49% longer than White federal drug offenders. *See* BARBARA S. MEIERHOEFER, FED. JUD. CTR., THE GENERAL EFFECT OF MANDATORY MINIMUM PRISON TERMS 20 (1992). According to a 2003 report by the U.S. Department of Justice, 44% of African-American inmates in 1997 did not complete high school or the GED, whereas 27% of White inmates did not complete high school or the GED. BUREAU OF JUST. STAT., U.S. DEP'T OF JUST., EDUCATION AND CORRECTIONAL POPULATIONS 6 (2003), *available at* http://www.ojp.gov/bjs/pub/pdf/ecp.pdf.

[28] *See* Tracey L. Meares, *Charting Race and Class Differences in Attitudes Toward Drug Legalization and Law Enforcement: Lessons for Federal Criminal Law*, 1 BUFF. CRIM. L. REV. 137, 148 (1997).

African-American communities from which these men come? Second, what is its impact on perceptions of African Americans of the legitimacy of our laws and legal institutions? Our thoughts on answers to these questions will unfold in four parts.

The first part lays out an explanation of the relationship between deterrence theory and social control. This part argues that our current "get tough" approach to crime control ignores the foundations of classical deterrence theory on which the policy presumably is premised, as classical deterrence theory pays much more attention to informal controls on individual behavior than our imprisonment policy does. The second part discusses the social contexts that can either enhance or detract from formal punishments. In this part we emphasize community social organization theory, and we demonstrate that African Americans, because they too often are situated in a community context that is very different from the context in which non-African Americans are situated, experience both crime and the policy that attempts to control crime in a unique way. The third part discusses the potential paradoxical effects of formal punishment and the unique consequences for predominantly minority communities where poverty is concentrated. The fourth part theorizes about reactions to law enforcement in minority communities. Here we emphasize how the escalation in formal punishment over the last two decades likely affects the commitment of residents of minority high-crime communities to government entities. The essay concludes with ideas about strengthening the legitimacy of law enforcement in distressed, predominantly minority communities.

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IV. THE PARADOXICAL EFFECTS OF FORMAL PUNISHMENT AND SOCIAL ORGANIZATION

We return, then, to the paradoxical effects of imprisonment in the United States in the late twentieth century. Offending rates increased, rather than decreased, in the face of escalating punishment costs of crime: the tripling of imprisonment rates, the lengthening of sentences, and the reduction of punishment thresholds relative to the severity of crimes. Using a framework of deterrence and

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social control, several factors can be implicated in the declining deterrent effects of punishment.

First, punishment has had unanticipated iatrogenic effects with respect to crime and negative effects on legal work. Several studies have shown that incarceration during adolescence and early adulthood has negative effects on employment and positive effects on crime in later adult years.[127] Both longitudinal and ethnographic studies place delinquency before unemployment in the sequence of developmental events over the life course. The assignment of a criminal record places concrete and lasting barriers to future employment, and for former inmates, reduces their choices with respect to avoiding crime and entering positive social roles. Increasing rates of incarceration and lower thresholds for imprisonment beginning in the 1980s have attenuated access to legal work that already was complicated by considerations of race, human capital, location, and discrimination.

Second, fundamental changes in the structure of work for marginally employed persons have lowered expected returns from legal work. The deterrent argument for punishment, at its simplest, suggests that the costs of punishment will exceed the returns from illegal work. However, declining wages and job mobility for unskilled workers combine to reduce incentives to avoid punishment, regardless of illegal incomes.[128]

Third, the corollary effect of widespread perceptions of increasing returns from illegal work—crime—undermine deterrence. That is, the costs of crime in foregone legal wages are no longer worth avoiding.

Fourth, punishment costs are discounted by cultural shifts, such as cultures of opposition and defiance of the goals of punishment.[129] This has occurred in spite of, or perhaps because of, objective increases in their certainty and severity. In fact, the increasing reliance on state-administered rather than informal social controls, contributes to the escalation of defiance and the delegitimization of punishment.

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[127] *See, e.g.*, Fagan & Freeman, *supra* note 32.

[128] *See, e.g.*, Hagan & Palloni, *supra* note 98 (on the embeddedness of criminal offenders in spatial and social contexts where the perceptions of returns from legal work are overwhelmed by normative perceptions of the limitations and futility of legal work). *See also* BOURGOIS, *supra* note 62; ANDERSON, STREETWISE, *supra* note 70; ANDERSON, CODE OF THE STREET, *supra* note 60 (on the devaluation of legal but low-wage work).

[129] The formation of oppositional cultures has been described by Elijah Anderson. *See* ANDERSON, CODE OF THE STREET, *supra* note 60. The process suggests that the isolation of marginalized communities has skewed perceptions of legal or conventional success so that achievement in school or the legal workplace is identified with an oppressive dominant economic and cultural order. Young people who pursue such success are themselves isolated and denied social standing in street networks in areas of social isolation and concentrated poverty. Defiance of the goals of punishment is part of this culture. *See* Sherman, *supra* note 11. Intrinsic emotional rewards from behaviors defying the goals of punishment outweigh whatever material rewards may be forthcoming from compliance and conformity.

> A vicious cycle has thus been formed. The hopelessness and alienation many young inner-city black men and women feel, largely as a result of endemic joblessness and persistent racism, fuels the violence they engage in. This violence serves to confirm the negative feelings many whites and some middle-class blacks harbor toward the ghetto poor, further legitimating the oppositional culture and the code of the streets in the eyes of many poor young blacks.[130]

We see this in the increasing likelihood and severity of punishment that has approached normative levels, compromising the moral component of punishment and in turn the logic of deterrence.

Finally, rapid changes in social structure have altered social organization in specific communities, compromising the informal social controls that reinforce legal controls including punishments. Informal social controls are the regulatory processes of social groups and institutions that convey the rewards and social opprobria for prohibited social behaviors. The salience of informal controls reflects the evaluation of negative social sanctions or rewards as meaningful and worth avoiding, that the status attached to societal acceptance itself is worthwhile, and that the groups allocating informal punishments have legitimacy and moral standing that merit efforts to obtain their acceptance. Structural changes—the concentration of poverty, declining marriage rates, high residential mobility combined with low political participation—have weakened the informal controls of social institutions such as schools and the supervision and cohesion of neighborhood residents. Ultimately, whatever the messages of punishment, their reinforcement through informal (extralegal) mechanisms has been weakened, and deterrent effects once again compromised.

So far we have explained how structural changes in many communities—especially high crime communities—have been altered in ways that make it more difficult for residents to exert social control. Because of these changes, we have argued that the effectiveness of deterrence-based formal punishment is likely to be undermined. In this section we focus on the experience of residents of high-crime, minority communities and explain that not only is the increase in formal punishment not likely to be effective for the reasons we have already explained, it is also likely to exacerbate the precursors to low levels of social control such as family disruption, unemployment, and low economic status. When these negative consequences are visited on a class of offenders that are not geographically dispersed but that are instead spatially concentrated, it is possible that the policy that leads to the consequences *confounds* its own crime-fighting ends.

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[130] Elijah Anderson, *The Code of the Streets*, ATL. MONTHLY, May 1994, at 83, *available at* http://www.theatlantic.com/doc/print/199405/code-of-the-streets.

A. *Family Disruption*

High rates of imprisonment of young African-American men and women translate into many broken families in African-American communities. It is difficult to measure how family ties and connections and individual psyches may be devastated when family members and close friends are removed from communities. Although quantification of emotional harm is practically impossible, some judgments about the ways in which high incarceration levels affect the vitality of families, the life chances of children left behind, and the economic circumstances of African-American communities are possible.

First, imprisonment contributes to the already high percentage of families headed by single African-American women.[131] Because the mortality rate for African-American men is somewhat higher than that for African-American women, the female to male ratio is already quite high in some African-American communities.[132] High levels of incarceration of African-American men add to this ratio. Increases in the ratio of African-American women to African-American men are likely to lead to a lower probability of marriage and formation of two-parent families.[133]

Second, the removal of young adults from the community means fewer adults to monitor and supervise children. Inadequate supervision leads to increased opportunities for children to become involved in delinquency and crime.[134] The increasing rate of African-American women sentenced to prison presents an additional hazard to poor African-American communities and especially to the children growing up in them, though the absolute numbers are small compared to the numbers of African-American men imprisoned.[135] Bureau of Justice Statistics data for the year 2006 shows that African-American women were incarcerated in

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[131] Fifty-five percent of African-American family households are headed by women compared to seventeen percent for Whites. *See* U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES 62 (1995), *available at* http://www.census.gov/prod/1/gen/95statab/pop.pdf.

[132] *See* WILLIAM A. DARITY, JR. & SAMUEL L. MYERS, JR. WITH EMMETT D. CARSON & WILLIAM SABOL, THE BLACK UNDERCLASS: CRITICAL ESSAYS ON RACE AND UNWANTEDNESS 148–51 (1994) (explaining that mortality rates for black men outpaces that of black women partly because of high homicide rates among young black men).

[133] This argument assumes, of course, that the marriage prospects of African-American women are substantially determined by the ratio of African-American men available to African-American women. This assumption is not without foundation. American interracial marriage is still relatively rare—about two percent of all marriages in 1994. *See* U.S. CENSUS BUREAU, *supra* note 131, at 55. Moreover, interracial marriage is least likely for African-American women. *See id.* (chart showing that in 1994 there were 96,000 more black husband/white wife interracial couples than white husband/black wife couples).

[134] *See* Robert J. Sampson & John H. Laub, *Urban Poverty and the Family Context of Delinquency: A New Look at Structure and Process in a Classic Study*, 65 CHILD DEV. 523, 531–33, 538–39 (1994).

[135] BUREAU OF JUST. STAT., PRISONERS IN 2006, *supra* note 17, at 6 (estimating that there were 28,600 African-American women incarcerated in state and federal prisons in 2006).

state or federal prisons at a rate of 148 per 100,000, whereas the rate for white women was 48 per 100,000.[136] Because African-American women often are the primary caretakers of children in poor communities, there is a growing risk that children are in danger of losing *both* parents to the criminal justice system.[137] As a result, these children face a very high risk of future criminal involvement. Moreover, communities will suffer a loss because each additional incarcerated adult erodes the important community adult/child ratio that is a predictor of greater neighborhood supervision.

B. *Low Economic Status and Joblessness*

In addition to the negative consequences that high rates of imprisonment undoubtedly have on the amount of emotional support and caregiving available to the families of incarcerated individuals, high imprisonment rates are likely to have a detrimental effect on the economic well-being of families in impoverished neighborhoods. The prevalence of low economic status and unemployment among families predicts low levels of community social organization. Given the well-established association between poverty and families headed by single women,[138] there can be little doubt that higher rates of incarceration of African-American men will contribute to the deepening poverty in the African-American community. Recent Census estimates indicate that an astonishing 22.3% of African-American families have incomes below the poverty level compared to 8.1% for whites.[139] Families of the incarcerated necessarily lose whatever financial support the offenders could have given them.[140] Though the majority of those incarcerated are

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[136] *Id*. at 7. Note that the number of African-American women in prison declined from an estimated 32,000 in 2000 to an estimated 28,600 in 2006. *Id*. at 6. Furthermore, those figures increased for white women from 33,300 to 49,100 during this period. *Id*.

[137] A 2000 Bureau of Justice Statistics Special Report, *Incarcerated Parents and Their Children*, estimated that Black children were nine times more likely than White children to have a parent in prison. *See* CHRISTOPHER J. MUMOLA, BUREAU OF JUST. STAT., INCARCERATED CHILDREN AND THEIR PARENTS 2 (2000), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/iptc.pdf. *See also* John Hagan & Ronit Dinovitzer, *Collateral Consequences of Imprisonment for Children, Communities, and Prisoners*, 26 CRIME & JUST. 121 (1999).

[138] *See* WILSON, *supra* note 108.

[139] *See* U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES 42 (2007), *available at* http://www.census.gov/prod/2006pubs/07statab/pop.pdf. These numbers have also been constant over time with respective rates standing at 31.3% and 9.4% in 1995, 32.3% and 9.7% in 1983, 28.1% and 6.6% in 1973. *Id.* at 48; U.S. CENSUS BUREAU, *supra* note 131, at 484, *available at* http://www.census.gov/prod/1/gen/95statab/income.pdf.

[140] An interesting statistic from the 1991 Survey of Prison Inmates supports an inference that families are worse off economically after an adult family member is incarcerated. Out of all inmates surveyed whose families were receiving public assistance at the time of the survey interview, fifty-one percent of those families were *not* receiving public assistance prior to the inmates' arrests. BUREAU OF JUST. STAT., SURVEY OF STATE PRISON INMATES, 1991, at 3 (1993), *available at* http://www.ojp.gov/bjs/pub/pdf/sospi91.pdf.

ill-educated and although many have shallow work histories,[141] many still manage to contribute to their families financially prior to being imprisoned. Some participate in the "informal economy," running unlicensed cab businesses, car repair businesses, and unlicensed street vending businesses, to name a few, in order to assist their families.[142] And some of them engage in illegal activity in order to contribute to their families. A recent RAND study documents the importance of drug selling as an economic activity for young black males in the District of Columbia. This study found that over half of the men sampled provided monthly support to a child, spouse, girlfriend, family member, or friend.[143] Another study of Chicago Public Housing found that many public housing residents rely on gang members for financial support to supplement public assistance benefits.[144]

Most drug offenders do not remain in prison forever,[145] and we should expect some of the negative financial consequences that families suffer when a contributor is sent away to prison to be alleviated, if only in part, when the offender is released. However, the negative consequences to the community are not likely to be remedied simply by the release of drug offenders. In fact, release of convicted drug offenders back into their communities may worsen the social organization of poor communities even while the convict's return may improve the financial situation of his family.

The vast majority of formerly incarcerated men return to their homes in the inner city, where job prospects for everyone already are glum, even if they are aware of better job prospects elsewhere.[146] In 1997 the Bureau of Labor Statistics

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[141] According to the 1991 *Survey of State Prison Inmates*, 65.1% of all state prison inmates have less than a high school education. *Id*. Moreover, in 1991 32.7% of all state prison inmates were not employed at the time of arrest. *See* U.S. CENSUS BUREAU, *supra* note 131, at 217, *available at* http://www.census.gov/prod/1/gen/95statab/law.pdf.

[142] *See, e.g.*, Sudhir Alladi Venkatesh, *Cleaning Up Chicago's Public Housing: A Critique Of "Sweeps" and Enforcement-Based Approaches*, *in* EIGHTH ANNUAL INTERNATIONAL CONFERENCE ON DRUG POLICY REFORM, "THE CRUCIAL NEXT STAGE: HEALTH CARE & HUMAN RIGHTS" 5 (1994) (explaining the entrenched informal economy in Chicago's public housing).

[143] *See* PETER REUTER, ROBERT MACCOUN & PATRICK MURPHY, RAND, MONEY FROM CRIME: A STUDY OF THE ECONOMICS OF DRUG DEALING IN WASHINGTON, D.C., 70 (1990), *available at* http://www.rand.org/pubs/reports/2005/R3894.pdf.

[144] *See* Venkatesh, *supra* note 112, at 251–52.

[145] For offenders convicted and sentenced in U.S. District Courts in 1992, the average sentence length was 21.8 months for a possession offense and 83.8 months for a trafficking or manufacturing offense. *See* U.S. CENSUS BUREAU, *supra* note 131, at 214, *available at* http://www.census.gov/prod/1/gen/95statab/law.pdf. A survey of 38 states found the average maximum sentence length to be 53 months for possession and 61 months for trafficking. Most telling, however, are the statistics on time served. In federal prisons, average time served totaled 8.2 months for possession and 34.7 months for trafficking, while for the states the averages were 15 and 18 months respectively. *See* BUREAU OF JUST. STAT., SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS *supra* note 17, at 555–56, 574.

[146] *See* john a. powell, *Race and Poverty: A New Focus for Legal Services*, 27 CLEARINGHOUSE REV. 299, 303 (1993) (documenting the fact that imprisoned men usually return to

estimated the unemployment rate in central cities to be 7.3% compared to 4.0% in suburbs of central cities and 4.9% in the balance of the country; however, researchers have documented jobless rates as high as 60% in some hyper-poverty areas in central cities.[147] This latter statistic is important. Unlike the term unemployment, which assumes an individual is a participant in the formal labor market, joblessness refers to those who have completely withdrawn from the labor force—they are not working nor are they actively looking for work.

Of course, legitimate job prospects for ex-convicts are likely to be worse than the already weak prospects for inner city residents generally. As we noted above, few people with the typical convict's credentials would be competitive in today's service-oriented economy, which emphasizes educational attainment and training.[148] Thus, a released convict likely will have even fewer employment opportunities than he had before he was imprisoned, so he will inevitably contribute to the already high rates of unemployment in the central cities when he returns home—unemployment that erodes community social organization.

Professor Bruce Western, in his 2006 book, *Punishment and Inequality in America*, provides statistical evidence for this proposition.[149] Western presents detailed information about hours worked and wages for those never incarcerated and compares those figures to hours worked and wages for those individuals both before and after incarceration.[150] Although the largest intraracial wage gap is that between whites who are never incarcerated and whites who end up in the criminal justice system at some point, with average hourly wages of $14.70 versus $11.14, African Americans who have been incarcerated experience the largest drops in earnings. Black offenders earned $7,020 in the year after reentry versus $13,340 in the year before their incarceration.[151] "These raw figures suggest that incarceration damages the employment prospects of men with criminal records, but it is also clear that men bound for prison, even before they are incarcerated, do worse on the job market than the rest of the population."[152] A statistical analysis intending to isolate the effect of incarceration (rather than one also reflecting labor market differences that might result because individuals who go to prison have fewer opportunities in the legitimate labor market) demonstrates that "[m]en with prison records are estimated to earn 30 to 40 percent less each year."[153] More ominously,

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the impoverished urban communities they came from, even if better jobs are located elsewhere).

[147] *See* BUREAU OF LABOR STAT., ISSUES IN LABOR STATISTICS (1998), *available at* http://ww.bls.gov/opub/ils/pdf/opbils27.pdf. *See also* WILSON, *supra* note 54, at 19.

[148] Professor Randolph Stone has said that a felony conviction for an African-American youth is an "economic 'life sentence.' " Randolph N. Stone, *Juvenile Justice: A Dream Deferred*, 8 CRIM. JUST. i, 50 (1994).

[149] WESTERN, *supra* note 5, at 116.

[150] *Id*. at 115–16; stated in 2004 nominal dollars.

[151] *Id*. at 115.

[152] *Id*.

[153] *Id*. at 120.

in terms of advocates' preference for ensuring that reentering individuals establish a permanent presence in the legitimate job market, there are issues of rapid job turnover and insufficient wage growth.

Moreover, Western cites research by Professor Devah Pager demonstrating pernicious discrimination among reentering individuals, particularly African Americans.[154] The study involved "randomly assign[ing] resumes to pairs of specially trained black and white job applicants. The resumes showed identical work experience and education, but one of the two indicated recent employment in prison and listed a parole officer as a reference."[155] After having these applicants interview for 350 jobs in Milwaukee in 2001, Pager found that Whites without a criminal record were offered second-round interviews from employers 34% of the time (versus 17% for those who said they were in prison); the corresponding rates for Blacks were 14% and 5%.[156] Western also discusses legal disqualifications from employment in certain licensed or professional occupations, the erosion of job skills during incarceration, the "signaling" effect of untrustworthiness that incarceration may convey to potential employers, and the erosion of social and community bonds that often help individuals to find a job.[157]

Furthermore, Jeremy Travis argues that mass incarceration is counterproductive because it may have criminogenic effects on prisoners.[158] Imprisonment not only weakens a person's access to legal work, as both Western's and Pager's research has shown, it also strengthens his connections to criminal networks.[159] Thus, upon re-entry to their communities, prisoners pull away from legal work and "push toward the secondary labor market of day labor and part-time jobs and toward illegal income."[160]

One might think that the argument that a released convict will contribute to high rates of unemployment upon re-entry is undercut by the fact that many convicted offenders did not participate in the formal labor force prior to incarceration. Under such conditions, it may be difficult to see how a convict's return to his neighborhood would substantially worsen the neighborhood's social organization. In fact, one might even predict that many families would be better off once an offender is released because the newly-released offender is able to contribute to his family financially, or in other ways, as he was not able to do in prison. Notwithstanding the fact that the unemployed released convict may be able

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[154] *See* DEVAH PAGER, MARKED: RACE, CRIME, AND FINDING WORK IN AN ERA OF MASS INCARCERATION (2007); Devah Pager, *Two Strikes and You're Out: The Intensification of Racial and Criminal Stigma*, *in* BARRIERS TO REENTRY? THE LABOR MARKET FOR RELEASED PRISONERS IN POST-INDUSTRIAL AMERICA 151 (Shawn Bushway, Michael A. Stoll & David F. Weiman eds., 2007).

[155] WESTERN, *supra* note 5, at 112.

[156] *Id*.

[157] *Id.* at 112–13.

[158] TRAVIS, *supra* note 20, at 166.

[159] *Id*.

[160] *Id*.

to enhance his family's welfare when he returns home, it is important to see that release of convicted drug offenders back into poor communities has the potential to erode a community's social organization even if the proportion of unemployed individuals in the community is essentially unchanged.

The widespread human capital in a community facilitates the formation of networks and relationships among individuals that form the backbone of the structural components of social organization; however, the status of "convict" severely compromises the released felon's ability to expand his human capital. A released convict may perceive further investment in human capital to be useless because he may understandably reason that sinking money and time into education and training will not overcome the stigma of a felony conviction on a job application. When he makes the decision to refrain from further investment, he weakens existing relationships he has with people who will be less likely to depend on him because his ability to provide them with benefits through interaction is compromised. Additionally, the individual who decides not to make further investments in education, skills, and training cuts himself off from potentially useful relationships with others who have no incentive to form relationships with him.

It is true that many law-abiders in the neighborhoods we are concerned with here possess low levels of human capital, as poverty often is correlated with low levels of education. By distinguishing convicted drug offenders from law-abiders, we do not mean to imply that it is a fairly simple proposition for residents of poor, urban communities to invest in human capital by acquiring better educations and vocational skills. However, we do mean to argue that, to the extent that it is difficult for anyone in poor communities to do so, it is that much harder for a released convict; the marginal effect of this additional hurdle may make a large difference in the potential of the convict to form important networks with his neighbors. The basic point is this: all unemployed populations are not equal, and any incremental increase in the proportion of convicts among the unemployed population of the ghetto portends incrementally worse consequences for the vitality of the community.

To emphasize the point that increases in the proportion of the community's population of those with the status of "convict" potentially erodes the social organization of a neighborhood, consider the likely change that ascription of the status will produce in the level of an individual's interaction with law enforcement or in that individual's level of civic participation. A released convict obviously will be less likely than other law-abiding neighborhood residents to engage positively with local law enforcement. Of course, many non-convicts in poor, minority communities may not welcome engagements with law enforcement. The point, however, is that released convicts are even less likely than others to do so.

Voting is another indicator of participation in the life of a community. In ten states, convicts are unable to vote upon the completion of their sentences,[161] The

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[161] *See* BRENNAN CTR. FOR JUST., CRIMINAL DISENFRANCHISEMENT LAWS ACROSS THE UNITED

burden of these laws falls disproportionately on African Americans and Hispanics: approximately thirteen percent of African American men cannot cast votes, and in three states, the percentage rises to twenty because they are either currently or formerly incarcerated.[162] Restoring the vote to ex-felons is complex and burdensome, with the result that many never regain the right to vote.[163] Voting is connected to other forms of political participation such as membership in formal organizations, an important structural component of social organization.[164] These arguments, together with those in the previous paragraph, illustrate that changes in the percentage of individuals with the status of "convict" in the community potentially affect the prevalence of friendship networks in a community and the levels of participation by neighborhood residents in formal organizations.

Finally, release of incarcerated drug offenders is unlikely to remedy the first precursor to social organization disruption referred to earlier—family disruption. Even while a released convict may contribute to his family in small and helpful ways, it is unlikely that release will lead to strengthening of family ties and aversion of family disruption. With dismal employment prospects, the released convict may not be viewed as a favorable "marriage prospect."[165] If the released convict was married prior to incarceration, his now-impaired economic

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STATES (2008), *available at* http://www.brennancenter.org/page/-/d/download_file_48642.pdf. In 25 states, felons can regain the right to vote only after completion of probation, parole or prison sentences, and often only upon application. *See also* MARGARET COLGATE LOVE, THE SENTENCING PROJECT, RELIEF FROM THE COLLATERAL CONSEQUENCES OF A CRIMINAL CONVICTION: A STATE-BY-STATE RESOURCE GUIDE Tbl. 7 (2006); THE SENTENCING PROJECT, FELONY DISENFRANCHISEMENT LAWS IN THE UNITED STATES, *available at* http://www.sentencingproject.org/Admin/Documents/publications/fd_bs_fdlawsinus.pdf (finding that 5.3 million Americans, including 1.4 million African-American men, are temporarily or permanently disenfranchised because of a felony conviction); Andrew L. Shapiro, *Challenging Criminal Disenfranchisement Under the Voting Rights Act: A New Strategy*, 103 YALE L. J. 537, 538–40 (1993) (finding that about four million Americans, disproportionately African-American, have lost their right to vote because of a criminal conviction).

[162] Among prison inmates in Rhode Island, African-American inmates outnumber Hispanics by two to one, and Whites by six to one. *See* ERIKA WOOD, RESTORING THE RIGHT TO VOTE 8, 21 (2008), *available at* http://www.brennancenter.org/page/-/Democracy/Restoring%20the%20Right%20to%20Vote.pdf.

[163] JEFF MANZA & CHRISTOPHER UGGEN, LOCKED OUT: FELON DISENFRANCHISEMENT AND AMERICAN DEMOCRACY 252–54 (2006) (showing that among 155,127 men and women released from prison in Mississippi between 1992 and 2004, only 107 petitions to restore their voting rights were approved, and that the potential African-American electorate in Kentucky has been reduced by almost 24% during the same period). *See also* Jason DeParle, *The American Prison Nightmare*, 54 N.Y. REV. OF BOOKS 33 (Apr. 12, 2007).

[164] *See* SIDNEY VERBA, KAY LEHMAN SCHLOZMAN & HENRY E. BRADY, VOICE AND EQUALITY: CIVIC VOLUNTARISM IN AMERICAN POLITICS (1995).

[165] WILSON, *supra* note 108, at 81–92 (discussing the "male marriageable pool index," the ratio of employed civilian men to women of the same race and age-group, and showing that the decline in the proportion of employed black men to women of the same age tracks the decline in the formation of black two-parent households).

circumstances likely will place strains on his relationship.[166] Higher numbers of families headed by single women seem inevitable even after incarcerated men are released. Also, to the extent that a single woman has managed to create a stable home life while the father of her children was incarcerated, his release may lead to disruptive domestic violence.[167]

This analysis should demonstrate that a law enforcement strategy that depends on the high prevalence of long sentences to generate benefits may ultimately backfire. The strategy could likely lead to family disruption, unemployment, weakened informal social controls among neighbors, and lower levels of civic participation.[168] Thus, to the extent that the strategy produces crime reduction benefits, it does so only by exacerbating the preconditions of social organization disruption.

V. THE IMPACT OF FORMAL PUNISHMENT AND PERCEPTIONS OF LEGITIMACY

How do the impacted African-American communities view the substantial increase in punishment over the last two decades? The answer to that question is complex. African Americans generally, and those who reside in high-crime neighborhoods especially, have multiple reasons to hold complex views about the issue.[169]

As noted earlier, the level of African-American imprisonment is greatly affected by sentencing policy directed at drug offending, and one undisputed consequence of the War on Drugs is the fact that disproportionate numbers of African Americans (poor African Americans in particular) have been convicted and imprisoned for drug offending. President George H. W. Bush's Attorney General, William Barr, touted this piece of data claiming that "[t]he benefits of increased incarceration would be enjoyed disproportionately by black Americans."[170] However, assessing the extent to which African Americans enjoyed the claimed benefits of the policy is difficult.[171] Drug selling and drug use

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[166] *See* Sampson, *supra* note 100.

[167] *See* Anthony E.O. King, *African-American Males in Prison: Are They Doing Time or is the Time Doing Them?*, 20 J. SOC. & SOC. WELFARE 9 (1993) (explaining how prison life can make former inmates prone to violence).

[168] *See* James P. Lynch & William J. Sabol, Commentary, *Assessing the Effects of Mass Incarceration on Informal Social Control in Communities*, 3 CRIMINOLOGY & PUB. POL'Y 267 (2004) (offering empirical evidence of the connection between community disruption and mass imprisonment and concluding in part that the long-term result of mass incarceration is to reduce its overall effectiveness in reducing crime rates.). *See also* Tracey L. Meares, *Mass Incarceration: Who Pays the Price for Criminal Offending?*, 3 CRIMINOLOGY & PUB. POL'Y 295 (2004).

[169] *See generally* Meares, *supra* note 28.

[170] *See* TONRY, *supra* note 6, at 36.

[171] In 1985, approximately 11.4% of current cocaine users were Black—roughly the percentage of African Americans in the population. *See* John P. Walters, *Race and the War on Drugs*, 1994 U. CHI. LEGAL F. 107, 135 (1994). In 1988, 15.3% of current cocaine users and 27.3% of frequent cocaine users were Black. *Id.* at 136. By 1991, 21.8% of current cocaine users were

unfortunately are prevalent in modern urban ghettoes where many poor African Americans reside, suggesting that many African Americans could benefit from federal and state crackdowns on drug offenders. At the same time, it is impossible to ignore the fact that "[t]he young black men wreaking havoc in the ghetto are still [considered] 'our youngsters' in the eyes of many decent poor and working-class black people who are sometimes their victims."[172] In light of such beliefs, it is difficult to be confident that African Americans, though supposedly beneficiaries of prevalent and long sentences for drug offending, wholeheartedly support them.[173] In short, while African Americans disproportionately suffer problems associated with drug use and marketing, they also suffer the negative consequences associated with the current drug-law enforcement regime.

So far we have explained reasons to be skeptical of the benefits flowing from the escalation of formal punishment to achieve deterrence of crime—especially drug offending. There are also reasons to believe that the racial asymmetry generated from high levels of punishment of inner city offenders is likely to ultimately undermine the goal of crime reduction. The race-specific reasons that undermine the ability of a law-and-order program to effect substantial crime reduction in inner city communities fall into three general categories: *stigma*, *linked fate*, and *multiple roles*.

Black, and 41.2% of frequent cocaine users were Black. *Id*. at 137. Although the numbers of all current and frequent cocaine users have declined since 1985, the numbers of White current and frequent cocaine users declined most dramatically. The result is an increasingly disproportionate representation of Blacks among illegal drug users, though White users still remain the majority of users. These data could suggest that if the War on Drugs was responsible for declining drug use, it was less effective among Blacks than Whites. This argument depends, however, on an assumption that the rate of increase of use among Blacks and Whites during the period in question was the same. If the rate of increase of use among Blacks was *faster* than that among Whites, these data could also suggest that the War on Drugs was just as effective among Blacks as it was among Whites—perhaps even more effective. The *1997 National Household Survey on Drug Abuse* seems to show a different picture. *See* OFF. OF APPLIED STUD., DEP'T OF HEALTH & HUM. SERV., 1997 NATIONAL HOUSEHOLD SURVEY ON DRUG ABUSE, *available at* http://www.oas.samhsa.gov/nhsda/1997Main/nhsda1997mfWeb-39.htm#Table4.5.

[172] Glenn C. Loury, *Listen to the Black Community*, PUB. INT. 33, 35 (1994).

[173] For instance, Bobo and Johnson conducted a study to see the effect racial cues would have on support for capital punishment and the crack-cocaine disparity. While the inclusion of racial cues did not have much effect on support for the death penalty, support for higher sentences for crack was halved among both African Americans and Whites when a question about support for the differential was preceded by a comment about the racial disparities between crack and cocaine users. The survey results demonstrate a tension in the African-American community, whereby concerns about the fairness of a differential policy must also confront concerns about the criminality that crack use produces in their communities. *See* Lawrence D. Bobo & Devon Johnson, *A Taste for Punishment: Black and White Americans' Views on the Death Penalty and the War on Drugs*, 1 DU BOIS REV. 151, 167 (2004); *see also* Meares, *supra* note 28.

A. *Stigma*

It appears fairly clear that the disproportionate involvement of minorities (African Americans in particular) in the criminal justice system generally stigmatizes all minorities, whether they are categorized as law breakers or law abiders.[174] This point is an unremarkable one. Less obvious is the link between the stigmatization of minority law-abiders and their commitment to law abiding conduct. By referring to "commitment to the law" here, we adopt a normative view of compliance whereby a social group promotes respect for authorities and commitment to law as a key value to pass on to other members of the group. Stigmatization of minority law abiders through law enforcement programs that generate extremely racially disproportionate incarceration rates can undermine commitment to the law by minority law abiders by fostering a perception of illegitimacy of government among members of the stigmatized minority group.

Scholars have noted that discrimination undermines minority citizen perceptions of fairness of the criminal justice system.[175] Although crime rates have declined significantly since the early 1990s, the rates for African Americans remain higher than the rates for both Whites and Hispanics. In the aftermath of the riots that decimated urban areas throughout the country in the mid-1960s, the Kerner Commission characterized how policemen in the ghetto become "the tangible target for grievances against shortcomings" that pervaded law enforcement and criminal justice systems, and that the police and society must "take every possible step to allay grievances that flow from a sense of injustice and increased tension and turmoil."[176] But in the intervening years, any substantial political support for extensive policies to remedy the underlying causes of the riots dissipated.

Glenn Loury offers a compelling historical rationale for the racial discrepancy in attitudes toward the legitimacy of legal outcomes. He argues that "the social meaning of race emergent in American political culture at mid-nineteenth century was closely connected with the slaves' dishonorable status," and consequently "that black Americans are exceptional in the extent to which remnants of this

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[174] *See* JODY DAVID AMOUR, NEGROPHOBIA AND REASONABLE RACISM: THE HIDDEN COSTS OF BEING BLACK IN AMERICA (1997); Dinesh D'Souza, *Myth of the Racist Cabbie*, NAT'L REV., Oct. 9, 1995, at 36; Walter E. Williams et al., *The Jeweler's Dilemma*, NEW REPUBLIC, Nov. 10, 1986, at 18.

[175] *See, e.g.*, TOM R. TYLER & YUEN J. HUO, TRUST IN THE LAW: ENCOURAGING PUBLIC COOPERATION WITH THE POLICE AND COURTS (2002); Lawrence D. Bobo & Victor Thompson, *Unfair by Design: The War on Drugs, Race, and the Legitimacy of the Criminal Justice System*, 73 SOC. RES. 445 (2006); Bobo & Johnson, *supra* note 173; Jason Sunshine & Tom R. Tyler, *The Role of Procedural Justice and Legitimacy in Shaping Public Support for Policing*, 37 LAW & SOC'Y REV. 513, 519–21 (2003) (suggesting that police treatment of people in the community has stronger effect on legitimacy than quality of police performance); Tom R. Tyler & Jeffrey Fagan, *Legitimacy and Cooperation: Why Do People Help the Police Fight Crime in Their Communities?*, 6 OHIO ST. J. CRIM. LAW 231 (2008).

[176] THE KERNER REPORT: THE 1968 REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 300 (1988).

ignoble history are still discernible in the nation's present-day public culture."[177] He explains how the pervasive societal stigmatization of African Americans can further marginalize the community from the institutions and norms that "mainstream" society purports to value.[178]

As Loury explains, the "social otherness" engendered by centuries of racial subordination infects social meaning, most notably the paradigm of how society conceptualizes policies and situations, if not the attitudes individual Americans say they hold.[179] He illustrates the effect of social meaning by noting how "[t]he youthful city-dwelling drug sellers elicit a punitive response, while the youthful suburban-dwelling drug buyers call forth a therapeutic one."[180] Racial stigma, as evidenced by the development of urban ghettos, "helped create the facts that are its own justification."[181] Despite the pervasive evidence of minority skepticism of the fairness of the criminal justice system and law enforcement authorities, very few scholars have linked these perceptions to predict behavior of minority group members.[182]

Certainly, widely shared perceptions of unfairness, ill treatment, and racial animus can erode popular support for law and the moral and social norms that underlie them.[183] These are the moving parts in a legitimacy story and would apply to most social groups. But to understand exactly how legitimacy may support or corrode beliefs in and compliance with the law, these linkages need to be spelled out in more precise theoretical detail. What, then, is legitimacy, what

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[177] GLENN C. LOURY, THE ANATOMY OF RACIAL INEQUALITY 69 (2002).

[178] *Id. See also* Glenn C. Loury, *Why Are So Many Americans in Prison? Race and the Transformation of Criminal Justice*, BOSTON REV., July 2007, *available at* http://www.bostonreview.net/BR32.4/article_loury.php [hereinafter Loury, *Americans in Prison*].

[179] LOURY, *supra* note 177, at 70–71.

[180] *Id.* at 71.

[181] *Id.* at 78.

[182] For notable exceptions, see Katheryn K. Russell, *The Racial Hoax as Crime: The Law as Affirmation*, 71 IND. L.J. 593 (1996) (arguing that perceptions of unfairness in the system support a theory of defiance whereby Black men especially become alienated from "mainstream" values, ultimately reject them as illegitimate, motivating lawbreaking); John Hagan, Carla Shedd & Monique R. Payne, *Race, Ethnicity, and Youth Perceptions of Criminal Injustice*, 70 AM. SOC. REV. 381 (2005) (showing that adolescents who perceive discrimination by criminal justice agents are more likely to engage in law violation); Janice Nadler, *Flouting the Law*, 83 TEX. L. REV. 1399 (2005) (showing that persons who perceive laws as unjust were more willing to flout unrelated laws, and their willingness to disobey extended unrelated laws in their everyday lives such as traffic violations, petty theft, and copyright restrictions). *See also* TOM R. TYLER, WHY PEOPLE OBEY THE LAW 34–35 (2006) (studies cited in charts on these pages identify a connection between political alienation and support for revolutionary behavior).

[183] Hagan et al., *supra* note 182; *see, e.g.*, David S. Kirk & Andrew V. Papachristos, Legal Cynicism and the Framing of Neighborhood Violence: Implications For 'Neighborhood Effects' Research 2 (Dec. 28, 2007) (unpublished manuscript), *available at* http://ssrn.com/abstract=1081894 (showing that elevated rates of legal cynicism in neighborhoods explain "homicide net of neighborhood structural conditions and collective efficacy", and "the persistence of homicide in certain Chicago neighborhoods during the 1990s when homicide declined drastically city-wide").

are its antecedents, and from what experiences or norms does it develop? The term is used widely and promiscuously in legal scholarship, moral philosophy, and political science but generally without consensus as to its definition, how it accrues, or its influence on normative action.[184]

Writing about the challenge of legitimacy in the development of the European Union, David Beetham and Christopher Lord define legitimacy as the moral or normative standing of political authority.[185] They characterize legitimate regimes as "rightful" governments where "those subject to political authority . . . have an obligation to obey it."[186] However, they are concerned less with the mechanisms by which political order and obedience are sustained or break down, than with explaining differences between countries or group differences in the relationship that each holds with a shared government.[187]

Following Beetham, we view legitimacy as the perceived obligation to comply with both civil and criminal law and to defer to decisions of legal authorities.[188] Legitimacy is a socially and morally salient belief to which social authorities can appeal to gain public deference and cooperation.[189] It both assumes

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[184] *See generally* Brian E. Butler, *Posner's Problem with Moral Philosophy*, 7 U. CHI. L. SCH. ROUNDTABLE 325, 332 (2000) (book review); Williamson M. Evers, *Social Contract: A Critique*, 1 J. LIBERTARIAN STUD. 185 (1977), *available at* http://www.mises.org/journals/jls/1_3/1_3_3.pdf; William G. Merkel, Parker v. The District of Columbia *and the Hollowness of Originalist Claims to Principled Neutrality*, 18 GEO. MASON U. CIV. RTS. L.J. 251, 262–63 (2008); Note, *The* Charming Betsy *Canon, Separation of Powers, and Customary International Law*, 121 HARV. L. REV. 1215, 1216 (2008); Arthur Isak Applbaum, *Legitimacy in a Bastard Kingdom*, (Ctr for Pub. Leadership, Working Paper, 2004), *available at* http://www.ksg.harvard.edu/leadership/images/stories/ksg/PDF/Publications/applbaumworkingpaper.pdf; Lawrence Solum, *Legal Theory Lexicon: Legitimacy* (2007), http://lsolum.typepad.com/legaltheory/2007/07/legal-theory--4.html.

[185] David Beetham & Christopher Lord, *Legitimacy and the European Union*, *in* POLITICAL THEORY AND THE EUROPEAN UNION 15, 15 (Albert Weale & Michael Nentwich eds., 1998).

[186] DAVID BEETHAM & CHRISTOPHER LORD, LEGITIMACY AND THE EUROPEAN UNION 1 (Longman, 1998)

[187] *Id*. at 20–25. *See, e.g.*, MAX WEBER, ECONOMY AND SOCIETY: AN OUTLINE OF INTERPRETIVE SOCIOLOGY 212–15 (Guenther Roth & Claus Wittich eds., 1978) (1968).

[188] *See, e.g.*, DAVID BEETHAM, THE LEGITIMATION OF POWER 15–16 (1991) (defining legitimacy along three dimensions, including rules that are justified "by reference to beliefs shared by both dominant and subordinate"); Tom R. Tyler, *Psychological Perspectives on Legitimacy and Legitimation*, 57 ANN. REV. PSYCHOL. 375 (2006) [hereinafter Tyler, *Psychological Perspectives*] (discussing ways in which legitimacy facilitates state exercise of power because individuals view authorities as morally or normatively appropriate); TYLER, *supra* note 182, at 25 (stating that "legitimacy exists when the members of a society see adequate reason for feeling that they should voluntarily obey the commands of authorities"); Tyler, *Psychological Perspectives*, *supra* at 378 ("One aspect of values—obligation—is a key element in the concept of legitimacy. It leads to voluntary deference to the directives of legitimate authorities and rules."). *But see* WEBER, *supra* note 186. *See also* Tyler & Fagan, *supra* note 175.

[189] HERBERT C. KELMAN & V. LEE HAMILTON, CRIMES OF OBEDIENCE: TOWARD A SOCIAL PSYCHOLOGY OF AUTHORITY AND RESPONSIBILITY (1990); TYLER, *supra* note 182; TYLER & HUO, *supra* note 175; John R. P. French, Jr. & Bertram Raven, *The Bases of Social Power*, *in* STUDIES IN

and requires that citizens perceive an obligation to obey legal authorities and also hold trust and confidence in authorities. Legitimacy, then, may be strongest when law and legal actors express moral and social norms that are widely shared by both dominant and subordinate social groups. In the context of this essay, legal actors, especially the police—because they are a common and frequent point of contact with the state for most citizens—can gain cooperation and compliance by inculcating the popular perception that their actions and decision are legitimate. This argument builds upon a long line of theory that argues for the centrality of legitimacy to the effectiveness of state actors.[190]

Psychologist Tom Tyler advances a normative view of compliance with the law that promotes the fact that people tend to comply with the law because they believe that authorities have the right to dictate to them proper behavior—that they believe that authorities are legitimate.[191] The normative view of compliance, in contrast to an instrumental one, emphasizes the importance of the social influence of groups on individuals. Individuals respond to normative factors differently from the way they respond to rewards and punishments. In contrast to the individual who complies with the law because she is responding to externally imposed punishments, the individual who complies for normative reasons does so because she feels an *internal* obligation.[192] It is "[t]he suggestion that citizens will voluntarily act against their self-interest [that] is the key to the social value of normative influences."[193]

Although the link between perceptions of legitimacy of government and compliance with the law has long been discussed in the theoretical and empirical social science literatures,[194] empirical support for this point has been equivocal.[195]

SOCIAL POWER 150, 155–65 (Dorwin Cartwright ed., 1959) (identifying six dimensions of organizational power, including legitimacy, that can produce compliance among subordinates: reward power (perceived ability to give positive consequences or remove negative ones), coercive power (perceived ability to punish those who not conform with your ideas or demands), legitimate power, or organizational authority (perception that someone has the right to prescribe behavior due to election or appointment to a position of responsibility), referent power (through association with others who possess power), expert power (distinctive knowledge, expertness, ability or skills), and information power (control of information needed by others in order to reach an important goal). *See also* TYLER, *supra*, at 170–78 (suggesting psychology of legitimacy wherein people obey authorities and institutions that they trust).

[190] *See* BEETHAM, *supra* note 188. *See also* WEBER, *supra* note 187.

[191] *See* TYLER, *supra* note 182, at 25. Professor Tyler also notes that people may also comply with the law because they believe that the law dictates behavior that accords with their own sense of personal morality. Tyler warns that personal morality is "double-edged" because it may or may not comport with the dictates of legal authorities. *Id.*

[192] *Id.* at 24.

[193] *Id.*

[194] *Id.* at 24–27 (summarizing research on compliance with legal norms and legitimacy of legal institutions).

[195] *Id.* at 27.

Work by Tyler nearly two decades ago systematically explored the connection between citizen perceptions of fairness and legitimacy and compliance, and this work supports the claim that extreme racial asymmetry in punishment can undermine compliance with law among minority groups. Tyler's work shows that compliance with the law is strongly related to a citizen's perceptions of legitimacy of government.[196] His study of the experiences, attitudes, and behavior of a random sample of citizens in Chicago demonstrates that perceptions of legitimacy independently contribute to compliance. Moreover, Tyler shows that this has a greater impact on compliance than fear of sanction, or on the particular outcomes of the interactions of citizens with legal or other government institutions.[197] More recently, Tyler and Fagan have replicated these results in New York, focusing specifically on the interactions of citizens with police and criminal actors.[198]

Professor Tyler, along with Tyler and Fagan, show that experience-based assessments of both distributive fairness[199] and procedural fairness[200] matter a great deal to perceptions of legitimacy and compliance, especially among African Americans.[201] In Tyler's 1990 research, he surveyed residents of Los Angeles neighborhoods of varying ethnic and racial composition to assess the relationship between procedural justice, distributive justice, and the acceptance of decision outcomes by legal actors. For Hispanics, their acceptance of decisions and satisfaction with the decision-maker was mediated by their experience at the hands of legal actors, specifically "quality of treatment" and "procedural justice." The outcome itself was unrelated to their acceptance and favorable rating of that outcome. For African Americans, however, both procedural and distributive justice were closely tied to acceptance of decisions. Moreover, procedural justice was important only in conjunction with distributive justice, not by itself.[202] In other words, for African Americans, "fairness" in the process is not easily separated from equity in the outcomes of the process.

Professor Tyler and his colleagues confirmed this finding in a national survey on views of the courts. Overall, the quality of treatment by legal actors was the

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[196] *Id.* at 64 ("People who regard legal authorities as legitimate are found to comply with the law more frequently.").

[197] *Id.* A caveat is in order. Professor Tyler explored adherence to laws that would not be considered by most to be serious crimes if broken—speeding and parking violations, shoplifting, and the like. Tyler's focus is on compliance with the law by those generally considered to be law-abiding.

[198] Tyler & Fagan, *supra* note 175, at Tables 4–6, 254, 257, 259.

[199] *See* TYLER, *supra* note 182, at 73 (explaining that the concept of distributive fairness emphasizes the ways in which "citizens evaluate public policies by examining the extent to which they distribute government benefits and burdens fairly"). *See also* Tyler & Fagan, *supra* note 175.

[200] "According to theories of procedural justice, citizens are not only sensitive to what they receive from the police and the courts but also responsive to their own judgments about the fairness of the way police officers and judges make decisions." TYLER, *supra* note 182, at 73.

[201] TYLER & HUO, *supra* note 175.

[202] *Id.* at 134.

most significant predictor of a favorable view of the courts. Both process issues and outcome fairness are important for all racial and ethnic groups in their interactions with legal authorities to assess procedural justice.[203] However, African Americans and Hispanics are less concerned than Whites with process issues, while Whites are more likely to rely on their assessments of process in estimating satisfaction with legal decisions. Minorities emphasize outcome issues more in assessing procedural justice, though the differences are small and the process issues are overall more important influences on their willingness to accept legal decisions.[204] Procedural justice weighed far more than distributive justice in the evaluation of the courts among Whites and Hispanics. African Americans were unwilling to place trust in courts and legal actors without trust in the fairness of substantive outcomes.

The disproportionate representation of minorities in prisons is linked to notions of distributive and procedural justice in a fairly obvious way. If members of a minority group do not believe that the prison sentences that members of their group receive are fairly distributed, then they may conclude that the policy that produces the unfair distribution is illegitimate.[205] If minority group members reach this conclusion because the law and order program produces asymmetrical incarceration rates, then Tyler's model suggests that members of the group are less likely to comply with the law.

Since then, further empirical and ethnographic evidence has tended to bolster that contention. In 2006, the New York Police Department conducted 506,491 documented stops, with arrests or summonses resulting less than one-tenth of the time; moreover, since African Americans represented 53% of those stops while constituting 24% of New York's population, it is clear that law-abiding African Americans disproportionately endure adversarial contacts with the police.[206] Such interactions with the police can profoundly shape how individuals view police legitimacy and thereby how they subsequently interact with law enforcement. While New York adopted zero-tolerance policing under the "broken windows" theory of criminality, recent research has questioned the connection between disorder and crime; such zero-tolerance plans therefore have the perverse effect of

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[203] *Id.* at 154.

[204] *Id.* at 155.

[205] Empirical work indicates that Blacks are much more likely than Whites to believe that courts are much too harsh on criminal offenders. *See, e.g.*, Meares, *supra* note 28.

[206] GREG RIDGEWAY, RAND SAFETY AND JUST., ANALYSIS OF RACIAL DISPARITIES IN THE NEW YORK POLICE DEPARTMENT'S STOP, QUESTION, AND FRISK PRACTICES 10, 19 (2007), *available at* http://www.rand.org/pubs/technical_reports/2007/RAND_TR534.pdf. While the study is able to narrow the racial gap by considering a number of other factors, African Americans are nevertheless subject to stop and to frisking more than white pedestrians in New York. Moreover, among those stopped, police were slightly more likely to frisk African Americans than Whites in similar circumstances. *Id.* at 33–35. Even if the NYPD's stop practices do not exhibit any unwarranted racial disparities, the higher likelihood of negative police interactions for African Americans may impact their perceptions of police legitimacy.

antagonizing minority communities and undermining the legitimacy of law enforcement.[207]

A recent study establishes the effects of attitudes of the New York Police Department's legitimacy on behavioral compliance with the law.[208] Legitimacy is primarily predicated on beliefs in procedural justice, with lesser effects for distributive justice and police performance. Legitimacy is fundamentally based upon the fairness of police interactions, rather than upon instrumental perceptions of police efficacy, and the strength of these attitudes affects compliance with the law, cooperation with police, and the willingness to further empower law enforcement.[209] Those findings are further bolstered by a forthcoming analysis illustrating that personal experiences with the police that are perceived as procedurally just enhance people's trust and confidence in the police even where negative personal outcomes result.[210]

The development of skepticism regarding law enforcement begins during childhood and adolescence and exhibits behavioral responses comparable to those of adults. A comparative study of youth in two Brooklyn neighborhoods demonstrates declines in perceptions of law enforcement legitimacy as youth become older, and that these perceptions affect compliance and cooperation with law enforcement.[211] The process of legal socialization, whereby children develop conceptions of the legitimacy of the law, often as a result of their own interactions, affects compliance and cooperation with law enforcement.[212] Similar results were demonstrated by an empirical study of Chicago youth; the study demonstrated that police contacts can engender perceptions of law enforcement injustice and illegitimacy.[213] Interestingly, the effect of police contacts is less among African-American youth than Latino youth, likely because of African Americans' "experience of the expected," while African Americans who live in integrated environments are more likely to distrust police, perhaps because the racial disparities in law enforcement are likely to be more salient.[214]

The stigmatization of law-abiding minority group members that is intimately related to racially disproportionate incarceration and minority group perceptions of (il)legitimacy connects up with this discussion. Disproportionate incarceration of African Americans is an important "race-making" factor.[215] Just as the existence

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[207] Robert Sampson, *Neighbourhood and Community: Collective Efficacy and Community Safety*, 11 NEW ECON. 106, 110 (2004).

[208] Sunshine & Tyler, *supra* note 175, at 520.

[209] *Id.* at 530–31.

[210] Tyler & Fagan, *supra* note 175.

[211] Jeffrey Fagan & Tom R. Tyler, *Legal Socialization of Children and Adolescents*, 18 SOC. JUST. RES. 217, 236 (2005).

[212] *Id.*

[213] Hagan et al., *supra* note 182.

[214] *Id.* at 397–99.

[215] This term is borrowed from Professor David James, who has written of the ghetto as a

of ghettoes (the ultimate referent of the consequences of race, place, and crime) can define and stereotype African Americans in a negative light, prisons in which half of the inmates are African Americans define and stereotype African Americans as criminal offenders. Both ghettoes and predominantly African-American prisons are physical constructs that sustain and nourish an African-American identity tied up with criminal and deviant behavior and in opposition to "mainstream" (read "law-abiding") American identity. Ghettoes and prisons institutionalize race, and because race becomes the marker of the identity that is created by place, it necessarily affects all African Americans whether or not they reside in inner city neighborhoods of concentrated poverty or in prisons.

As a result, many African Americans must endure suspicion by both minorities and non-minorities alike, poor service, refusals of service, and perhaps most importantly for our argument here, erroneous arrests and accusations by the police. In neighborhoods where a decent, law-abiding adolescent must conform to the oppositional culture of the streets, "to the extent that he takes on the *presentation* of 'badness' to enhance his local public image, even as a form of self-defense, he further alienates himself in the eyes of the wider society."[216] In the minds of some law enforcement agents, black skin is considered a factor to use to decide whether an individual should be considered a criminal suspect.[217]

For obvious reasons, erroneous arrests are likely to undermine the particular individual's assessment of the legitimacy of the state. But even more important for this discussion, erroneous arrests affect how an individual subjected to them *discusses* the legitimacy of government with his or her friends. This effect is critical to the normative view of compliance with the law. Erroneously arrested individuals may not argue vigorously that government deserves *no* respect; however, such an individual is probably much less likely than she would otherwise be to vigorously and positively *promote* government. This is a negative consequence for a norm-driven view of compliance, particularly in communities where the community structure predicts higher crime levels. To see why, consider again the discussion of cultural organization in a community.

Weak structural social processes facilitate diversity in values and norms governing law-abiding conduct, as Elijah Anderson's work demonstrates. Residents of many inner-city communities must negotiate the clash of inconsistent value systems that dictate acceptable behavior. When the strength of signals

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"race-making situation." David R. James, *The Racial Ghetto as a Race-making Situation*, 19 LAW & SOC. INQUIRY 407, 420–28 (1994).

[216] ANDERSON, CODE OF THE STREET, *supra* note 60, at 112.

[217] *See* RANDALL KENNEDY, RACE, CRIME, AND THE LAW 140–41 (1997) (citing numerous examples of individuals stopped by police most likely because of race); Angela J. Davis, *Race, Cops, and Traffic Stops*, 51 U. MIAMI L. REV. 425 (1997) (discussing the problem of black motorists being stopped disproportionately due to race); David A. Harris, "*Driving While Black" and All Other Traffic Offenses: The Supreme Court and Pretextual Traffic Stops*, 87 J. CRIM. L. & CRIMINOLOGY. 544 (1997).

supporting government legitimacy wanes, we should expect the level of commitment to compliance to wane as well. Signals supporting law-breaking behavior, on the other hand, even while fewer in number than those supporting law-abiding conduct may be very strong. This phenomenon is likely connected to the relative strength of social networks among community sub groups. Teen peer groups, for example, may not be large in number, but the norms that are generated and transmitted among members of these cohesive groups may be very strong compared to the norms generated and transmitted among more numerous but weakly connected adults. This means that adults interested in transmitting law abiding norms to youths in a community through intergenerational transfer may lose in the norm transmission competition to teen peer groups.[218] Tyler's work shows that when there are fewer positive signals of government legitimacy within a group to support compliance, opinions of peer groups will take their place.[219] When peer group opinions support law breaking, there will be a net loss of compliance among members of the stigmatized group. The "code of the street" that has developed in opposition to "mainstream" values is "a cultural adaptation to a profound lack of faith in the police and the judicial system;"[220] in place of a reliance on racist and indifferent law enforcement officials, taking care of oneself—even if it results in violence—becomes a primary indicator of control and respect that supersedes compliance with externally-imposed legal authority.[221] In sum, the potential for stigma creation generated by the racially asymmetrical distribution of prevalent and long sentences prescribed by law and order cheerleaders to allay the problems that minority crime victims experiences undermines the deterrent potential of these sentences where its needed most. Law-abiding African Americans in poor communities, then, must bear the costs of stigma in exchange for few benefits.

B. *Linked Fate and Multiple Roles*

The effect of *linked fate* among all African Americans and the reality of *multiple roles* played by individuals who hold very ambiguous positions with respect to the terms "law breaker" and "law abider" in many inner-city communities reinforce the detrimental impact that racial asymmetry in punishment can have on the potential for the law-and-order approach to produce the levels of crime reduction necessary for social organization improvement.

Linked fate refers to the empathy that people have with family and friends. But it can also exist among strangers. In the African-American community, linked fate has its foundation in the fact that the life chances of African Americans

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[218] For a figure illustrating this process, see Tracey L. Meares, *It's a Question of Connections*, 31 VAL. U. L. REV. 579, 592 (1997).

[219] TYLER, *supra* note 182, at 20–27, 44–45, 58.

[220] ANDERSON, CODE OF THE STREET, *supra* note 60, at 34.

[221] *Id*.

historically have been shaped by race.[222] The long history of race-based constraints on life chances among blacks generates a certain efficiency in evaluating policies that affect minority individuals. Many African Americans may use what Michael Dawson calls the "black utility heuristic" to determine what in their best interests. The heuristic allows an individual to determine what is in her individual interests by relying on what is in the best interests of the group.[223] Whether familial, social, or racial group links are considered, the outcome is likely to be the same. Minority residents of the inner city are less likely to condemn the law breakers among them when they experience critical bonds with them. This bonding process clearly undermines the crime reduction power of the law and order approach to law enforcement.

The multiple roles that many inner-city residents play with respect to the categories "law breaker" and "law abider" also undermine the efficacy of deterrence policies based solely on formal punishment. The lines between law breakers and law abiders are not so clean and clear as promoters of formal punishment often suppose. Multiple roles are inevitable in poor, structurally weak communities where it is not uncommon for law-abiding citizens to decry law-breaking even as they rely on law breakers for necessary goods such as money and security. If there are few well-paying employment opportunities in poor communities, drug trafficking offers the promise of work and monetary benefits.[224] Families that do not condone illegality might believe that they have to choose between a shrinking social safety net or the illegal proceeds of drug transactions to feed and clothe children.

Multiple roles are inevitable for another reason. In many cases victims in poor communities are themselves law breakers in the more conventional sense. Some individual victims in high crime inner-city neighborhoods, especially young men, are not always victims. Instead they oscillate between being a victim in one instance and an offender the next.

The ambiguity surrounding the terms "law breaker" and "law abider" in communities that are not well-organized to resist crime can confound the aims of those who promote increased imprisonment. When lines cannot be easily drawn between law abiders and law breakers, a regime tethered to the power formal sanctions to produce deterrence will be forced to raise the price of crime very high indeed to insure differentiation between the two groups. Raising the price of crime through increasing the severity of sanctions and perhaps the certainty of sanctions,

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[222] *See* MICHAEL C. DAWSON, BEHIND THE MULE: RACE AND CLASS IN AMERICAN POLITICS 77 (1994) (explaining the linked fate concept as a means of explaining the way that African Americans perceive what is in their individual self-interest.).

[223] *Id.* at 10–11 (explaining that when race over-determines an individual's life chances, it is much more efficient for that individual to use the relative and absolute status of the group as a proxy for individual utility).

[224] There are numerous accounts of the importance of drug selling as an important economic activity in inner-city communities. *See, e.g.*, WILSON, *supra* note 54; REUTER ET AL., *supra* note 143; Venkatesh, *supra* note 81.

though, creates an extreme risk of asymmetry in punishment that can undermine crime reduction through stigma generation.

VI. DETERRENCE AND THE POLITICS OF PUNISHMENT

In the U.S., the political demand for punishment often has reflected the cyclical nature of social problems and social change. In particular, a series of "moral panics" about social deviance have captured Americans' political attention and imagination for nearly two centuries, embracing such problems as "unruly" immigrant children, alcohol and drug problems, drunk drivers, child molesters, juvenile delinquency and street gangs, and more recently, youth and domestic violence.[225] Historically, these growth spurts in imprisonment reflects trends in the criminalization of deviance or the management of the so-called dangerous classes.[226] The opening of the House of Refuge in New York in 1824, for example, was in part to reaction to problems of unsupervised youth in poor neighborhoods resulting from immigration and in-migration during the rise of manufacturing industry.[227] Over time, the expansion of child welfare and mental health systems reflected the demand for non-custodial forms of social control, seen on the one hand as benign alternatives to institutionalization, but alternatively as an expanding state apparatus of social control.[228]

Incarceration rates rose sharply beginning in the 1970s. Several political and social trends fueled this increase, contributing to a cycle of political and social demand for punishment. Frustration with rising crime rates, especially homicide and "street" crimes such as robbery, together with social upheavals generally, helped launch a conservative era of crime politics, beginning with the Safe Streets Act of 1968.[229] However, while homicide rates rose steadily beginning in the 1960s and declined through the 1990s, nearly all the increase and decline was in

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[225] JOSEPH R. GUSFIELD, THE CULTURE OF PUBLIC PROBLEMS (1981); JOHN R. SUTTON, STUBBORN CHILDREN: CONTROLLING DELINQUENCY IN THE UNITED STATES, 1640–1981 (1988); DAVID J. ROTHMAN, CONSCIENCE AND CONVENIENCE: THE ASYLUM AND ITS ALTERNATIVES IN PROGRESSIVE AMERICA (1980); Craig Reinarman & Harry G. Levine, *Crack in Context: Politics and Media in the Making of a Drug Scare*, 16 CONTEMP. DRUG PROBS. 535 (1989).

[226] *See* ANTHONY M. PLATT, THE CHILD SAVERS: THE INVENTION OF DELINQUENCY (1969); GEORGE RUSCHE & OTTO KIRCHHEIMER, PUNISHMENT AND SOCIAL STRUCTURE 5 (1939). They argue that the similarities of regime, organization, and structure across institutions of social control including factories, "workhouses" and prisons, are the consequence of their strategic overlap and interrelated function with respect to the management of the so-called dangerous classes.

[227] PLATT, *supra* note 226; DAVID J. ROTHMAN, THE DISCOVERY OF THE ASYLUM: SOCIAL ORDER AND DISORDER IN THE NEW REPUBLIC (1971); DAVID S. TANENHAUS, JUVENILE JUSTICE IN THE MAKING (2004); JUDITH SEALANDER, THE FAILED CENTURY OF THE CHILD (2003).

[228] PAUL LERMAN, DEINSTITUTIONALIZATION AND THE WELFARE STATE (1982); *see also* FOUCAULT, *supra* note 29.

[229] KATHERINE BECKETT, MAKING CRIME PAY: LAW AND ORDER IN CONTEMPORARY AMERICAN POLITICS (1997); ELLIOTT CURRIE, CONFRONTING CRIME (1985).

gun homicides.[230] The same pattern was observed for gun robberies and assaults.[231] While many legislators reacted to a violence epidemic, in fact the epidemiology of violence for nearly three decades suggested a contagious epidemic of gun violence that was most disproportionately concentrated in poor and minority communities. While lethal and near-lethal violence rose and fell cyclically, rates of non-lethal violence and other crimes remained relatively flat since the early 1970s.[232]

Despite good evidence of cyclical patterns of contagion and violent crime, a variety of social constructions of the "violence" problem have been advanced, each one justifying new demands for "tougher" sentences and increased punishment. For example, increases in violent crime in the 1960s were attributed to sharp increases in heroin addiction in large U.S. cities,[233] in the 1970s to youth violence,[234] and in the 1980s to youth gangs, guns, and drug traffickers.[235] Each successive iteration of the etiology of rising violence rates lead to the identification culturally, politically and socially of new "dangerous classes" that threatened public safety and whose crimes merited increased doses of punishment. Similar trends were identified in the United Kingdom.[236]

Importantly, the "dangerous classes" of the last two decades were "raced." That is, crime became inextricably linked to African Americans, and African-American men, in particular. Thus, the escalation in imprisonment can be read not only as a reaction to the changing nature of violent crime and the country's changing mores regarding drug offending, but it also can be read as a statement regarding mainstream society's linkage of African-American men with crime. This phenomenon is not confined to non-African Americans. The crystallization of the connection between African-American men and criminality (that high levels

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[230] Jeffrey Fagan, Franklin E. Zimring & June Kim, *Declining Homicide in New York City: A Tale of Two Trends*, 88 J. CRIM. L. & CRIMINOLOGY 1277, 1289–90 (1998) (showing that non-gun homicide rates were unchanged over a 30-year period while gun homicide rates rose and declined cyclically over the same period of time). *See also* ZIMRING & HAWKINS, *supra* note 7, at 21–24; Alfred Blumstein, *Disaggregating the Violence Trends*, *in* THE CRIME DROP IN AMERICA 13 (Alfred Blumstein & Joel Wallman eds., 2d ed. 2005).

[231] Jeffrey Fagan, Deanna L. Wilkinson & Garth Davies, *Social Contagion of Violence*, *in* THE CAMBRIDGE HANDBOOK OF VIOLENT BEHAVIOR AND AGGRESSION 688, 694–97 (Daniel J. Flannery, Alexander T. Vazsonyi & Irwin D. Waldman eds., 2007) (showing similar patterns and trajectories of gun and non-gun lethal and non-lethal violence).

[232] *Id* at 698–700. *See also* Richard Rosenfeld, *Patterns in Adult Homicide: 1980–1995*, *in* THE CRIME DROP IN AMERICA, *supra* note 230, at 130, 135–43.

[233] Jan M. Chaiken & Marcia R. Chaiken, *Drugs and Predatory Crime*, *in* DRUGS AND CRIME 203, 203 (Michael Tonry & James Q. Wilson, eds., 1990). For data on England, see NICHOLAS DORN, KARIM MURJI & NIGEL SOUTH, TRAFFICKERS: DRUG MARKETS AND LAW ENFORCEMENT (1992).

[234] PAUL A. STRASBURG, VIOLENT DELINQUENTS (1978).

[235] Alfred Blumstein, *Youth Violence, Guns, and the Illicit-Drug Industry*, 86 J. CRIM. L. & CRIMINOLOGY 10 (1995); James Q. Wilson, *Drugs and Crime*, *in* DRUGS AND CRIME, *supra* note 233 at 521.

[236] *See* BEATRIX CAMPBELL, GOLIATH: BRITAIN'S DANGEROUS PLACES (1993).

of incarceration promote) engenders distrust within African-American communities. The Reverend Jesse Jackson is not unique among African Americans in fearing victimization by young African-American men.[237]

Weakening of already compromised social structures in poor communities and increased detachment of African Americans generally from government and political participation is a high price to pay for the American commitment to the "get tough" crime control policy. The growth of punishment during the last decade created another paradox: allocations to punishment increased during an era of declining public resources and strains on a wide range of services.[238] Arguably, in a zero-sum game of public financing, funds allocated to punishment were *de jure* reductions in allocations to other services. Some of this was fueled by economic circumstances and the realities of state and municipal finance: declining tax bases, increasing drains on budgets for health care and social welfare, reduced federal assistance. It also occurred in a political context of declining confidence in public institutions such as schools and social service agencies. The defunding of services affected social areas and groups who were most involved in punishment, either directly or through family and kinship relationships.

Here, then, is the paradox: the growth of punishment and the correctional industry resulted in the transfer of resources away from the mediating institutions and sources of social control that form the structure of informal social control that are so critical in the high crime communities we have discussed. A steadily weakening structure of informal social control gives rise to the need for increased investments in formal social control, often in the form of formal punishment. Both public and private corrections have flourished in the past decade as this cycle accelerated in the U.S. The demand for punishment provided political support (or cover) for rapid and unprecedented prison expansion. This demand, expressed in the legislatures, at the polling places and through reciprocity between popular culture and political institutions, is what von Hirsch calls "law and order" populism.[239] This populism increased markedly during the period of prison expansion and defunding of informal sources of social controls. Ironically, the same institutions that serve as informal social control also were the same institutions that in the past could mediate the demand for punishment. In the absence of viable mediating mechanisms, there was unfettered expansion of punishment and corrections.

The decline in confidence in public institutions not only diverted resources from institutions such as health care and schools, but it also bifurcates public sector reaction to rising crime rates. Faced with a crisis of crime, societal reaction could take several directions. One direction might be toward increased punishment and formal control. That is, the state could react by increasing its punitive-control

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[237] *See* Richard Cohen, *Common Ground on Crime*, WASH. POST, Dec. 21, 1993, at A23.

[238] *See generally* MAUER, *supra* note 5; WESTERN, *supra* note 5.

[239] *See* Andrew von Hirsch, *The Logic of Prison Growth*, 57 MOD. L. REV. 476, 478 (1994) (book review).

apparatus. Another direction might involve ameliorative and preventive reactions that emphasize the state's role in socialization and social development.[240] A third direction might be to pursue a decentralization of state functions of control ceding responsibility to private institutions. The public response in the U.S. has taken the direction of an increased state role in punishment and formal control. Nowhere in contemporary crime policy is there recognition of a public sector role to strengthen informal mediating institutions of socialization and informal control. Instead, public responses were bifurcated: increased allocation of state resources to punishment, coupled with highly localized *populist* "watchman" forms of informal control such as surveillance mechanisms, block watches, and the criminology of "place." The conservative politics of this era redefined the state role in crime control away from socialization and social development and toward punishment. And prevention through technology replaced prevention through socialization and social control, with the former ceded to the private sector.

The expansion of punishment institutions was the result initially of a political demand for punishment, but recent analysis suggests that the demand for punishment now is sustained by the industry itself.[241] While the demand for punishment may have its origins in "law and order populism," its current support is sustained through complex political processes that involve the cultural mobilization of resentments against disapproved behavior, and against populations that invoke fear.[242] But popular support for expanding corrections through "law and order populism" also gave rise to a correctional industry has become an autonomous source of demand for punishment. These institutions have achieved a threshold where they have the motivations and means for perpetuating the political processes that sustain a continuous expansion, and that redistribute public resources away from mediating institutions toward correctional ones.

This drain will insure that mediating institutions remain weak relative to legal institutions, continuing the cycles that contribute to the demand for punishment. A recent study by the California Policy Research Center at the University of California showed that corrections spending continued to match K-12 education spending in California as recently as 2006.[243] While that projection was not

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[240] While this response now seems the province of the far-left, the moderate establishment figures endorsed this type of idea when looking to increased opportunities for urban African Americans and an attack on racial discrimination. "There are those who oppose these aims as 'rewarding the rioters.' They are wrong. A great nation is not so easily intimidated. We propose these aims to fulfill our pledge of equality and to meet the fundamental needs of a democratic, civilized society—domestic peace, social justice, and urban centers that are citadels of the human spirit." THE KERNER REPORT, *supra* note 176, at 413.

[241] NILS CHRISTIE, CRIME CONTROL AS INDUSTRY (3d ed. 2000).

[242] von Hirsch, *supra* note 239, at 481.

[243] JOAN PETERSILIA, CALIFORNIA POLICY RESEARCH CENTER, UNDERSTANDING CALIFORNIA CORRECTIONS 1, 15–17 (2006), *available at* http://ucicorrections.seweb.uci.edu/pdf/UnderstandingCorrectionsPetersilia20061.pdf. *See also* Thomas D. Stucky, Karen Heimer & Joseph B. Lang, *A Bigger Piece of the Pie? State Corrections Spending and the Politics of Social Order*, 33 J. RES. CRIME & DELINQ. 91 (2007).

ultimately realized, budget projections show that corrections spending will overtake higher education spending there by 2013.[244] Among African-American men, however, that milestone seems distant; there are already four times as many black men incarcerated in the state's prisons as enrolled in public universities, even as the lack of new colleges limits access of tens of thousands of Californians to public higher education.[245] This possibility is all the more remarkable in light of the political activism and high levels of electoral campaign contributions of the union of correctional officers in California.[246]

VII. CONCLUSION

The continuing social restructuring of work and community will maintain political tensions that give rise to escalating demand for formal punishment, at the same time that this same restructuring weakens the forms of informal controls that formal controls would supplant. The allocation of resources from informal to formal social controls, particularly punishment through incarceration, sustains a process that contributes to the marginalization of already isolated communities and individuals, further weakening informal controls and continuing the cycle of discontrol and punishment.

In many communities, punishment has become normative, losing its contingent value that lends credibility to its claims of fairness and proportionality.[247] As the social and cultural distance between the punishers and the punished continues to widen, respect for the legitimacy of punishment will suffer. This is one source of the perverse escalatory effects of punishment, and a source that appears unlikely to abate in a continuous process of deindustrialization and restructuring of work. The globalization of economic restructuring will sustain the political basis for the expansion of punishment: disquiet in the popular culture will continue as economic uncertainty fuels suspicion and rejection of marginalized or alien populations.

What passes for "control" today in the U.S. is an odd combination of large correctional institutions and elaborate networks of surveillance systems: cameras,

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[244] James Sterngold, *Prisons' Budget to Trump Colleges'*, S.F. CHRONICLE, May 21, 2007, at A1.

[245] Elliot Currie, *Race, Violence, and Justice since Kerner*, *in* LOCKED IN THE POORHOUSE: CITIES, RACE, AND POVERTY IN THE UNITED STATES 95, 114–15 (Fred. R. Harris & Lynn A. Curtis eds., 1998).

[246] *See* Stucky et al., *supra* note 243; Dan Morain, *Potent Prison Guards Union Facing Challenges to Status Quo*, L.A. TIMES, Jan. 5, 2004, at B-1, *available at* http://articles.latimes.com/2004/jan/18/local/me-guards18; Dan Walters, *California Prison Guards Union, Indian Tribes Flex Political Clout*, MODESTO BEE, Aug. 28, 2008, *available at* http://www.modbee.com/opinion/state/dan_walters/story/411165.html.

[247] Nagin, *supra* note 12, at 23 (constructing a theory of "stigma erosion," where high rates of imprisonment make punishment non-contingent and socially meaningless, and therefore an ineffective deterrent).

urine testing devices, infrared detectors, and so forth. De-emphasized is the state's role in socialization and the fostering of moral communities. The devolving of the public sector involvement in socialization, and the continuing privatization of "security," will further weaken informal social controls and mediating institutions. This restructuring and devaluation of government, accompanied by the restructuring and fragmentation of economic activity, makes difficult the achievement of a social consensus on the rationale of punishment in a broader context of social control. How will the reintegrative functions of punishment be achieved when social functions are limited to those essential only to economic, but not social, well-being?[248]

Historically, punishment has been part of social control when formal and informal social controls are reciprocal and complementary, and when punishment is perceived as fair substantively and procedurally. Punishment has thrived independently of social control in the political context of weak government that assumes no role in other social functions. This paradoxical affinity of punitiveness and weak government points the way toward new policies that will reverse the weak if not iatrogenic effects of punishment with respect to crime. The reconfiguration of criminal justice along lines of reintegrative justice, substantive rationality, and proportional and procedural fairness, is one large step. Social and economic policies designed to produce social and human capital will strengthen the moral basis of punishment, and paradoxically, reduce the demand for it.

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[248] *See, e.g.*, JOHN BRAITHWAITE, CRIME, SHAME AND REINTEGRATION (1989).