The Myth of a Fair Criminal Justice System

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Abstract

This paper examines whether the belief that the US criminal justice system is fair is a myth. After an introduction of the criminal justice system and its goals, we turn to possible sources of unfairness in criminal justice, including the criminal law, definitions of crime, policing, courts, and corrections. The authors explore the possibility that the criminal justice system is unfair both in what it does and in what it does not do. After a discussion of the role of mythology in criminal justice, the paper concludes with a summary and suggestions for making American criminal justice activity fairer.

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Introduction

The word *fair* is defined by Merriam-Webster's Dictionary (2009) as "marked by impartiality and honesty ... free from self-interest, prejudice, or favoritism." Related words include just, equitable, impartial, unbiased, dispassionate, and objective, all of which mean "free from favor toward either or any side."

One additional term that is important for understanding fairness is "desert." Desert refers to getting what you deserve, as in reward or punishment. When considered in the context of victimology (Karmen 2009) and social justice (Miller 2003), it is unfair when those culpable for harmful behaviors are not held accountable for their actions.

Many believe that the criminal justice system is fair. For example, two-thirds of Americans (66%) in 2003 stated they thought the criminal justice system was fair (Sourcebook of Criminal Justice Statistics 2009c). Additionally, two-thirds of Americans in 2000 and 2002 (66% and 67%, respectively) asserted that police in their community treated people fairly (Sourcebook of Criminal Justice Statistics 2009b). Further, between 51 percent and 61 percent of Americans between the years of 2000 and 2008 have expressed their belief that capital punishment is applied fairly (Sourcebook of Criminal Justice Statistics 2009a)

Others hold that the belief that criminal justice is fair is a myth (Bohm and Walker 2007). *Myths* are stories that serve to "unfold part of the world view of a people or explain a practice, belief, or natural phenomenon." A myth is "a popular belief or tradition that has grown up around something … one embodying the ideals and institutions of a society or segment of society." It is "an unfounded or false notion" (Merriam-Webster's Dictionary 2009). In this

article, we examine whether the belief that the US criminal justice system is fair is a myth, and whether the commonly held belief referring to the institutions of criminal justice is unfounded and false. To do so, we analyze the processes of law-making/defining acts as criminal, policing, courts, and corrections in order to assess how criminal justice practice is consistent and inconsistent with fairness. We begin with a discussion of the "criminal justice system."

The Criminal Justice System

The *criminal justice system* is the term used to describe the interdependent components of the police, courts, and correctional facilities within the federal government, as well as the agencies of criminal justice of each of the fifty states. The criminal justice system is a whole, made up of these three interdependent components. Some would add law-making as a fourth component of criminal justice, for all legitimate criminal justice system activity emanates from the law (Samaha 2007). This is important to understand because if criminal justice process is unfair, some of it would stem from the criminal law (Robinson 2001). The substantive aspect of the law reflects the "what" of the law, in that laws are created to define certain behaviors as crimes and to provide punishments for violations of those laws (Dressler 2006). One example of unfairness in the substantive criminal law is the disparate punishments for crack vs. powder cocaine found in the federal sentencing guidelines (Blumstein 2003). In the mid-1980s, the emergence of crack led to an increase in violence surrounding the crack market, especially among juveniles. As a result, Congress responded with sanctions that provided that 500 grams of powder cocaine and only 5 grams of crack cocaine will net a mandatory sentence of five years in federal prison (Sentencing Project 2008b). Since African-Americans are disproportionately more likely to be involved in the crack cocaine market, the law invariably discriminates against

these offenders, who made up more than 80 percent of defendants in federal courts charged with crack cocaine offenses (U.S. Sentencing Commission 2007). This is evidence of a serious inequity in criminal justice practice.

One reason this is unfair is because the disparities are not based on any real difference between crack and powder cocaine. As noted by the US Supreme Court in *Kimbrough v United States* (2007): "Crack and powder cocaine have the same physiological and psychotropic effects." Yet, because of the law that created these disparities (the Anti-Drug Abuse Act of 1986), crack and powder cocaine cases are "handled very differently for sentencing purposes." As noted by the Court: "The relevant statutes and [Federal Sentencing] Guidelines employ a 100-to-1 ratio that yields sentences for crack offenses three to six times longer than those for offenses involving equal amounts of powder. Thus, a major supplier of powder may receive a shorter sentence than a low-level dealer who buys powder and converts it to crack" (pp. 5-6).

Referring to the US Sentencing Commission, who several times unsuccessfully suggested to Congress that the disparities between crack and powder cocaine be eliminated, the Court continued:

> The Commission … found the disparity inconsistent with the [Anti-Drug Abuse Act of 1986] goal of punishing major drug traffickers more severely than low-level dealers, and furthermore observed that the differential fosters a lack of confidence in the criminal justice system because of a perception that it promotes an unwarranted divergence based on race (p. 9).

The disparity based on race has been recognized by the American Civil Liberties Union (ACLU), American Bar Association (ABA), US Sentencing Commission, and ultimately the US Supreme Court. Although the disparities in sentencing between crack and powder cocaine have now been held to be unreasonable by the US Supreme Court, the fact remains that criminal

justice activities have created disparities based in part on the overwhelming focus on crack cocaine. For example, a study of policing in Seattle, Washington found that two-thirds of arrestees were black even though the only drug for which blacks made up a majority of dealers is crack cocaine (Beckett, Nyrop, and Pfingst 2006). The majority of those involved in dealing methamphetamine, ecstasy, powder cocaine, and heroin were white. The authors explained racial disparity in arrests using three organizational factors: 1) an explicit focus by police on crack offenders; 2) an explicit focus by police on outdoor drug activity; and 3) racially diverse outdoor drug markets received more attention by police than predominantly white outdoor drug markets.

Ideal Goals of the Criminal Justice System

One goal of the criminal justice system is to reduce crime. *Reducing crime* can be achieved through reactive means (such as responding to a call for service, making an arrest, obtaining a criminal conviction, and carrying out the punishment imposed by the court), or through proactive means (such as eliminating the conditions that produce criminality) (Fuller 2005). The former type of crime reduction is referred to as *crime control*, and accurately depicts the majority of criminal justice activity in the United States (Worrall 2008). The latter type of crime reduction is referred to as *crime prevention*, and is far less emphasized in America (Lab 2007).

Another goal of the criminal justice system is to do justice. *Doing justice* has two related meanings, both of which are reflected in *Justitia*, the blindfolded lady justice who holds a sword and scales and adorns many courthouses and legal buildings across the country (Curtis and Resnick 1987). The sword is thought to represent the first meaning of justice, which is aimed at holding the guilty responsible for the harms they inflict. If a criminal is not punished for his or

her wrongdoings, we would say that justice has not been achieved. This type of justice is referred to as *corrective justice* (as in corrections or punishment), or *justice as an outcome* (Robinson 2009). The scales and blindfold are thought to represent fairness, the second meaning of justice. This conception of justice assumes that all persons will be treated equally in the eyes of the law – that justice will be blind. Justice thus would not be present when any group is somehow left out or singled out for differential treatment by the law. This type of justice is referred to as *procedural justice*, or *justice as a process* (Robinson 2009).

Proponents of corrective justice (justice as an outcome) seek to make American criminal justice more punitive in order to achieve vengeance for crime victims and retribution for society. Research suggests that efforts such as increased use of incarceration, longer average sentences, mandatory sentences, and more executions over the past three decades have eroded the procedures that make American criminal justice processes fair (Simon 2007).

Ironically, one of the reasons for the more punitive changes in the criminal justice system was to reduce judicial discretion. It was thought that judges, when allowed to practice unfettered discretion in indeterminate sentencing systems, could easily discriminate against certain offenders by imposing different sentences on similarly-situated offenders. To create more "fairness" in the system, judicial discretion has largely been constrained by the use of mandatory sentences and habitual offender laws, in hopes of creating more equity in the system. However, these sentences are largely only applied to certain types of offenders, such as drug offenders, so the goal of producing equity by reducing discretion has led to a zero-sum gain as one brand of "fairness" has been replaced with another. For example, a study of Oregon's implementation of Measure 11 in 1994, which required mandatory minimums for sixteen violent and sex-related

offenses, yielded interesting results. On the one hand, it did meet its goal of increasing prison sentences of offenders eligible for mandatory sentences, which effectively reduced judicial discretion. On the other hand, many other offenders who should have been sentenced to mandatory minimums under Measure 11 were not, as prosecutors were able to use their discretion to reduce charges or avoid charging defendants with Measure 11 offenses. In effect, judicial discretion was limited by the law, but prosecutorial discretion increased, allowing many offenders to escape the punishment that the law initially set out to impose (Merritt, Fain, and Turner 2006; see also Tonry 1996; Walker 2005; Walker, Spohn, and DeLone 2007).

Due process versus crime control

Whichever conception of justice should be prioritized, America's constitution requires *due process of law*, which can be thought of providing accused criminals with the process they are due (Orth 2007). These include freedom from unreasonable searches and seizures (Fourth Amendment), freedom from arrest or search without probable cause (Fourth Amendment), freedom from self-incrimination (Fifth Amendment), freedom from double jeopardy (Fifth Amendment), freedom from cruel and unusual punishment (Eighth Amendment), freedom from excessive bail or fines (Eighth Amendment), right to speedy, public, and fair trial by jury (Sixth Amendment), right to an impartial jury (Sixth Amendment), right to counsel (Sixth Amendment), and most generally, freedom from being deprived of life, liberty, or property without due process of law (Fifth Amendment and Fourteenth Amendment) (Fuller 2005).

Although these rights are at times violated by various criminal justice actors, courts have ruled these rights are not absolute and that certain violations are permissible. Appellate courts, particularly the U.S. Supreme Court, have routinely created exceptions to these rights (e.g., the

"good faith" exception to the exclusionary rule (see *U.S. v. Leon* 1984), and right to counsel only for those who are incarcerated (see *Scott v. Illinois* 1979). Further, numerous protections have been eroded as a result of the drug war (Gray 2001). As a result, procedural justice (justice as a process) is not an absolute and can be subverted by crime control concerns. In at least some of these cases, many would argue that criminal justice practice is unfair.

America is now entrenched in a *crime control* model (Packer 1968), thus some due process rights of Americans have been eroded (Klein 2006; Shelden et al. 2008). In fact, some scholars now recognize a degree of toughness in criminal sentencing beyond mere retribution and more consistent with vengeance (Elikkan 1996; Ellsworth and Grosse 1994; Ho, ForsterLee, ForsterLee, and Crofts 2002). That is, criminal punishment is at times hateful and disproportionate to the harms caused by criminal acts, rather than objective, dispassionate, or rational (Welsh and Harris 2004). For example, according to Ho et al. (2002), jury research has indicated that jurors admit to seeking vengeance on capital murderers and hope to make the offenders "pay" for what they have done. Research from the Capital Jury Project supports this finding as well (e.g., see Blume, Eisenberg, and Garvey 2003). Additionally, Oregon's mandatory sentencing law, Measure 11, was not passed by the legislature – it did not get enough votes because many lawmakers had concerns about its effectiveness – but was voted into law by citizens who claimed that they had enough of crime (Merritt et al. 2006). "Justice" in some areas of criminal justice is far from dispassionate or rational.

Unfairness in Criminal Justice?

The next section of the paper examines potential examples of unfairness in criminal justice activity. We examine the criminal law and label of crime, policing, courts, and corrections.

The Law

An examination of law makers and the law-making process in the United States reveals some significant facts for understanding criminal justice processes. Law makers at both the federal and state level of government are:

- disproportionately white (more than 85 percent);
- disproportionately male (more than 80 percent);
- more than 20 years older than the average American; and
- significantly more wealthy than the average American household (federal legislators earn $120,000 more per year than the average family) and tend to be millionaires (Center for Responsive Politics 2008; Center for Voting and Democracy 2008; Common Cause 2008; Congress Link 2008; National Institute on Money in State Politics 2008).

Additionally, even though nearly two-thirds of eligible voters are registered to vote:

- most people do not regularly vote (typically, the highest voter turnout is in close, national elections, and is still only about 50 percent);
- voters are disproportionately white (about 60 percent of whites vote, versus just over half of blacks and only about one-quarter of Hispanics);
- voters are disproportionately older (more than two-thirds of people ages 65 and older vote, versus only about one-third of people ages 18-24); and
- voters are disproportionately wealthier (more than two-thirds of people earning more than $75,000 per year vote, versus less than one-third of people earning less than $5,000 per year) (U.S. Census 2008).

Finally, in terms of the influence of money on the law:

- there is a lot of money involved in the political system (in the last political cycle, federal politicians raised more than $1 billion);
- money determines the outcomes of virtually every election (more than 90 percent of elections are won by the candidate who spent the most money);
- far less than 1 percent of Americans donate money to politicians or political parties; and
- most of the money involved in politics comes from wealthy individuals and Political Action Committees (PACs) (Center for Responsive Politics 2008; Center for Voting and Democracy 2008; Common Cause 2008; Congress Link 2008; National Institute on Money in State Politics 2008).

Although some research shows that neighborhood poverty is related to an increased motivation to participate in political activity (see Swaroop and Morenoff 2006), many studies indicate that motivation and participation is greatly lacking in poor areas. These studies show that social isolation, a lack of connection to "mainstream" America, a lack of role models, a lack of socialization to participate, and a lack of exposure to civic groups greatly decreases the likelihood that individuals in these areas will participate in the political process (see Alex-Assenoh and Assenoh 2001; Cohen and Dawson 1993; Rankin and Quane 2000; Wilson 1987). When taken together, these facts show that law-makers are not demographically representative of Americans, that most people do not regularly vote for the law-makers who are supposed to represent them, that those who do vote for law-makers are not demographically representative of Americans, and that the election process itself is driven mostly by monied interests while not significantly being affected by most Americans. Further, these facts raise the possibility that the law, including the criminal law, is not created by people who serve the interests of the general public (Lynch and Michalowski 2006; Lynch, Michalowski, and Groves 2000). Some theorists argue that those who are in a position of power work proactively to represent their interests and neglect the interests of their constituents. For example, Tonry (1996) argues that the criminal justice system zealously enforces violent and property crimes (which blacks and lower-class individuals disproportionately commit), while virtually ignoring white-collar and corporate crimes (which are disproportionately committed by middle- to upper-class whites).

If the law is biased in favor of and/or against certain interests, we should expect the label of *crime* to be reserved for only some acts – those committed by people unlike law-makers and the moral and financial interests they serve. It is logical to assume that law-makers would not

criminalize the kinds of acts that they (and their financial backers) tend to commit. And if the label of crime is not applied to behaviors based on the degree of harm they cause but rather is based on their perceptions that the only important type of crime is street crime, we should expect that the entire criminal justice system will not be fair, because all it does is determined by the law. That is, if a bias arises in the criminal law as a result of criminalizing only those acts that tend to be committed by the street classes (who are at the lower end of the economic strata and who are disproportionately likely to be minorities) rather than those acts committed by the wealthy and the white (e.g., corporate and white-collar crimes), then enforcement of biased law will surely result in biases in law enforcement, court, and correctional processes (Robinson 2001).

The Label of Crime

Simply stated, the label of crime – particularly what we call "serious crime" – is not reserved for the acts that cause the most damage to Americans. Instead, "street crimes" (the *Part I Index Crimes* of the *Uniform Crime Reports*) are the crimes that our federal government views as the most serious. These crimes – homicide, forcible rape, aggravated assault, robbery, theft, burglary, motor vehicle theft, and arson – were originally claimed in the 1930s to be the most dangerous, most frequently occurring, and the most geographically widespread crimes in the United States, which made them "serious" (Robinson 2009). Other crimes, not listed among the UCR's Index Offenses, are currently considered serious, including acts of terrorism, drug offenses, and some weapons offenses.

Acts of *white-collar crime* and *corporate crime* are generally viewed as far less serious, presumably because it is assumed that they cause less physical and financial damage, they occur

less frequently than street crimes, and they are less widespread (Stylianou 2003). These assumptions are demonstrably false. Acts by the rich and powerful and by corporations produce far more damage to human life and property than all street crimes combined. Lynch, McGurrin, and Fenwick (2004) state that, in 1990, the amount of property loss from conventional street crime annually was approximately $5 billion. The loss from the savings and loan scandal during the same period of time cost anywhere from $200 - $500 billion, although one estimate puts the cost at $1.5 trillion (see also Friedrichs 2003; Reiman 2006; Rosoff, Pontell, and Tillman 2003; Shelden et al 2008).

More recently, Robinson and Murphy (2008) demonstrated more than $1 trillion in direct losses due to corporate and white-collar crime annually, and each of their sources was from the US government! For example, according to the U.S. Consumer Product Safety Commission (CPSC) – which is charged with "protecting the public from unreasonable risks of serious injury or death from more than 15,000 types of consumer products" – the total cost associated with defective products in the United States is $700 billion every year (this cost includes deaths, injuries and property damage from consumer product incidents). This alone is far more than the $4 billion lost each year due to burglary and robbery, as well as the $20 billion lost annually from all street crimes combined (Mokhiber 2007).

Many examples illustrate the point that corporate crime is also more deadly than street crime. More than 20,000 people in the United States are killed annually by defective products. This number is understood to represent the minimum killed by defective products, for it excludes the 430,000 who die each year from tobacco-related illnesses, the approximately 300,000 who die from eating high fat diets (including large amounts of fast food products) while living

sedentary lifestyles, the more than 100,000 who die from adverse reactions to legal and approved drugs, and the 60,000 who die each year due to toxic chemicals (Robinson 2005). Additionally, Simon (1999) indicates that, although there are approximately 20,000 homicides in any given year, the number of deaths from job-related injuries and illnesses is five times that number, although Reiman (2006) puts the number killed by hazardous working conditions at 55,000.

Since the criminal law generally does not define these acts as crimes (and typically not as serious crimes), very little criminal justice system activity is focused on these acts. For example, more than 75 percent of police officers in the United States work for city and county governments who rarely investigate acts of white-collar and corporate crime. Amazingly, only about 1 percent of all police officers in the United States are charged with investigating white-collar and corporate crimes (Robinson 2009).

Federal law enforcement and the federal courts are largely responsible for handling white-collar and corporate crime. However, a glance at the types of offenders handled by the federal criminal justice system illustrates that, like state criminal justice systems, white-collar and corporate crimes are not on their radar. In 2004, federal authorities arrested approximately 140,000 offenders. Of those, 54 percent were arrested for immigration and/or drug offenses, and another 17 percent were arrested for violating their supervised release. This comprises 71 percent of federal arrests. Only 12,700 people were arrested for fraud offenses and only 335 for regulatory violations, two white-collar type offenses (Sourcebook of Criminal Justice Statistics 2006). Thus, only about 7 percent of federal arrests are for white-collar type offenses. Further, of all 7.9 million arrests in cities in 2006, only 110,000 were for fraud, and 11,300 were for embezzlement, two white-collar offenses (Sourcebook of Criminal Justice Statistics 2006). Thus,

only about 1.5 percent of all arrests in cities are for white-collar type offenses. One of the reasons for this could be the lack of resources devoted to white-collar crime enforcement. Coleman (2002) indicates law enforcement agencies at the state and federal level simply do not have the manpower to handle white-collar crime and questions their desire to do so. Gallo (1998) argues that law enforcement can be effective if its resources are devoted to smaller pockets of white-collar crime. However, law enforcement also relies on businesses to monitor themselves and many white-collar offenses only come to the attention of law enforcement when the business voluntarily reports it to authorities.

Federal courts in 2007 handled 88,014 defendants. Of these, there were 11,593 people charged with fraud, 1,101 for forgery and counterfeiting, and only 617 for embezzlement (Sourcebook of Criminal Justice Statistics 2007). Thus, only about 15 percent of federal defendants were charged with white-collar type offenses. Additionally, the rate of federal prosecution for white-collar crimes has declined tremendously since the mid 1990s (Holtfreter et al. 2008). This could be the result of the attitudes of prosecutors who are responsible for charging defendants with crimes. A study by Benson and Cullen (1998) found that prosecutors did not perceive white-collar crimes as serious. The authors found that close to 50 percent of the prosecutors in their study did not consider white-collar crime to be serious at all.

Regarding incarceration, most offenders in federal prisons are convicted of drug offenses (approximately 55 percent). Of the 1.3 people incarcerated in all prisons, only 32,100 are being held for fraud, just 2.5 percent of all inmates (West and Sabol 2008). A study by Tillman and Pontell (1992) found that offenders who were involved in Medicaid fraud were much less likely to be incarcerated than offenders who were arrested for grand theft, even though the losses from

the Medicaid fraud were much higher than the losses from the grand theft. The authors speculate that prosecutors and judges were reluctant to sanction doctors and other administrators who were first-time offenders. Additionally, Tillman and Pontell (1992) point that there is evidence that other types of sanctions, including administrative sanctions and loss of job, are seen as sufficient punishment for these offenders, thereby taking the criminal justice system "off the hook" in punishing these offenders.

The criminal law, when it ignores the most harmful acts against Americans, is unfair because in these cases it does not hold the perpetrators of such acts accountable, as required by corrective justice (justice as an outcome). Logically, criminal justice activity would also be unfair since police, courts, and corrections carry out criminal law. By not pursuing those offenders who are actually the most dangerous, criminal justice processes do not achieve desert, an important component of fairness.

When police, courts, and corrections unintentionally enforce unfair law, this is called *innocent bias* (Robinson 2001). The presence of innocent bias does not require bad police officers, dishonest courtroom personnel, or unethical correctional staff. In fact, even if every employee of criminal justice was fair, just, equitable, impartial, unbiased, dispassionate, and objective, American criminal justice processes would still be unjust because of innocent bias (Robinson 2009). Innocent bias is not the only form of unfairness in the criminal justice system, but it is the most important and the most dangerous, for its effects are widespread and not easily rooted out as are more apparent forms such as police brutality or corruption, prosecutorial misconduct, bribery, and so forth. Other possible forms of bias – threats to fairness in criminal justice – are identified below.

Before moving on to other threats to fairness, it is important to acknowledge that public opinion generally suggests that citizens agree with the criminal law – those acts that are recognized as serious crimes in the law are those that citizens tend to think are the most serious (Akers and Sellers 2003). However, there is some evidence that when the public are made aware of the harms caused by acts of white-collar and corporate crimes, they are likely to rank such acts as even more serious than street crime. A survey of more than 1,100 people by the White Collar Crime Survey, for example, found that in four of six cases, the respondents thought the white-collar offenses were more serious than the similar street crimes (e.g., a bank teller embezzling $100, versus when someone stealing $100 from a handbag; knowingly sending bad meat to a grocery store which is sold making a person ill, versus robbing someone on the street causing serious injury; a doctor lying on an insurance form to receive more money, versus a patient lying on an insurance form to receive more money; and an insurance company denying a valid claim to save money, versus a patient filing a false claim to save money). Further, about two-thirds of respondents thought more resources should be devoted to apprehending white-collar offenders (Piquero, Carmichael, and Piquero 2008).

Policing

Since police investigate alleged crimes and are the primary entry point for cases into the criminal justice system, innocent bias created in the criminal law continues with law enforcement activities. Other alleged sources of unfairness in policing are the disproportionate focus by police on street crime and the disproportionate location of most police officers in the urban areas of America (Reiman 2006; Shelden 2007). If police are heavily focused on street crime and disproportionately located in urban areas, it is inevitable that there will be disparities in stop and

arrest rates between whites and people of color. It is also certain that force will be more likely to be used against people of color than against whites.

Government statistics verify these realities, as blacks and Hispanics are far more likely to report having run-ins with police and to be stopped and harassed by police (see generally, Walker, Spohn, and DeLone 2007). They are also three to four times more likely to be arrested and are disproportionately more likely to have force (including lethal force) used against them (Bureau of Justice Statistics 2007a).

Are there crime data that show people of color commit so much more crime than whites that might explain these disparities? No, there are not (Cole 2000; Gabbidon and Greene 2008; Kennedy 1998; Tonry 1996; Walker, Delone, and Spohn 2007). The Uniform Crime Reports (UCR), National Crime Victimization Survey (NCVS), nor self-report studies reveal disparities in criminal offending that could possibly account for the enormous disparities in arrests, convictions, and various forms of punishment (Robinson 2004).

Some crime statistics show clear evidence of disparities in offending by race. For example, blacks, who make up 12 percent of the US population, commit approximately half of the murders and robberies in any given year. Yet, these crimes are *not* a major source of cases for criminal justice processing and thus cannot account for the disparities by race in imprisonment. For example, in 1998, 76,585 people were arrested in the United States for murder and robbery. This accounts for only 9.1 percent of all arrests that year. In 2007, 79,656 people were arrested in the United States for murder and robbery, accounting for only 9.8 percent of all arrests that year (Sourcebook of Criminal Justice Statistics 2009d). Further, in 2004, there were 47,250 people convicted of murder and robbery in state courts the United

States. These offenders made up only 4.4 percent of all convictions in that year (Sourcebook of Criminal Justice Statistics 2009e). Only 41,530 of these offenders were sentenced to incarceration (Sourcebook of Criminal Justice Statistics 2009f). This makes up only 6.4 percent of the 646,830 people admitted to state prisons in 2004 (Sourcebook of Criminal Justice Statistics 2009g).

There are approximately 3,100 black males sentenced to state prison per 100,000 black males in the United States. For white males, that number is only 480 per 100,000 white males (Bureau of Justice Statistics 2008). What accounts for these disparities? It could be argued that black involvement in murder and robbery accounts for these disparities, but that is not a sufficient explanation because such offenders make up only a small portion of those actually sentenced to prison. Since about 93 percent of prison inmates are sentenced for crimes other than murder and robbery, disparities in offending between blacks and whites cannot account for the above disparities in state incarceration.

Disparities in arrest and use of police force seem to be good examples of what Walker, Spohn, and Delone (2007) refer to as institutionalized discrimination. *Institutionalized discrimination* refers to disparities in criminal justice outcomes such as arrest and use of force that are explained by race-neutral factors such as levels of offending and prior record. People living in areas that are "over policed" will be more likely to have run-ins with the police and thus will be more likely to be arrested and/or have a longer criminal record (Kane 2005).

One alleged source of policing disparities is the nation's drug war (Robinson and Scherlen 2007). Research indicates that blacks do not engage in significantly more drug use than whites. For example, the most recent National Survey of Drug Use and Health (NSDUH)

showed that 8.2 percent of whites admitted to current (past-month) drug use, versus only 9.5 percent of blacks (U.S. Department of Health and Human Services 2008). Previous NSDUH reports showed identical drug use rates for whites and blacks (Robinson and Scherlen 2007). According to the Sourcebook for Criminal Justice Statistics (2006), whites are *arrested* only twice as much for drug law violations as blacks, but blacks are *incarcerated* for law violations at 13 times the rate of whites (Human Rights Watch 2000).

Ironically, in 2001, John Walters, Director of the Office of National Drug Control Policy (ONDCP), stated that it was among the greatest urban myths of our time that "the criminal justice system is unjustly punishing young black men" as a result of the nation's drug war. In fact, at the time of his statement, only 7 percent of blacks were current drug users. Yet, they made up 32.5 percent of drug arrests, 53 percent of those convicted of drug offenses in state courts, and 57 percent of prison inmates for drug offenses (Robinson and Scherlen 2007).

Since differences in offending cannot account for disparities in criminal justice processing, this is suggestive of an inequity in criminal justice processing that is inconsistent with fairness. Two fundamental sources are police focus and police presence: police disproportionately focus on street crimes instead of white-collar and corporate crimes; and police are disproportionately located in urban areas. Police are thus more likely to encounter, approach, stop, question, detain, arrest, and use force against the people who live in urban areas (Robinson 2009). The people who live in urban areas are more likely to be poor and people of color (U.S. Census 2008).

On top of this, because police are given wide *discretion* to decide how to behave and when to act, any and all stereotypes they carry will be detrimental to those who have been

stereotyped (Schafer et al. 2006). Given the image of the typical criminal – a young, minority male from the inner-city – *police profiling* occurs where officers look for certain people more than others (Walker, Delone, and Spohn 2007). The results can be dramatic.

The phenomenon "Driving While Black" reflects the fact that blacks are disproportionately stopped for traffic violations compared to whites. Some have argued that the U.S. Supreme Court's support of pretextual stops (stops for any reason to justify a more thorough search later) in *Whren v. United States* (1996) gives police wider authority to engage in race-based stops and searches. According to Lundman and Kaufman (2003), blacks are stopped more than whites and are stopped more repeatedly than whites. In fact, the authors state that, in Maryland, although blacks did not speed at higher rates than whites, they constituted 73 percent of all drivers stopped and 81 percent of all drivers who had their cars searched. Additionally, blacks were more likely to be pulled over for "discretionary stops," such as a broken tag light or driving too slow, while whites were more likely to be pulled over for "non-discretionary stops," such as speeding and reckless driving. Despite this, blacks were no more likely to be arrested after stops (Bureau of Justice Statistics 2007a), which suggests stops are not justified by greater involvement in criminality.

Studies from more than a dozen states now have documented racial profiling (e.g., see Buerger and Farrell 2002; Petrocelli, Piquero, and Smith 2003; Romero 2006). This suggests people of color are being targeted by the police when the evidence does not warrant it (Greenleaf, Skogan, and Lurigio 2008). Further, this is clear evidence of inequality and partiality in criminal justice.

There are also studies that fail to find evidence of racial profiling in policing (Skolnick 2007; Smith et al 2004). Results of studies of racial profiling depend on the location studied, the level of law enforcement studied (e.g., local versus state police), the nature of the data collected, how key variables are operationalized, and whether certain control variables are introduced (Engel, Calnon, and Bernard 2002; Fridell 2004; Gold 2003; Harris 2003; Parker et al. 2004; Walker 2001; Warren et al. 2006; West 2003). Since racial profiling has been documented at some places and at some times, this is consistent with Walker, Delone, and Spohn (2007) call contextual discrimination. *Contextual discrimination* refers to discrimination found in some places at some times in some contexts. Such racial disparities are evidence of unfairness in policing, at least in some jurisdictions.

Courts

After an arrest and booking, the courts take over. In the courts, there is supposed unfairness in decisions related to charging, release through bail or use of preventive detention, plea bargaining, and some stages of the criminal trial (such as voir dire) (Blackwell et al. 2003). As one example, a study by Demuth (2003) of felony defendant processing in large urban courts to discover differences at the pretrial release stage for Hispanics, blacks, and whites found that Hispanic defendants were more likely to be detained prior to case disposition than white and black defendants. Further, the differences were most pronounced in drug cases. Additionally, Hispanic defendants were most likely to be required to pay bail and more likely to have to pay higher bail amounts, yet they were least able to pay bail. This is another example of contextual discrimination.

Nationally, since the poor and people of color are disproportionately arrested, they make up the largest share of courthouse clients. In 2004, for example, 82 percent of felony defendants convicted in state courts were male and 41 percent were non-white, a number that would be higher if data on "whites" were divided into Hispanics and non-Hispanics (Sourcebook of Criminal Justice Statistics 2009f). Further, roughly 82 percent of all felony defendants in the largest counties were *indigent* and had their cases handled by public defenders (Bureau of Justice Statistics 2009). The result is that, as noted above, poor people and people of color are less likely to have charges dropped or reduced and are more regularly denied bail (or given higher bail amounts), as well as held in pre-trial detention awaiting trials. They are also less able to afford bail when it is granted and, in fact, are more likely to be required to post cash or surety bonds to secure their release when compared to whites (see Walker, Spohn, and DeLone 2007).

Some would argue that the rates of the poor held in pre-trial detention reflect the types of crime they commit; in effect, the reason for their detention is due to their perceived dangerousness or the seriousness of the offense. On the contrary, most individuals who are in jail awaiting trial are offered bail (5 out of 6 offenders), but cannot afford to pay the amount; only 6 percent of offenders are denied bail (Bureau of Justice Statistics 2007b). Finally, research has shown that offenders who are incarcerated prior to trial (regardless of the reason) are more likely to be convicted (Williams, M. 2003). This is not a fair outcome since it is determined not by dangerousness but by social class and diminished access to resources. These kinds of findings are evidence of unfairness in court processes.

We also see disparities based on differential access to private versus public attorneys. Holmes and colleagues (1996) found that black and Hispanic defendants in Texas were less

likely to be represented by private attorneys. In the study, offenders with private attorneys were more likely to be released prior to trial and received more lenient sentences than offenders represented by public defenders. These outcomes are unfair if they result from inadequate access to resources, as many scholars believe they do (Beckett and Sasson 2003; Reiman 2006; Shelden et al 2008; Walker, Spohn, and Delone 2007).

Further, the Bureau of Justice Statistics (2003) showed that even though conviction rates of defendants with public and private attorneys are nearly identical, defendants with private attorneys are more likely than defendants with public attorneys to be released prior to the disposition of their cases, as well as less likely be sentenced to prison for their crimes and more likely to be sentenced to probation. It should be pointed out, however, that the Bureau of Justice Statistics did not provide data on seriousness of offense, meaning these findings may be at least partly attributable to legal factors. Whatever the case, being released prior to disposition and avoiding prison are benefits reserved for those defendants with private attorneys which allows them to return to their homes, go back to work, assist in their defense, and so forth. The only benefit of a public defender it would seem is that those defendants with public attorneys are sentenced to shorter sentences than defendants with private attorneys, likely due to being members of the courtroom workgroup. This may owe itself simply to the fact that public defenders are more likely to encourage guilty pleas by their clients. Overall, pre-trial processes appear to operate in a biased way against the poor (Williams, L. 2004).

When it comes to the death penalty, there is overwhelming agreement among death penalty scholars that lack of resources leads to a much higher probability of conviction and sentence to death (e.g., see Bedau 1997; Bohm 2007; Bright 1997; Dow 2002; Zimring 2003).

Capital punishment experts surveyed by Robinson (2007) consistently noted that a major source of bias in capital punishment pertains to not being able to afford quality legal representation.

The wealthy also have other resources such as jury consultants and expert witnesses. They utilize jury consultants and expert witnesses as part of their defense, suggesting a different quality of defense reserved for those financially better off (Robinson 2009). This is an additional source of inequality in partiality in criminal justice practice. As a result, trials are not aimed at establishing truth but instead are simply contests to win (Pizzi 2000).

With regard to *charging*, prosecutors have tremendous power in the courts and they single-handedly decide whether charges will be pressed against a defendant and what charges will be pursued (Baker 1999). Because prosecutors also have wide discretion in such matters, they largely determine what happens to a person who has been arrested by the police. Prosecutors have the power to dismiss charges, reduce charges, negotiate plea agreements, recommend sentences to the judge, and take cases to trial, among other things. Due to this vast amount of discretion, it is possible that prosecutors can exercise their discretion in a discriminatory way.

In the federal courts, there is evidence that prosecutors often seek tougher sentences (and that judges are less likely to grant downward departures based on sentencing guidelines) when defendants are black or Hispanic (Johnson, Ulmer, and Kramer 2008). The picture is likely the same at the state level, as this has been demonstrated clearly in capital punishment cases. For example, prosecutors are more likely to seek the death penalty in cases involving white victims, especially when the offender is non-white and in borderline cases where prosecutorial discretion is possible (e.g., see Death Penalty Information Center 2008).

Most studies examine individual court systems. For example, according to Spohn, Gruhl, and Welch (1987), the decision to dismiss charges in Los Angeles was biased against black and Hispanic defendants. Controlling for legal factors such as seriousness of the offense and prior record, the authors found prosecutors were less likely to dismiss charges against these defendants, particularly in "marginal" cases. These cases are defined as those that could go either way and that prosecutors were more likely to file charges in marginal cases against minority defendants compared to non-minority defendants. Other research has demonstrated a similar racial bias against blacks in child abuse cases in North Carolina (Keenan, Nocera, and Runyan 2008). This is further evidence of contextual discrimination, a bias in some places at some times.

The ideal of criminal court processes is the criminal trial. Although the right to trial is mentioned in the Declaration of Independence, the U.S. Constitution, and scores of Supreme Court cases, the reality is that trials rarely happen. Currently, only about 3 percent of felony cases lead to a criminal trial (Bureau of Justice Statistics 2008). The rest are resolved through informal means such as *plea bargaining*, which occurs in private, behind closed doors, without a determination of guilt beyond a reasonable doubt, and with little regard for the rights of the accused or the victim of the crime.

It is no wonder that no one seems to like plea bargaining – it is regretted by both conservatives and liberals (Walker 2005) – yet it is seen as a necessary evil because of the more than 14 million arrests each year made by the police (Vogel 2006). Courts employ the fewest number of criminal justice employees and receive the lowest portion of resources in any given year, far less than police and corrections. Courts receive roughly 20 percent of all criminal justice resources, including funding and employees (Robinson 2009). As a result, courts must

plea bargain in order to resolve cases.

The primary problem with plea bargaining is that it fails to meet either of two definitions of justice. First, plea bargaining fails to respect due process requirements and also does not achieve procedural justice (justice as a process), thereby assuring that some innocent people may plead guilty for crimes they did not commit (Walker 2005). Second, plea bargaining does not achieve corrective justice (justice as an outcome), for the guilty receive far less punishment than they deserve under plea bargaining.

Plea bargaining also results from a serious imbalance in courtroom power. Prosecutors have far more power and resources than the typical defense attorney in the United States, who is a public defender with thousands of cases each year to handle. As noted earlier, about 82 percent of American court clients are indigent. Given the large number of cases to handle, public defenders have little time to visit with clients and thus often encourage guilty pleas to get rid of cases. Data from 1999 show that the average public defender in the nation's largest hundred counties had approximately 520 cases to deal with each year (Bureau of Justice Statistics 2008). In 1999, public defenders handled 3.4 million cases, spending about $876 million, which amounts to only $258 per case. The total spent defending all indigent clients in 1999 (including assigned counsel as well as public defenders) was $1.2 billion. Compare this with the roughly $114 billion spent on law enforcement and corrections in the same year (Bureau of Justice Statistics 2008). These realities mean criminal trials are simply not possible for each client.

This imbalance of power in the courts is inconsistent with the notion of fairness in criminal justice. To some, it is evidence of a lack of objectivity in the courts, as if the courts are not really interested in whether defendants are factually guilty or not. Instead, it suggests the

primary goal of courts is efficiency – i.e., keeping the docket flowing.

When trials do (rarely) occur, they may best serve those with resources to hire jury consultants to hand pick sympathetic jurors and to use expert witnesses to question the government's evidence (Pizzi 2000). Additionally, research has shown that black defendants (who are more likely to be poor) are more likely to be convicted at trial compared to white defendants (see Fleury-Steiner 2002; Kalven and Zeisel 1966; Sommers and Ellsworth 2001; Williams and Burek 2008), especially if the jury is comprised of white jurors. Williams and Burek (2008) noted that black defendants whose cases were deliberated by majority white juries were more likely to be convicted by those juries than white defendants.

Most notably, research into capital punishment shows bias toward killers of whites, especially when the offender is of another race. For example, Lee (2007) found evidence in California that defendants in Hispanic victim cases were less likely to face a death-eligible charge than defendants in white victim cases. Similar research has been conducted in numerous states, particularly in the south, and found that killers of whites are far more likely to be charged with capital offenses, regardless of the race of the killer, but especially when the killer is black (Paternoster and Brame 2008; Williams and Holcomb 2004; also see Robinson 2007). An alarming study in North Carolina using data from 1999 to 2006 found that even though whites made up less than half (45 percent) of all victims of those arrested for murder, nearly four out of five (78 percent) of those executed by the state from 1999 to 2006 killed whites. Offenders who killed white females were the most likely to be executed, followed by killers of white males. In contrast, blacks – who made up more than half (55 percent) of murder victims in North Carolina from 1999 to 2006 – comprised only 22 percent of victims of offenders executed by the state.

Offenders who killed black females were more likely to be executed than killers of black males (Howell 2008).

Further, blacks who killed whites were far more likely to be executed than whites who killed blacks. During the analysis period, there were 3.78 times more killings of whites by blacks than killings of blacks by whites in the state. However, between 1999 and 2006 in North Carolina, blacks who killed whites were 14 times more likely to be sentenced to death than whites who killed blacks. Further, there were 6 executions of blacks who killed whites during the time period, yet zero executions of whites who killed blacks (Howell 2008). Similar studies conducted across the south have produced similar results (Bohm 2007). This serves as further evidence of unfairness in criminal justice, in at least some states (contextual discrimination).

The good news with regard to sentencing is that there is less evidence at the national level of sentencing disparities. Without distinguishing between types of offenses, sentencing generally does not appear to be biased against any race of people. For example, blacks and whites appear to receive the same sentences within the same categories of offenses. The average prison sentences imposed on convicted felons by state courts are virtually identical for blacks and whites for violent, property, drug, weapons, and other felonies (Sourcebook of Criminal Justice Statistics 2007).

The primary reason for this is that sentencing has been made highly predictable based on legal factors such as seriousness of the offense and prior record – now virtually all "serious offenders" will receive nearly identical sentences based on the seriousness of their offenses and the length of their records. Because of *mandatory sentencing* and *sentencing guidelines*, it is harder for judges to be discriminatory in sentencing matters. Mandatory sentencing mandates a

minimum sentence that must be served after a criminal conviction (Clear, Cole, and Reisig 2005). Sentencing guidelines provide a range of punishment between a minimum and maximum amount based on legal factors (Clear, Cole, and Reisig 2005). Such innovations remove sentencing discretion from sentencing matters and provide more uniformity in sentencing based on seriousness of offense and prior record. However, as noted earlier, there is evidence that federal judges are less likely to depart from sentencing guidelines when the defendant is black (see Walker, Spohn, and Delone 2007).

The general lack of sentencing disparities is used by some to suggest an obvious concern for fairness in judicial processes. Yet, it should be obvious that deciding sentences based on legal factors does not mean there is no unfairness in criminal sentencing. If there are biases in the criminal law and in policing, then offense seriousness and prior record are both partially determined by unfair criminal justice processes. As noted by Reiman (2006), the biases in criminal justice are merely shifted to earlier stages of criminal justice including the criminal law and policing. That is, since the criminal law defines the acts of the powerless as more serious than those of the powerful (even though the latter are more dangerous), and since police are more likely to be patrolling their neighborhoods, the poor (who are disproportionately minorities) are more likely to have criminal records. One result would be tougher sentences handed down by judges. This is another form of institutionalized discrimination, whereby disparities based on race arise out of societal institutions. For example, since police are more likely located in poor, minority areas where crime is perceived to be higher, there will be higher arrest rates in those areas.

There is evidence of sentencing disparities in drug cases (Brennan and Spohn 2008; Lurigio and Loose 2008), especially at the federal level. Steffensmeier and Demuth (2000) examined drug and non-drug offenses in federal courts and found that blacks and Hispanics were more likely to be sentenced to incarceration, and for longer periods of time, than whites. These results held true for both drug and non-drug offenses, but were especially true for drug offenses.

In at least some state courts, similar results are found. Spohn and DeLone (2000) found evidence of racial bias in drug sentencing for black and Hispanic offenders in Chicago and for Hispanic offenders in Miami. In both cities, whites were less likely to be incarcerated than the minority offenders. Additionally, in Kansas City, judges sentenced black offenders to longer sentences than white offenders for drug offenses. In support of this finding, a meta-analysis of 71 published and unpublished studies found that blacks are generally sentenced more harshly than whites (Mitchell 2005).

Further, in a study of the implementation of California's three strikes laws, Chen (2008) found evidence that blacks were much more likely than whites to be charged with three strikes offenses, even after controlling for legally relevant variables. This was true in cases she called "wobblers," cases that can be filed as either felonies or misdemeanors. Racial disparities were also greater for property and drug offenses than for violent crimes. Another study in Florida found evidence that sentence disparities exist across racial and ethnic lines when habitual-offender status is invoked in Florida (Crow and Johnson 2008; also see Crawford 2000; Crawford, Chiricos, and Kleck 1998). These findings, consistent with contextual discrimination, are inconsistent with fairness.

Even in the absence of clear sentencing disparities by race, it is in the marginal cases

when discretion does come into play. Because sentencing guidelines restricted judicial discretion, the predominant use of discretion has shifted to the prosecutor. As stated earlier, prosecutors have enormous discretion with regard to filing charges and, in doing so, influence the sentencing process. For example, prosecutors can choose to file a felony charge instead of a misdemeanor charge, in those "wobbler" cases. Also, prosecutors can file multiple charges against an offender or go after a third felony in three strikes cases. As stated above, minority defendants are not given the benefit of the doubt in marginal cases; thus, prosecutors are more likely to press charges and levy a greater number of charges and more severe charges against minorities and the poor (Walker, Delone, and Spohn 2007). This is evidence of unfairness in criminal justice, given all the efforts to regulate sentencing in the courts.

Finally, studies show that women tend to be treated vastly different than men; generally women receive more lenient sentences relative to men, a form of *chivalry* to women (e.g., see Griffin and Wooldredge 2006). Yet, other research shows that when women commit crimes outside their traditional societal roles they are more likely to be sentenced harshly (e.g., see Brennan 2006; Williams 2004). However, since legal variables are rarely considered in analyses of such cases, researchers cannot definitively characterize these disparities as proof of intentional discrimination based on the extra-legal factor of gender.

Corrections

Corrections represents the end point of the criminal justice system. The nation's men, its poor, and its minorities are over-represented among nearly all correctional populations (Beckett and Sasson 2003; Clear, Cole, and Reisig 2005; Reiman 2006; Walker, Delone, and Spohn 2007).

Those who regularly end up in state prisons and jails are overwhelmingly male, uneducated, unemployed or under employed, poor, and non-white (i.e., black or Hispanic) (The Sentencing Project 2008a).

Black males are disproportionately likely to be under all forms of correctional supervision. The Sentencing Project (2008a) reports that black males have a 32 percent chance of serving time in prison at some point in their lives, versus a 17 percent chance for Hispanic males and a 6 percent chance for white males. According to the Bureau of Justice Statistics (2008): "At yearend 2007 there were 3,138 black male sentenced prisoners per 100,000 black males in the United States, compared to 1,259 Hispanic male sentenced prisoners per 100,000 Hispanic males and 481 white male sentenced prisoners per 100,000 white males." Black males between the ages of 20 and 39 years now make up more than one-third of all state and federal prison inmates. So, the war on crime is clearly having its greatest effects on young black males (Cole 2000). The picture is similar with probation and other criminal sanctions, as well as parole. Given the absence of evidence that blacks commit enough criminality to explain these disparities, each of these outcomes is further evidence of unfairness in criminal justice.

The death penalty is plagued by the same disparities. Men are more likely to receive the death penalty, as are poor people and killers of whites (Bohm 2007; Williams and Holcomb 2004). Death sentences are most likely when blacks murder whites (Baldus, Woodworth, and Pulaski 1990; Gross and Mauro 1989). For example, in the United States since 1976, 235 blacks have been executed for killing whites, versus only 15 whites executed for killing blacks (Death Penalty Information Center 2008). Race and gender of offender and victim matter in death penalty cases (e.g., see Williams, Demuth, and Holcomb 2007).

A study of death penalty experts found that they overwhelmingly believe the death penalty is a failed policy since it does not meet its goals and is plagued by serious problems that greatly outweigh its modest benefits (Robinson 2007). These costs include racial biases, class biases, gender biases, unequal access to quality defense representation, wrongful convictions and sentences of death, and other considerations that result in an unfair capital punishment process. Biases in the application of capital punishment are evidence of unfairness in criminal justice. Further, when innocent people are subjected to death, this directly violates the concept of desert.

From this analysis, it is clear who is suffering most from our current criminal justice policies. Young, poor, minority men are most affected by mass imprisonment and other forms of punishment. If you accept that poor people and people of color are no more likely to be criminal and/or dangerous than people in other classes, races, and ethnic groups (considering all forms of criminality, not just street crime), then the logical conclusion is that correctional punishment is being applied in an unfair manner.

The Role of Mythology

In this article, we've presented evidence that criminal justice practice is, at times, unfair. In spite of our widespread belief that criminal justice practice is "marked by impartiality and honesty ... free from self-interest, prejudice, or favoritism," and that it is just, equitable, impartial, unbiased, dispassionate, and objective, this may be a myth, at least in some ways. That is, people commonly believe that the institutions of criminal justice are fair, but this may be false, at least in some places.

While other scholars have addressed the issue of mythology in criminal justice, most of the research pertains to how myths about crime are created. For example, Kappeler and Potter

(2004) and Barkan and Bryjak (2008) illustrate various myths associated with crime, such as that the typical crime is violent in nature (rather than committed against property) and that the typical criminal is an urban, minority street male (rather than a wealthy, corporate white male). To a large degree, these myths serve to maintain our punitive criminal justice apparatus. The more punitive criminal justice becomes – the more criminal justice is entrenched in Packer's (1968) crime control model – the less likely issues of fairness, due process, and procedural justice will take precedence in criminal justice practice. This is true, even though the American Bar Association's Committee on Criminal Justice in a Free Society showed that the majority of police officers and prosecutors surveyed did not believe that constitutional protections aimed at assuring fairness in criminal justice practice interfered with their ability to effectively "fight crime" (Raven 1988).

Valverde (2006) illustrates how media images of law-related television shows contribute to this process. The more Americans believe criminal justice processes benefit the offender (as suggested by the typical television show dealing with criminal justice) and the more they are afraid of crime, the less likely they will be concerned with issues of procedural justice and demand fairer criminal justice processes. Indeed, research shows that media portrayals of crime tend to promote more punitiveness in criminal justice practice (Beale 2006).

Relationships between exposure to media portrayals of crime and the following outcomes have been well-established in the literature: misperceptions of crime; higher perceptions of crime risk; fear of crime; and fear of poor, minority males (Altheide 2006; Chiricos, Padgett, and Gertz 2000; Eschholz, Chiricos, and Gertz 2003; Oliver 2003; Surette 2007). Similarly, when the media create beliefs that crime is disproportionately committed by people unlike you (e.g., the

poor, and/or minorities), this likely helps maintain punitive and unjust criminal justice practice (e.g., see Chiricos, Welsh, and Gertz 2004; Dunaway et al. 2000; Robinson 2004).

Research on myths of criminal justice practices is much rarer. Bohm and Walker (2007) come the closest to explaining why criminal justice myths arise and persist. They illustrate that every myth has a "kernel of truth," meaning myths often have credible aspects to them. They also show how various interests are inevitably served by myths, which help sustain them over time. Yet, their work does not address the issue of fairness in criminal justice, with exception of a chapter on how the death penalty is unfair.

Based on our review of the evidence, we can assert that, with regard to the idea that criminal justice processes are fair, there is a kernel of truth to this belief. At the very least, the *ideals* of criminal justice, as found in state and federal procedural criminal law, posit in writing that every citizen has certain due process rights, rights that assure a fair process for all. These are found in the Bill of Rights of state and federal constitutions, as well as hundreds of years of common and case law. Because these documents exist and its history and values are taught within schools, families, and other societal institutions, people believe that our due process rights are strong, irrevocable, and actually important to criminal justice practice. Further, because widely viewed television shows centering on criminal justice themes depict due process as the norm rather than the exception, viewers get a sense that our due process protections remain central to the criminal justice process. And to some degree, this is true. In some cases, some of the time, a "due process" criminal justice process exists. For example, in only about 3 percent of felony cases, defendants actually enjoy their Sixth Amendment right to criminal trial, which states:

> In *all* criminal prosecutions, the accused *shall* enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

This example illustrates clearly that criminal justice reality differs greatly from the ideal. Sadly, this is typical of all criminal justice practices – the realities do not match the ideals. The reality of criminal justice practice widely diverges from the myth of a fair system.

Of course, unfairness in criminal justice practice has not been demonstrated at all times and in all places. This means criminal justice is not plagued by *systematic discrimination*, defined by Walker, Spohn, and Delone (2007) as discrimination at all stages of criminal justice, at all places and times. Further, there are studies that have looked for unfairness in criminal justice that have not found it. Thus, criminal justice practice is fair in many ways and in many places. Yet, our review of the evidence allows us to be confident that there is no such thing as *pure justice*, or no discrimination whatsoever.

Conclusion

Evidence supports that some American criminal justice processes are unfair. Most unfairness in criminal justice practices grows out of the criminal law, which is unjust in defining some harmful acts as crimes (and serious crimes) while ignoring others. The main problem is that street crimes cause far less damage than corporate and white-collar crimes, yet our focus remains squarely on the former. The result is that criminal justice activity is unfair mostly because of what it does not do (i.e., seriously pursue corporate and white-collar offenders) rather than because of what it does (i.e., pursue street criminals in unfair ways). Specifically, to the

degree that the criminal justice system does not hold the guiltiest accountable for the harms they inflict on society, it fails to achieve desert and is thus unfair.

In essence, American criminal law can be described as inequitable, partial, biased, and subjective, serving some limited moral and financial interests more than others. The criminal law is made by people who are not demographically representative of the population, is voted for by people who are not demographically representative of the population, and is strongly influenced by limited financial interests. Law-making is ideological and political in nature, aimed at serving certain moral and financial interests (Reiman 2006; Shelden 2007; Williams and Robinson 2004).

Is it a coincidence that the criminal law generally does not define harmful acts as crimes (or "serious" crimes) when they are committed by people who look like law-makers and their supporters? Further, is it a coincidence that those people least like law-makers and their financial backers are most likely to be processed through criminal justice and end up incarcerated? Whether it is intended or not, the criminal law functions to serve the interests of law-makers and people like them, making criminal justice activity unfair (Bell 2008; Brown 2007).

When it comes to criminal justice policy, it is generally unplanned and not rooted in empirical evidence about the etiology of crime, meaning it is often planned on a whim based on the hunch of legislators (Welsh and Harris 2004). This means it is not objective, rational, or dispassionate. Instead, it has become increasingly hateful and vengeful (Simon 2007).

In fact, America is one of the toughest countries in the world – we practice the death penalty even though the majority of our allies do not, our incarceration rate is the highest in the

world, average prison sentences for serious crimes compare with other nations, and we sentence relatively minor offenders to much longer sentences than most countries through practices such as mandatory sentencing and truth-in-sentencing laws (Fairchild and Dammer 2000; Pakes 2004; Reichel 2004).

The result of all this is that much criminal justice practice is, in reality, much different than the ideals on which America's criminal justice system rests. Instead of being fair, just, equitable, impartial, unbiased, dispassionate, and objective, some criminal justice practice is unfair, inequitable, partial, biased, impassioned, and subjective.

The belief that criminal justice practice is fair appears to be a myth, a popular belief that has grown up throughout our nation's history and that embodies the ideals and institutions of our society, but that nevertheless is unfounded or false. The myth of a fair criminal justice system appears to arise out of formal and informal sources. The criminal law, on which all criminal justice practice is founded, imparts certain procedural rights to all citizens. These due process rights are celebrated within families, schools and similar societal institutions. Further, media images of crime and criminal justice serve to maintain the myth that criminal justice practice is fair. In spite of this, the fact remains that American criminal justice practice is unfair from law-making to correctional punishment.

So, what is to be done? Efforts to change biases in police, judicial, and correctional processes can help, but more fundamental change is required. To increase fairness in American criminal justice, the most important reforms pertain to the criminal law. First and foremost, American criminal law must define these acts as "serious" crimes that cause the greatest physical and financial harms to citizens. Unless and until we treat these acts like we do murder, terrorism,

and drug crimes, unfairness will persist in the criminal justice system.

Second, criminal justice agencies must shift their focus away from relatively harmless acts toward those that actually do the most damage – white-collar and corporate crimes. Unless and until white-collar and corporate criminals are treated like street criminals, unfairness will persist in the criminal justice system. That is, until we go after the people actually harming us the most, our criminal justice apparatus will remain a social control mechanism aimed at only some elements of society which serves limited interests (Reiman 2006; Shelden 2007).

There is little hope in reforms such as these without making serious efforts to increase access of everyday citizens to law-makers – registering voters, encouraging regular voting – as well as reducing the impact that monied interests have on the legislative processes. As long as monied interests can have their will enacted into the criminal law through lobbying and donating large sums of goods, services, and cash, the average American will continue to face unfairness caused by the criminal law. That is, the criminal law will only represent our interests if we elect law-makers who represent us and to which we have access. Arrangements that punish the least advantaged members of society while failing to hold accountable those just because they hold advantaged positions in society are unjust and unfair (Rawls 2005).

Beyond this, needed criminal justice reforms include reducing police profiling and abuse of police discretion, rebalancing power in criminal courts (away from the prosecution to the defense), increasing access to competent defense attorneys for both pretrial and trial processes, increasing access to resources for indigent and middle-class defendants, and reducing disparities in criminal sentencing and criminal sanctions that are rooted in discrimination based on extra-legal factors. Such reforms can increase fairness in American criminal justice. Such reforms

will not be possible without a shift away from our crime control values (e.g., "let's get tough on crime," "lock 'em up and throw away the key," "round them all up!") and toward our due process values (e.g., "innocent until proven guilty," "let's protect our civil liberties," "equality and justice for all").

Finally, media reform is essential. Media portrayals of crime promote fear, misperceptions of crime, and punitiveness. All these outcomes tend to deemphasize the importance of fairness in criminal justice practice. Until we insist that media portrayals of crime and criminal justice better match realities, fully realizing fair criminal justice practice will be unlikely.

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