

What Does it Mean to Say “The Criminal Justice System is Racist”?

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Abstract

This paper considers three possible ways of understanding the claim that the American criminal justice system is racist: individualist, “patterns’-based, and ideology-based theories of institutional racism. It rejects an individualist explanation of institutional racism because such an explanation fails to explain the widespread prevalence of anti-black racism in this system or indeed in the United States. It considers a “patterns” account of institutional racism, where consistent patterns of disparate racial effect mimic the structure of intentional projects of racial subjugation like slavery or Jim Crow. While a “patterns” account helpfully directs attention to the effects of policies and practices that make up an institution, it does not fully explain the deep roots of anti-blackness in the criminal justice system in the United States. The paper concludes by defending an ideology-based theory of institutional racism for understanding the criminal justice system because the stereotype of the black criminal has a mutually reinforcing relationship with the patterns of disparate outcome for black people in the criminal justice system. This relationship creates a looping effect where the stereotype of the black criminal fuels the disproportionate involvement of black people in the criminal justice system, and the disproportionate representation of black people with felony records, in prisons, brutalized in police encounters, and so on reinforces the idea that black people are especially prone to

criminality. Ideological approaches to racism that integrate attention to the patterns of disparate effect best explain what it means to say that the criminal justice system is racist.

Keywords: institutional racism, criminal law, racism, disparate effect, ideology, criminal justice system, philosophy of race

0. Introduction

“The criminal justice system in the United States is racist.” This claim, or something like it, animates public discourse around policing and incarceration in the United States. While many activists have long made this claim, Michelle Alexander’s 2010 book, The New Jim Crow, helped raise the claim of the systematic nature of racism in the criminal justice system to academic audiences. Since at least 2014, the Black Lives Matter movement has brought national attention to the unending acts of police violence that harm and kill black people. These academic discussions and popular movements have highlighted racial disparities in the criminal justice system that lead many people to claim that there is some deep connection between anti-black racism and the criminal justice system. Of course, other racial minorities and oppressed groups are also systemically disadvantaged by the criminal justice system in the United States, but I will focus on its anti-black harms in this paper. References to racial disparities, harms, and racism should be understood as primarily claims about anti-black racial disparities, harms, and racism.

This paper will offer a philosophical framework for what it means to say that “The criminal justice system in the United States is racist.” I will refer to this claim as “the Claim.” Conclusively proving the Claim is beyond the scope of this paper, as it would require extensive empirical evidence and expertise in social science. Still, one cannot fully ignore empirical reality in attempting to clarify the conceptual meaning of the Claim. While I will not be able to address

the immense empirical literature on race and the criminal legal system in the United States, I will discuss some of the empirical evidence of racial disparities in the criminal justice system.

When I refer to “the criminal justice system,” I refer to an institution that is at a more foundational level than individual acts (e.g., the use of a racial slur) and individual policies (e.g., stop-and-frisk), but not as foundational as structural racism that is at the level of a whole society. At this intermediate level, an institution is a collection of policies, formal and informal practices, agents, and material items that are explicitly organized around a specific social goal. In this case, the criminal justice system includes such diverse entities as local police departments and sheriffs’ offices, the legal doctrine of qualified immunity, judges in criminal cases, state and federal criminal codes, parole boards, state and federal legislatures in their capacity to define criminal statutes and punishments, the U.S. Constitution, prisons and police cars, and the like. In the case of the criminal justice system in the United States, this institution’s putative goal is to prevent and respond to crime.

When explaining what the Claim means, I take a social critical approach to conceptual analysis. That is, my account of racism is not meant to capture “common-sense race talk,” but instead to offer a conceptual framework for understanding why the criminal justice system has systemic racial disparities that disadvantage black people. I follow Tommie Shelby in undertaking conceptual analysis of “racism” that is aimed at social criticism (Shelby 2014, 63). In this case, to explain what the Claim means for the purpose of social criticism, an account should give some explanation of why the criminal justice system disproportionately harms black people specifically. The Claim does not just mean that the criminal justice system is full of random acts of racial animus, such that any person is just as likely as another to have their race be targeted. This Claim is about the regularity of mistreatment of black people and the patterns

that make them consistently worse off than their white counterparts throughout this institution. Any account of the Claim's meaning must include an explanation of this systematicity in order to be helpful for social critique.

After introducing some important empirical evidence of the types of racial disparities that are essential to the Claim in part one, the paper will proceed by considering three ways of interpreting the Claim and related empirical evidence: individualist accounts of institutional racism, (what I call) pattern accounts of institutional racism, and ideological accounts of racism. I will conclude that the individual accounts do not shed light on the Claim, but both the pattern and ideological accounts work together to offer a complete account of the meaning of the Claim.

Section two examines and critiques J.L.A. Garcia's individualist accounts of institutional racism. His account provides a basis for interpersonal accountability and assigning blame for racism. But Garcia's model cannot account for the patterns of racial disparity in the criminal justice system or the essential role that disproportionate harm to black people has in any institutional account of racism.

Section three builds what I call a "pattern" account of institutional racism where a policy, practice, or institution (i.e., set of policies and practices) is racist if it is part of a pattern of policies and practices that, when taken together, work to maintain social, political, and economic domination. On the pattern account, the criminal justice system is racist because it works as if it were designed to disproportionately harm black people in the United States. Thus, I argue that the criminal justice system, just like the institutions of healthcare, education, employment, and housing, among others, is racist.

Section four argues that the criminal justice system is particularly racist because it is built on and reinforces the powerful ideological symbol of the black criminal. Building on ideology-

based accounts of institutional racism from Shelby and Haslanger, I argue that the criminal justice system is racist not only because of the patterns of disproportionate harm it causes to black people, but also because that harm is created by and reinforces the stereotype of the black criminal. The connection of blackness with criminality is particularly important for offering a pretextual justification for the drastic inequalities that black people face in the criminal justice system and beyond because it provides a putative moral explanation for that inequality in a society that ostensibly eschews racial hierarchies.

1. Racial Disparities in the United States' Criminal Justice System

In order to situate the phenomenon that the Claim describes, some empirical evidence of the disproportionate impact of the criminal justice system on black people is warranted. While only one in 17 white men will be incarcerated in their lifetimes, one in three black men will spend time incarcerated (Sentencing Project). Most studies suggest that black people are five times more likely to be incarcerated than their white counterparts. Even after a record-breaking 15% decline in prison (excluding jails) incarceration rates between 2019–2020 due to COVID-19 backlogs, black men remained 5.7 times more likely to be in prison than white men, and black men 18-19 years old were 12.5 times more likely to be in prison than white men the same age (Carson 2021, p. 23).

Beyond the obvious racial disparities in incarceration, studies have found significant negative disparities for black people compared to white people in every significant stage of engagement with the criminal justice system, including traffic stops (Shoub 2020; Baumgartner 2018; Pierson 2020), arrests (Patten 2019; Mitchell and Coudy 2017), pretrial detention and bail (Arnold et al. 2018); plea bargaining (Kutateladze 2016; Metcalfe & Chiricos 2018), sentencing

(Kovera 2019, p. 1146), and collateral consequences of conviction (Pager 2003). Young black men are particularly disproportionately impacted. “Innocent Black people are 3.5 times more likely than innocent White people to be convicted of sexual assault, 7 times more likely to be convicted of murder, and 12 times more likely to be convicted of drug crimes” (Kovera 2019, p. 1147).

Additionally, these inequalities interact with one another in the criminal justice system itself. For example, in a close call, a police officer might be more likely to arrest someone who has been stopped many times already (even if those stops turned up no evidence of crime), and a judge may be more likely to deny bail to a person that has been arrested multiple times, even if no prior arrest became a conviction. The disparate outcomes at each stage have a cumulative effect not only within the system itself, but also on other aspects of life for those who must negotiate frequent police encounters, apply for jobs and housing with arrest or criminal records, and maintain family and community during and after incarceration. For example, when looking at the impact of a criminal record on employment, one study found, “Blacks are less than half as likely to receive consideration by employers, relative to their white counterparts, and black nonoffenders fall behind even whites with prior felony convictions.” (Pager 2003, p. 960). Social science researchers refer to this kind of effect as cumulative disadvantage (see, e.g., Kurlychek and Johnson 2019).

It is this state of affairs that the Claim refers to, but simply giving evidence that black people are disproportionately negatively affected in these stages of the criminal justice system is only the start of explaining the Claim.

2. An Individualist Explanation

On an individualist account of racism, where institutional racism is always ultimately dependent on the racism of individual people, the Claim would depend on there being many individual racist actors in the criminal justice system. The cumulative actions of these racist individuals explain these disparities. Thus, on an individualist account, the disparities noted above arise simply because police officers, judges, prosecutors, and juries hold anti-black animus and act on it, resulting in these racial disparities. Police officers use their discretion to stop black people more often; prosecutors use their discretion to charge black people with more serious crimes and seek harsher penalties; judges sentence black defendants more harshly, and so on. That is, one way that someone could claim that the criminal justice system is racist is to say that many or most of the agents who act in and on behalf of this system are racist.

Jorge L. A. Garcia's account of racism as paradigmatically in the hearts of individual people would cash the Claim out in such a way. To prove the Claim, he would argue we need to look into the hearts of the actors who carry out the activities that make up the system. He argues that racism is ill-will or hatred for others based on their race; as such, racism is wrong because it is vicious (Garcia 1996, p. 6). Although hatred is the strongest form of racism, a lack of proper regard or concern for people on account of their race will also suffice. Garcia notes that it is common to refer to people, acts, policies, structures, items, and other things racist. To understand this common language usage, he proposes that we call these things racist when they are infected by racist ill will of individual people. Thus, for example, a policy is racist if the person who created it or carries it out does so with racist ill will. Racism is about ill-will, and it has no necessary cognitive content (Garcia 1996, p. 6). While beliefs about the bad qualities of members of a targeted race often act as rationalizations of racist attitudes, they are neither necessary nor sufficient for a person to be racist.

Using this “racism as vice” model, Garcia argues that there are two different ways we can explain what institutional racism is.¹ First, on the cumulative individual actions account, institutional racism is racism because the individuals who operate within the institution have racist ill will, and that ill will infects their actions with racism (Garcia 1996, p. 11). Second, on the historical intent account, the institution is racist because it was created by people with racist ill will with the purpose of enacting that ill will. The policies and institutions are infected with this racist ill will. Even if no one currently carrying out that policy or leading the institution has racist ill will, the policy or institution is still affected by the racist ill will of its creator (Garcia 1996, pp. 11–12, 33–34). In the rest of this section, I argue that both these accounts of institutional racism fail.

Following the first account, the racism of the criminal justice system is reducible to the accumulated actions of many actors who carry out policies with racist ill will. For example, a police officer pulls over a disproportionate number of black motorists on “pretext” stops² because his instincts regularly pick out black motorists as suspicious. He never questions these instincts despite the fact that he finds contraband on white motorists much more often than black motorists. On the cumulative individual actions account, the criminal justice system would be racist if many of the actors in it were like this officer. They need not have an explicit racist belief (e.g., that young black men are more likely to be criminals) or the consciousness of ill will (“I am pulling over that guy because he is black.”) Either of these cognitions can and do often accompany the racist action stemming from the racist attitude, but on Garcia’s account, neither are necessary.

There are likely many people who fit Garcia’s definition of racism in the criminal justice system, and this account gives one satisfying explanation of their blameworthiness. But this

account does not explain why so many agents have anti-black ill-will. An explanation of the Claim would need to explain the findings noted in part one. For example, why are black drivers more likely to be stopped than white drivers during daylight hours, but not during the night, when the race of a motorist is harder to discern (Pierson et al. 2020)? Also, once stopped, why are black drivers searched based on a lower threshold of evidence of wrongdoing than white people (Pierson et al. 2020)? Garcia's formulation of institutional racism as an accumulation of individual actions does not shed any light on the phenomenon of these consistent patterns of increased targeting of black people in stops and searches, in other aspects of the criminal justice system, or indeed in other sectors of social life. This does not mean that Garcia's model of what counts as individual racism is conceptually misplaced. But it is not a helpful account of institutional racism because it does not explain the consistent patterns of anti-black outcomes in the criminal justice system (nor did he necessarily set out for it to do so).

One could argue that Garcia's second historical intent account offers a plausible explanation of the systematic nature of all kinds of racial injustice. In his historical account of an institution's racism, if a person or persons create an institution with the motivation of carrying out racist harm, that institution can continue to be racist even if its racist creators no longer operate it (Garcia 1996, p. 12, 33). Plausibly, this is at least part of the story of why the criminal justice system looks like it does today. If you follow Angela Davis's work, former confederates set up many criminal laws and punishments explicitly to target black people to exploit their labor (2000; 2003). Similarly, Alexander argues that politicians purposefully created mass incarceration to maintain domination over black people after the Civil Rights victories of the mid-twentieth century (2010).

But Garcia's historical intent account goes wrong when it locates the wrongness of a

policy in the intentions of the people who created it. This normative account discounts the harms caused to targeted people as a source of injustice or wrongness of racism. For Garcia, outcomes are irrelevant to determinations of whether a person, act, or institution is racist. He gives this example:

Suppose, a few generations back, some Rls designed a certain institutional procedure P specifically to harm R2s, an oppressed racial group, though the designers were never explicit about this aim. Later, anti-R2 feeling among Rls faded away, and in time real social equality was achieved. The Rls, however, are a traditionalist lot, and they continue faithfully to execute P out of deference to custom and their ancestors. P no longer specially harms R2s. [. . .] In that case, it appears that the racism of the earlier generation persists in the institutional procedure P, even though P no longer specially harms R2s.

(Garcia 1996, p. 33)

Because his account focuses on ill will, and institutions can be racist only by an “infection” of ill will, nothing in this account hinges on whether or not members of the targeted race are actually harmed or experience disproportionately negative effects. The racism is the infection of ill will, even if it never harms a single person of the targeted race. I disagree. I argue that P is no longer racist when it ceases to harm R2s. On my account, some kind of disproportionate harm or outcome is a necessary (but not sufficient) feature of structural racism, and the infliction of harm itself is a part of what makes institutional racism unjust or wrong.

I suspect those who agree with Garcia’s intuition that the harm-free policy is still racist are actually responding to a different, less quantifiable harm. Harms can be dignitary. For example, racial covenants (rules attached to deeds of houses that do not allow the house to be sold to some non-white people), are still on many deeds for homes in the United States. They are

unconstitutional, so they cannot be legally enforced. Thus, they cannot legally prevent any non-white person from buying a house. But their existence is still an insult, so they are not harmless. On my account, the existence of racial covenants is an example of a racist policy. But in Garcia's example, the reason for P is completely unknown in later generations, so there is no dignitary harm. Garcia bites the bullet, insisting that P is still racist, but it is not convincing.

There might be another reason one might agree with Garcia that P is still racist. One might believe that present-day R2s are owed reparations for the harms suffered by their ancestors under the policy. Reparation would require making the historical purpose of the policy known, which would cause dignitary harm. It may also be necessary to change the policy as a part of building a systematic reparative project. This reason for thinking that P is racist after it no longer directly targets R2s is not an indication that ill will is what makes a policy racist because reparation is directed at repairing harm.³

To further highlight the role of disproportionate harm in institutional racism, consider this example based on an actual court case. Imagine that in St. Louis County, 50% of postal workers are black, while only 18% of the residents are black. The County Prosecutor is aware of this, as well as the fact that black people are less likely to convict criminal defendants. In each trial, prosecutors can use three "peremptory strikes" to knock out jurors who they do not want on the case. After a 1986 Supreme Court case, prosecutors are not allowed to strike jurors because of their race. So, the County Prosecutor establishes a policy for his office that all prosecutors should use peremptory strikes to remove all postal workers from juries, secretly intending to exclude black jurors. He justifies this policy by explaining that the postal service's high level of control and bureaucracy put so much pressure on postal workers that they took every opportunity to violate rules.⁴ From this day forward, prosecutors in the county follow policy for all postal

workers, regardless of race. Prosecutors are used to using obscure stereotypes based on employment, age, class, clothing, and body language to try to shape a favorable jury. No one notices or measures the effect the policy has in significantly reducing the number of black people on juries in the county.

Of course, on Garcia's account, this policy is racist because it is, at minimum, fueled by a lack of concern for treating black people as political equals in being allowed to join juries. On my account, it is racist in part because it causes disproportionate harm by keeping black people from participating as equals on the jury and by lessening the likelihood that black defendants will have a representative jury of their peers.

Imagine that the County Prosecutor has died, but the policy remains in force. After several decades, the racial make-up of the postal service changes. Only 10% of the postal workers are black while the county's residential population remains 18% black, so the use of this policy no longer disproportionately removes black jurors from the pools. While it might be a silly policy, it is not obvious that it is still a racist policy, particularly because no one is or was ever aware of the original intent of the County Prosecutor. If someone discovers the original purpose, it would be appropriate to end it for the purpose of explicitly eschewing the policy's harmful past. But these reasons have to do with redressing the harms that the policy created. The fact that the County Prosecutor was racist is distinct from whether the policy is itself forever racist.

This example highlights features of the way policies differ from individual acts of racism when they arise in the real world. First, a policy is extended over time, applying to many individual cases even as background conditions change. Second, in the present United States, there is (at least some) social pressure to avoid explicit racism in public life, and statutory and

constitutional law make it illegal for businesses and the government to make policies explicitly based on race. Those seeking to enact policies based on racist attitudes have to pick race-neutral categories that may or may not continue to track the targeted racial groups as other things change. Thus, the race-neutral category of “postal worker” was aimed at targeting black people, but this was dependent on the background social conditions that many black people in Saint Louis County were employed as postal workers. Given these variables, one should not have to get access to the heart of a dead policy maker to determine if a policy is racist, especially for the social-critical goal of dismantling the structure that maintains racial domination.

Both of Garcia’s individualist accounts of institutional racism fail in their own ways. The accumulated bad actors account does not explain why we see a pattern of disproportionate harm to black people in the criminal justice system, or indeed in so many other American institutions. The historical intent account cannot explain the necessity of disproportionate harm or impact for a finding that a policy is racist, as the postal worker preemptory strike example shows. When examining policies and institutions, which persist over time, carried out by many individual actors, disproportionate harm is a necessary (but as the next section argues, not sufficient) feature of racism. Contrast policies with Garcia’s example of a powerless, isolated racist person who burns with hatred for black people (Garcia 1997, p. 13). Even if there were no way for this person to ever harm a single black person, we would likely all agree that he is racist. But institutions are not people, and the harm institutions cause to members of a targeted race is one of the motivations for developing an account of institutional racism at all.

3. Non-Accidental Pattern of Harm Account

If individual people’s ill will cannot account for the Claim, a second plausible account, the

“pattern account,” would argue that the claim means that the criminal justice system causes patterns of disproportionate harm to black people.⁵ On the pattern account, the Claim would mean that the criminal justice system is racist because it results in patterns of harm to black people that are “non-accidental.”⁶ That is, its policies and practices work as if they were designed to maintain historical inequalities. In this section, I argue that, on a pattern account, the bare fact of disproportionate harm is not enough on its own to explain why the criminal justice system is racist. Instead, this harm must arise “non-accidentally” because of race. The harms are likely to be non-accidental when harms from various policies and practices in an institution work together to keep black people in worse conditions than their white counterparts. Often, these harms perpetuate or mimic domination from explicitly racist historical projects like slavery and Jim Crow.

Merely showing that some institution or policy has disproportionate racial impacts or harms does not show that it is racist on its own. I follow an example from Garcia: Extra-Terrestrials, who know nothing about tellurian racial systems, are attempting a hostile takeover of Earth. To carry out this plan, they fire a devastating weapon at Earth, and it happens to hit Africa. Certainly, this disproportionately affects black people, but few of us would say that the Extra-Terrestrials or their act is racist. Garcia, elaborating on the example, says that even if they set up a plan of attack that targets Africa over and over again because it is easy for their weapons system to lock onto the minerals that are more highly concentrated on parts of the African continent, this system would still not be racist even if it created a pattern of disproportionate harm to black people over time (Garcia 1996, p. 26). This example highlights the fact that merely showing that a particular race is disproportionately harmed by an act or a policy or practice does not always mean that the policy is racist.

Garcia's example shows that disproportionate harm of a practice and racism are conceptually distinguishable. But real-life examples often muddle this conceptual clarity. How does one tell if disproportionate harm to black people is harm because of their being black? In the United States, there is a history of explicit racist policies and institutions designed to harm and exploit black people, including slavery and Jim Crow, and their effects continue. At the same time, complicated policies and practices often have no single creator or agent to carry them out. But collections of these policies and practices, like the criminal justice system, have similar effects as historical, explicitly racist institutions. When there is a pattern of consistent disadvantage to one group of people across a myriad of practices and policies in an institution, that should count as strong evidence that the institution non-accidentally harms those people.

Notice that Garcia posits Extra-Terrestrials to make sure there is no hidden relationship between being black and being harmed by this weapon. This is a helpful device for his argument because if the actors were humans, it would be tempting to suss out a non-accidental correlation between a harm and the race of those affected. With thought experiments that are closer to real life, it is harder to believe that the harm is completely accidental. For example, Garcia employs another example, arguing that even with a disproportionate harm against black people, a policy is not racist without ill-will on the part of the policy's creator:

Suppose, to adapt an example from the literature, a city administrator, looking only to increase revenue, raises the subway fare by a nickel. The negative impact of this measure, let us suppose, falls disproportionately upon black people because they disproportionately use mass transit. (Garcia 1997, p. 23)

Garcia argues that neither this policy nor its administrator is racist using his ill-will model because this example is controversial, unlike the Extra-Terrestrial example.

In the transit fare example, the policy may indeed be racist on the pattern account. A harm need not have been directly intended by a person or group of persons to be non-accidental. The harm merely needs to be causally connected to the targeted group. In nearly all cities in the United States, the fare hike would meet that standard. For example, if black people disproportionately use public transit because they are unable to afford cars or because they are more likely to live in neighborhoods that make their commutes dependent on mass transit, the disproportionate harm is non-accidental. The policy may not have been directly intended to harm black people, but the disproportionate impact is connected to historical projects that were designed to marginalize and disempower black people by keeping them poorer and geographically isolated.

The patterns account also emphasizes that policies and practices across multiple institutions can interact in ways beyond the intent of any given policy maker. If black people are disproportionately harmed by the fare hike because they are disproportionately poorer than white people, then the harm is not accidental. It is part of a pattern of interrelated harms that extends back to slavery and Jim Crow. Empirically, black people have less wealth than white people in the United States. The most recent data shows that the typical white family has eight times the wealth of the typical black family (Bhutta 2020). This disparity arises from legacies of slavery and other historical explicitly racist policies such as discrimination in policies that supported home ownership, where most middle-class white people gained their wealth (Katznelson 2005; Rothstein 2017). At first blush, this connection to historical, explicitly racist projects appears to support Garcia's historical version of institutional racism. But that account's focus on the individual policy creator's ill will as the locus of racism, and not consequences of policies, means that it is not especially well equipped to examine how historical policies can interact with

other background conditions to create and perpetuate patterns of domination of black people.

The pattern account is also better equipped than individualist accounts to explain the interactions of different policies with one another. The harmful effects of a policy require looking beyond that policy or a singular agent. Take bail and pretrial detention. Researchers have consistently found disproportionate disadvantages for black people in the allocation of bail. If a person cannot pay bail, they will be kept in jail—pretrial detention—until their case is resolved either by trial or plea deal. One study of bail hearings in Miami and Philadelphia, for example, found that “black defendants are 3.6 percentage points more likely to be assigned monetary bail than white defendants and, conditional on being assigned monetary bail, receive bail amounts that are \$9,923 greater” (Arnold 2018, 1886).

Unlike the transit fare example above, in bail determinations, there is no single policy or agent one can point to as a source of these disparities. When a person is charged with a crime, a judge sets their bail upon consideration of a prosecutor’s recommendation. In Philadelphia, dozens of judges and prosecutors play a role in those statistics, and all the official policies and local practices of the courts and the prosecutor’s office play roles as well. The individual racial ill-will on the part of judges and prosecutors in these jurisdictions may be the immediate cause of at least some of the determinations (meeting Garcia’s first model for institutional racism), but this does not on its own explain the pattern of disproportionate outcomes. If there were simply racist judges (with no further account for why anti-black racism is so prevalent amongst them) there is no explanation for why black and Hispanic defendants, but not white and Asian defendants, consistently get worse outcomes. Moreover, given this complexity, it is unlikely that the bail system has an identifiable agent as an historical source of racist ill will.

The pattern account does not generally look at single policies in isolation, as thought-

experiments tend to. Instead, it would put the bail disparities in the context of other disparities across the criminal justice system. Bail determinations have significant implications beyond whether a defendant awaits trial or plea deal in a cell. One study of bail practices in Philadelphia found that those who remained in pretrial detention had a 13% increase in the likelihood of being convicted over those who were released and “a 42% increase in the length of the incarceration sentence and a 41% increase in the amount of nonbail court fees owed” (Stevenson 2018). The fact that black people have less wealth than white people surely contributes to their higher chances of remaining in pretrial detention, as bail is rarely set based on ability to pay.

Pretrial detention also means defendants lose jobs, housing, and government benefits, and they weaken their ties with family and community. These impacts have long term consequences, measurable and immeasurable. One study found that being detained pretrial makes one less likely to find formal employment even years down the road, affecting the ability to get social security and unemployment. Those who were released from pretrial detention were 24.9% more likely to have formal employment three to four years after a bail hearing than those who were detained (Dobbie 2018).

Thus, when claiming that a policy like pretrial detention (or the transit fare increase) is racist, one way to cash that claim out is to say that, upon empirical investigation, the disproportionate harm to black people from that policy interacts with other policies, which together work to keep black people disadvantaged. Rather than looking into the hearts of policy makers or agents of the criminal justice system to determine if it is racist, as Garcia’s account would have us do, the patterns account would have us look at the outcomes of the policies and practices of the criminal justice system to see if they consistently harm black people in a way that is unlikely to be accidental. Such disadvantages tend to coincide with a lack of power,

including wealth, political power, and social capital, inequalities which mimic explicitly racist historical practices.

A critic might argue that the pattern account mistakenly argues that the criminal justice system is racist, but these outcomes are really based on the fact that black people are poorer than white people. Thus, they could argue, the criminal justice system is really classist, not racist. In response, the pattern approach does not require that empirical evidence definitively find that race is the single determining factor for racial disparities instead of wealth, class, education level, neighborhood, or other associated metrics. Black families' disproportionately low wealth is a type of institutional racism that interacts with the racism of the criminal justice system.

On the patterns account, to call a policy like the transit fare increase or the bail system "racist" calls attention to the pattern of disadvantages that both of these policies are a part of, patterns that work to keep black people in oppressive situations. The bail system would not be racist, nor would the transit fare increase, if they existed in a vacuum. But they exist with other policies, practices, historically rooted wealth disparities, and lack of equal social and political power. On this view of institutional racism, it is non-accidental that the targeted group, black people, still suffers from the unremedied harms of slavery and Jim Crow.

The patterns account goes further than an individualist account in explaining what the Claim could mean because it names the way that policies and practices work together to create patterns of harm for black people. On the pattern account, alongside other institutions, the criminal justice system disproportionately harms black people as if it were designed to take away economic, political, and social power through connections to past historical racist projects and through interactions with other policies that create disproportionate disadvantages for black people. There is a connection to historical and explicit racist systems, but unlike Garcia's

account, the intent of the past systems is not what makes these policies racist. Their systematic harm is.

Patterns accounts mainly point to the fact that, though the historical, explicit forms of racist domination from the past have technically ended, many practices have similar harmful outcomes. But this is not all that the Claim means. In the next section, I argue that the criminal justice system also produces and maintains a particularly powerful racist symbol, that of the black criminal.

4. Ideology of Black Criminality

Another candidate explanation of what the Claim means is that the criminal justice system depends on and perpetuates racist ideology. Ideological accounts of racism argue that ideology organizes and simultaneously justifies or hides racial hierarchies. Building on accounts from Shelby and Haslanger, I argue that the criminal justice system is racist because it plays a particularly important role in the ideology that currently maintains the subordination of black people in the United States by making black subordination appear as a natural outcome of some kind of tendency of black people toward criminality.

Like Garcia, Shelby has a unified account of racism, but instead of ill-will as the defining feature of racism, it is ideology. “An ideology is a widely held set of loosely associated beliefs and implicit judgments that misrepresent significant social realities and that function, through this distortion, to bring about or perpetuate unjust social relations” (Shelby 2014, p. 66). Shelby argues that racist ideologies are misrepresentations about race that serve to keep some “races” of people subordinated to others. People can be racist by (consciously or unconsciously) ascribing to racist ideologies, and acts that are undertaken because of racist ideologies are racist.

Shelby also defines institutional racism by reference to ideology:

An institution is racist if (1) its goals or policies are premised on or convey racist propositions or (2) its rules and regulations fail to be impartially and consistently applied because racial ideology has a pervasive (though perhaps unconscious) hold over its officials or functionaries. (Shelby 2014, p. 68).

Using his account, one could argue that the criminal justice system is racist because its policies and practices produce disparate effects because police, prosecutors, judges and juries are influenced by the idea that black people are especially prone to criminality. Or, it is racist because the policies are premised on this racist proposition.

Importantly, Shelby's account explains why this collection of agents, policies, and so on work together to produce bad outcomes for black people at every point in the system. Beliefs and assumptions that make up racial ideology function to maintain and disguise unjust hierarchies. Unarticulated beliefs that black people are prone to criminality make it appear natural that so many black people are incarcerated, subject to police brutality, and branded as "felons" for life. Such treatment is not only harmful in itself, but also it works to maintain the subordination of all black people in many facets of society, from family life to employment, from education to health care.

Haslanger explicitly adopts much of Shelby's account, including his account of the function of racial ideologies and the idea that ideology "distorts reality and it produces or supports injustice" (Haslanger 2017, p. 3). But Haslanger disagrees with Shelby that ideology is primarily about beliefs. On her account, ideology operates on psychological processes that are prior to the formation of beliefs or thoughts. "These psychological processes are learned through socialization. To become a participant in the social domain, one must learn how to differentiate

signal from noise in order to communicate and coordinate. To become a fluent participant, this differentiation must occur spontaneously, ‘unthinkingly’” (Haslanger, 2018, 7). Ideology shapes how people participate in communities, perform cultural practices, and learn the habits of thought and action that allow them to navigate the social and material world. Her account does not require that people have either racial animus or racist beliefs. But it is also consistent with people holding conscious racist beliefs or feeling racial animus, and it can explain why racial animus toward black people in the United States is so pervasive.

Haslanger’s ideology account explains the structure of inequalities that the pattern account identifies. For example, an officer might pick out more black people for stops without holding a racist cognition (conscious or unconscious) or racist ill will. It may, in fact, be the case that such an officer actually experiences the black men that they disproportionately pull over as more suspicious, precognitively. Likewise, prosecutors, judges, and juries could precognitively view black defendants as more suspicious or dangerous because anti-black ideology shapes their impressions of trustworthiness during court proceedings. But it is also the case that many agents in the criminal justice system consciously ascribe to racist ideologies in Shelby’s sense of the phrase. I do not think the two accounts are mutually exclusive, and I suspect that it is difficult to fully distinguish the two in particular instances.

Haslanger’s account goes further than Shelby’s in explaining the relationship between ideologies and the world in which institutions operate. She argues that racism is not the ideology itself, but the result of ideology, connecting the pre-cognitive ideologies with their expression in practices that reinforce the ideologies. The policies and practices—disproportionately pulling over black drivers, detaining more black people pre-trial, keeping black people from participating equally on juries—have “looping effects” so that the outcomes reinforce the

ideology, and vice versa (Haslanger 2017, pp 16-17).

With this in mind, the claim “the criminal justice system in the United States is racist” means that this particular collection of policies, formal and informal practices, agents, and activities, is a locus of a set of semiotic relationships that are particularly effective in maintaining racial hierarchies in the United States. The central stereotype of black criminality informs who is treated as a criminal, which, through a looping effect, reinforces that stereotype. The disproportionate number of incarcerated black people, the heavily policed black neighborhoods, and the unceasing regularity of black people being killed by police is caused by the ideology that connects blackness with criminality. But it also reinforces it.

The criminal justice system putatively reduces and responds to crime, and by extension, keeps (some) people safe. In so doing, it produces and maintains the stereotype of black people as criminals by shaping “what we must attend to in order for our practices to produce and distribute things of value” (Haslanger, 2017, p. 7). The criminal justice system is a particularly important node of racial-ideological formation because it shapes our perceptions of the world, safety, danger, who is a threat, who is a victim, and so on. It is driven by narratives and symbols that allow people to unthinkingly determine who is worthy of protection versus who threatens safety, who is a potential victim or a likely criminal. It operates by deeming black people criminals and white people as not dangerous or potential victims. These perceptions have concrete consequences for whose neighborhoods are safe, who is monitored, who is protected, who is incarcerated, who lives where, and sometimes, who lives at all.

5. Conclusion

In conclusion, I argue that the Claim means that the criminal justice system works as a collection

of policies and practices that work together and with other institutions to maintain the domination of black people. It does this by systematically causing them disproportionate harm, disempowering black people economically, socially, and politically. This is the patterns account. But the criminal justice system is particularly instrumental in maintaining these inequalities because it helps maintain the racist symbol of the black criminal. This is the ideological account. Not only does the disproportionate representation of black people in the criminal justice system itself harm black people, but it also perpetuates the stereotype of the black criminal, which acts as a legitimization of the unjust disadvantages black people face in every arena of American life.

Notes

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References

- Alexander, Michelle. 2010. The New Jim Crow: Mass Incarceration in the Age of Colorblindness (New York: New Press).
- Arnold, David, Will Dobbie, and Crystal S Yang. 2018. "Racial Bias in Bail Decisions," The Quarterly Journal of Economics, vol. 133, no 4, pp. 1885–1932.
- Baumgartner, Frank R., Derek Epp, and Kelsey Shoub. 2018. "Suspect Citizens: Fighting the War on Crime with Traffic Stops," in Suspect Citizens: What 20 Million Traffic Stops Tell Us About Policing and Race (Cambridge: Cambridge University Press), pp. 1-34.
- Brame, R., Bushway, S. D., Paternoster, R., and Turner, M. G. 2014. "Demographic patterns of

cumulative arrest prevalence by ages 18 and 23.” Crime and Delinquency vol 60, pp. 471–486.

Carson, E. Ann. 2021. Prisoners in 2020. (Washington, DC: Bureau of Justice Statistics)

<https://bjs.ojp.gov/content/pub/pdf/p20st.pdf>.

Davis, Angela Y. 2000. “From the Convict Lease System to the Super-Max Prison.” in: James, J. (eds) States of Confinement (New York: Palgrave Macmillan).

———. 2003. Are Prisons Obsolete? (New York, NY: Seven Stories Press).

Dobbie, W., Goldin, J., Yang, C. 2018. “The Effects of Pretrial Detention on Conviction, Future Crime, and Employment: Evidence from Randomly Assigned Judges.” American Economic Review, vol. 108, no. 2, pp. 201–240.

Ezorsky, Gertrude. 1991. Racism and Justice : the Case for Affirmative Action. (Ithaca: Cornell University Press).

Garcia, J. L. A. 1996. “The Heart of Racism.” Journal of Social Philosophy, vol. 27, no. 1, pp. 5–46.

———. 1997. “Current Conceptions of Racism: A Critical Examination of Some Recent Social Philosophy.” Journal of Social Philosophy, vol. 28, no. 2, pp. 5–42.

Glasgow, Joshua. 2009. “Racism as Disrespect.” Ethics, vol. 120, no. 1, 64–93.

Haslanger, Sally. 2012. “Oppressions: Racial and Other.” in Resisting Reality: Social Construction and Social Critique. (New York: Oxford University Press), pp. 311–342.

———. 2017. “Racism, Ideology, And Social Movements.” Res Philosophica, vol. 94 no. 1, pp. 1–22.

Katznelson, Ira. 2005. When Affirmative Action Was White : an Untold History of Racial Inequality in Twentieth-Century America. (1st edition). (New York: W.W. Norton).

Kovera, M. B. 2019. “Racial Disparities in the Criminal Justice System: Prevalence, Causes, and

- a Search for Solutions.” Journal of Social Issues, vol. 75, no. 4, pp. 1139–1164.
- Kurlychek, Megan C, and Brian D Johnson. 2019. “Cumulative Disadvantage in the American Criminal Justice System.” Annual Review of Criminology, vol. 2, no. 1, pp. 291–319.
- Kutateladze, Besiki Luka, Nancy R. Andiloro & Brian D. Johnson. 2016. “Opening Pandora’s Box: How Does Defendant Race Influence Plea Bargaining?,” Justice Quarterly, vol. 33, no. 3, pp. 398-426.
- Metcalf, Christie and Ted Chiricos. 2018. “Race, Plea, and Charge Reduction: An Assessment of Racial Disparities in the Plea Process,” Justice Quarterly, vol. 35, no. 2, pp. 223-253.
- Mitchell, O., and Caudy, M. S. 2017. “Race Differences in Drug Offending and Drug Distribution Arrests.” Crime and Delinquency, vol. 63, no. 2, pp. 91–112.
- Nellis, Ashley. 2021. “The Color of Justice: Racial and Ethnic Disparity in State Prisons.” The Sentencing Project. <https://www.sentencingproject.org/publications/color-of-justice-racial-and-ethnic-disparity-in-state-prisons/>.
- Pager, D. 2003. “The Mark of a Criminal Record.” American Journal of Sociology, vol. 108, no 5, pp. 937–975.
- Patten, M., Bond, E., Low-Weiner, C., Hood, Q. O., Lu, O., Tomascak, S., and Chauhan, P. 2019. Trends in Marijuana Enforcement in New York State, 1990 to 2017. <https://datacollaborativeforjustice.org/wp-content/uploads/2020/04/Marijuana-Report.pdf>.
- Peffley, M., and Hurwitz, J. 2007. “Persuasion and Resistance: Race and the Death Penalty in America. American Journal of Political Science, vol. 51, pp. 996–1012.
- Pierson, E., Simoiu, C., Overgoor, J. et al. 2020. “A Large-Scale Analysis of Racial Disparities in Police Stops across the United States. Nature Human Behavior vol. 4, pp. 736–745. 1
- Rothstein, Richard. 2017. The Color of Law : a Forgotten History of How Our Government

Segregated America. (1st edition). (New York ; London: Liveright Publishing)

Sentencing Project. Nd. Sentencing Project Fact Sheet:

(<https://www.sentencingproject.org/criminal-justice-facts/>)

Shelby, Tommie. 2002. "Is Racism in the 'Heart'?" Journal of Social Philosophy, vol. 33, no. 3), pp. 411–20.

———. 2014. "Racism, Moralism, and Social Criticism." Du Bois Review, pp. 57–74.

Shoub, Kelsey, Derek A. Epp, Frank R. Baumgartner, Leah Christiani, and Kevin Roach.

2020. "Race, Place, and Context: The Persistence of Race Effects in Traffic Stop Outcomes in the Face of Situational, Demographic, and Political Controls." The Journal of Race, Ethnicity, and Politics, vol. 5, no 3, pp. 481–508.

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1. Garcia does not explicitly identify two different accounts, but both of these appear in his text. Joshua Glasgow differentiates them and notes some minor inconsistencies in Garcia's account of them. (Glasgow 2009, pp. 71–76)
 2. Pretext stops occur when police use a minor traffic violation as a pretext to pull a car over for the real purpose of looking for evidence of other crimes.
 3. I am grateful to an anonymous reviewer for raising this objection.
 4. The facts presented here are taken from Edwards v. Roper, 688 F.3d 449, 457 (8th Cir. 2012). A prosecutor in St. Louis County indeed had such a policy, and he gave this reason to support it. The Appeals Court found that it was not a constitutional violation because there was not enough

evidence to show that the policy was racially motivated. Edwards v. Roper, 688 F.3d 449, 457 (8th Cir. 2012).

5. I sketch out my own pattern account, but others have given similar accounts. See Ezorsky (1991, 9–27). See also Haslanger (2012).

6 I borrow this term from Haslanger, 2012.