



Divided Justice: Trends in Black and White Jail Incarceration, 1990-2013

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Director's Note

The story of mass incarceration in the United States is a story about race. As incarceration rates soared in jails and prisons through the 1970s, 1980s, and 1990s to reach historically unprecedented heights, the burdens of that growth did not fall equally on all communities. For black people in particular, the impact has been devastating, cutting a swath of destruction through the economic and social fabric of communities, ensuring the persistence of systemic inequality that undermines our country's bedrock values.

Like all stories about race in America, however, the chronicle of incarceration's shifting path is a complicated one, and we are only just beginning to understand and reckon with it in full. This report sheds a bright new light on a key chapter of that story: the changing picture of race in America's local jails, the municipal and county facilities that hold, primarily, people who have been charged with offenses but have not yet been found guilty. Using the Vera Institute of Justice's (Vera) Incarceration Trends data tool, Vera staff analyzed jail incarceration trends by race nationally as well as by region and jurisdiction size.

What we found is that black people continue to be vastly overrepresented in the nation's jails, in every region of the country. This is despite declines in incarceration rates for black people in the past 10 years, most significantly in large urban and suburban areas. But this isn't the only story the data tells. In fact, a new headline is that white incarceration rates have increased, particularly in smaller jurisdictions. With the opioid crisis constantly in the news, it is tempting to assume that this epidemic, which has impacted white communities more so than others, explains the growth in jail incarceration for white people. And while it may be a contributing factor, we simply don't know the reasons underlying these trends. As this report notes, a number of understudied phenomena could be influencing the numbers. Is the misidentification of

Latino people as white in some jurisdictions masking white incarceration trends? Are criminal justice reforms differently impacting jail incarceration rates for black and white people? Are jail capacity issues — including the outsourcing of jail beds from one county to another — impacting racial trends in those areas? To answer these and other questions, researchers and policymakers will need more comprehensive data, because data about race and jails is incomplete, and its collection uneven across jurisdictions.

Understanding the changing narrative about race in local justice systems — and how it varies from place to place — is a critical task not only for those who study the justice system and seek to improve it. It matters equally, or even more so, for those on the ground, inside and outside government, who care about equity, justice, and safety. The reasons for the differences in jail incarceration rates between white and black people are more likely because of the criminal justice policies and practices of particular localities. Community stakeholders need to ask how their local trends are measuring up, whether policy choices or practices may be contributing to racial disparities or changes in incarceration rates by race or ethnicity, and why. But to fully answer all of these questions goes beyond what current data can tell us. Further race data and analyses — including qualitative data to measure and understand the racial and ethnic impact of discretionary decision making along the criminal justice continuum — are needed to explain intergroup differences in jail incarceration trajectories. Because race and ethnicity play such a big role in the ways in which localities use their jails, overcoming these gaps in knowledge will be integral to criminal justice reform efforts aimed at reducing the overuse of jails and incarceration generally.



Fred Patrick
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About This Report

This report is one of a series that the Vera Institute of Justice (Vera) is releasing with the Safety and Justice Challenge — the John D. and Catherine T. MacArthur Foundation's initiative to reduce overincarceration by changing the way America thinks about and uses jails. The initiative is supporting a network of competitively selected local jurisdictions committed to finding ways to safely reduce jail incarceration. Other publications in the series to date include *Incarceration's Front Door: The Misuse of Jails in America*, *The Price of Jails: Measuring the Taxpayer Cost of Local Incarceration*, *Overlooked: Women and Jails in an Era of Reform*, and *Out of Sight: The Growth of Jails in Rural America*, as well as a multimedia storytelling project, *The Human Toll of Jail*.

Through the Safety and Justice Challenge, our own office in New Orleans, and direct partnerships with jurisdictions nationwide, Vera is providing expert information and technical assistance to support local efforts to stem the flow of people into jail, including using alternatives to arrest and prosecution for minor offenses, recalibrating the use of bail, and addressing fines and fees that also trap people in jail. For more information about Vera's work to reduce the use of jails, contact Nancy Fishman, project director at Vera's Center on Sentencing and Corrections, at nfishman@vera.org. For more information about the Safety and Justice Challenge, visit www.safetyandjusticechallenge.org.

About the Incarceration Trends project

The Incarceration Trends project at the Vera Institute of Justice aims to inform the public dialogue, advance research, and help guide data-driven reform by providing easily accessible information on jail and prison populations in every U.S. county. The centerpiece of the project is an interactive data tool, available at trends.vera.org, that can be used for reference and measurement by justice system stakeholders and others looking to understand how their county uses jail and prison incarceration and how it compares to others over time. The tool allows users to explore particular problems within their jurisdictions—such as excessive growth or racial or ethnic disparities, among others. For more information about the project or how to use the data tool, contact Christian Henrichson, research director, at chenrichson@vera.org, or Jacob Kang-Brown, senior research associate, at jkangbrown@vera.org.

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Introduction

Race matters in incarceration in the United States. Indeed, disproportionate racial and ethnic contact with America's prisons and jails has become a defining feature of mass incarceration, the decades-long growth in the use of imprisonment as the nation's primary response to crime. People of color — especially black people — are imprisoned at astoundingly higher rates than would be expected given their proportions of the country's total population. The brute numbers related to black prison incarceration bring this reality into stark relief: Although comprising 13 percent of the total population, black people make up 35 percent of the combined state and federal prison population and are incarcerated at over five times the rate of white people.¹

Black jail incarceration rates have fallen significantly since the nationwide peak in 2005; in contrast, white jail incarceration rates have steadily grown across all regions and jurisdiction types since 1990.

Overrepresentation of people of color in the criminal justice system is a well-established subject of deep and considerable scholarly and policy attention. To date, however, the majority of empirical studies and policy reform efforts have focused primarily on understanding and remediating

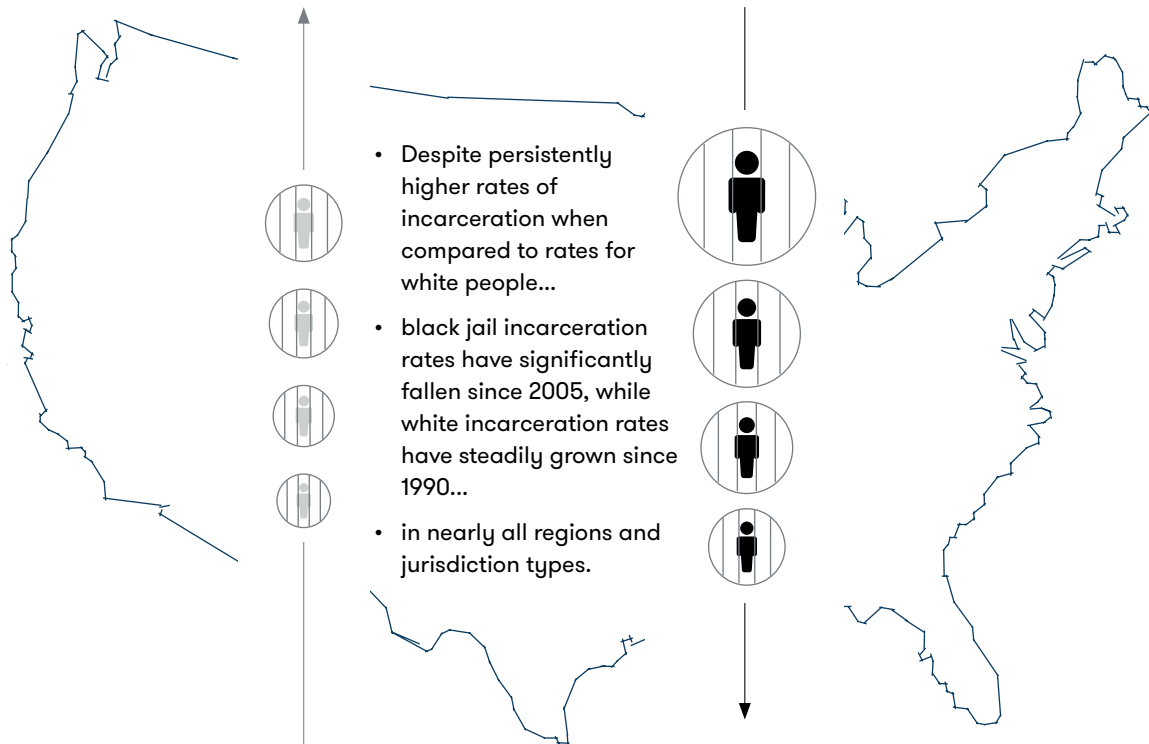
disproportionate racial or ethnic representation at the bookends of the criminal justice process — arrest and sentencing.² Some studies, mostly limited to single jurisdictions, have specifically examined racial disparities in local jails — county or municipal detention facilities that primarily hold people arrested but not yet convicted of a crime.³ Given the vast reach of jails — whose admissions are 18 times that of state and federal prisons, at approximately 11 million jail admissions annually — their omission from consistent or rigorous scrutiny results in an incomplete picture.⁴ Although jails play a key role in the country’s system of incarceration — and are a critical location where racial disproportionality in incarceration plays out — little is known about the scope and magnitude of differences in local jail incarceration rates among racial and ethnic groups, or whether observed differences have changed over time or vary from place to place. Yet disparities among demographic groups in local jail incarceration — like those elsewhere in the criminal justice system — are fundamentally unjust and need to be better understood so that they can be remediated.⁵

Vera Institute of Justice (Vera) has sought to contribute to this emerging field of inquiry by conducting a comprehensive analysis of jail population trends by race using the *Incarceration Trends* data tool, which incorporates jail data from the Bureau of Justice Statistics — the most complete national dataset on jails available to date.⁶ (See “The *Incarceration Trends* data tool: sources and units of analysis” on page 10.) Using this tool, Vera researchers also examined the degree to which differences in jail incarceration rates between white and black people vary along the urban-rural axis (between large cities, suburbs, small/medium metros, and rural areas), as well as between U.S. regions — the West, Midwest, South, and Northeast. The current analysis largely confines itself to an examination of black and white jail incarceration trends — the two groups that comprise the majority of incarcerated Americans. Due to inconsistent and incomplete data reporting, there are limitations to the conclusions that can be drawn about Latino/Hispanic people in local jails. (For more, see “Challenges surrounding the collection of jail data about race” on page 14.)

While this analysis confirms that black people have historically been, and continue to be, significantly overrepresented in local jails nationally, it also uncovered some unexpected trends:

- › Despite persistently higher rates of incarceration when compared to rates for white people, black jail incarceration rates have fallen significantly since the nationwide peak in 2005, including declines in nearly all regions and types of geographies along the urban-rural axis.

- > In contrast, white jail incarceration rates have steadily grown across all regions and jurisdiction types since 1990. Also, it appears that smaller jurisdictions, including small/medium metros and rural areas, are experiencing the largest growth in jail incarceration of white people. For reasons explored below, white growth in some places may be in part due to a number of localities starting to count Latino/Hispanic people as “white.”



The root causes of these diverging jail trends are not yet clear. This is in part because only a few jurisdictions have set out to deliberately study the specific drivers of jail incarceration by race, and fewer still have implemented explicitly race-conscious interventions to target those drivers.⁷ Where policy or practice changes are enacted to reduce jail populations — for example, through the increase in the use of alternative-to-incarceration programs — these are often done in a race-neutral way, assuming that the “rising tide will lift all boats.”⁸ At the same time, although there is growing recognition that disproportionate racial representation can have serious social and economic consequences that

implicate wider community safety, directly wrestling with the issue of race and incarceration remains uncomfortable ground because it forces people to confront a deep legacy of racism in this country, past and present.⁹ This lack of direct inquiry has compounded the existing dearth of knowledge about why racial disparities continue to exist in local jail incarceration.

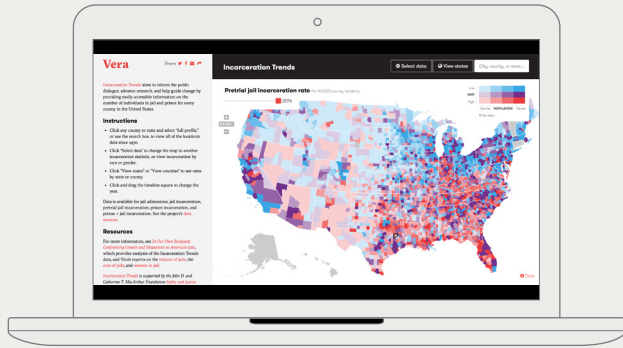
To prompt discussion and further action, this report not only provides an analysis of how white and black jail incarceration rates have changed over time or from place to place, it also proposes a remedy to fill current gaps in knowledge: deliberate collection of race data related to jail incarceration — much of which is presently non-existent. Such information will be crucial in understanding why recent jail population patterns are occurring in an era of widespread criminal justice reform. To begin exploring the reasons behind recent trends, this paper suggests a few questions to consider, including whether:

- › criminal justice policies and practices are impacting racial or ethnic groups differently;
- › issues with demographic data collection on Latino people may be skewing analyses of white incarceration rates based on currently available data;
- › lack of jail capacity or constraints on other resources are influencing trends in some jurisdictions;
- › differences in the distribution of various criminal justice resources — from access to courts, to availability of pretrial, treatment, or public defender services — are resulting in different racial outcomes depending on where people live; or
- › the opioid epidemic has contributed to rising incarceration rates for whites living outside urban jurisdictions.

These questions put race front and center and, in doing so, call on policymakers, researchers, and the public to contend with how much race still functions in pervasively harmful ways in society, particularly in the criminal justice system. Complete and accurate data provides a starting point for more fine-grained analyses that will clarify the reasons behind recent jail trends by race. But data is not a panacea for racial disproportionality — it is only a tool for tracing each group's pathway to the jailhouse door. Once those drivers of jail incarceration are better understood, determining potential ways to close that door will likely become more apparent.

The Incarceration Trends data tool: sources and units of analysis

The *Incarceration Trends* data tool—available at trends.vera.org—collates and visualizes publicly available, but disparately located, data about jail incarceration so that it can be used to explore how each county’s jail compares with others over time.



Jail population data

The *Incarceration Trends* tool combines jail population data from the Bureau of Justice Statistics Annual Survey of Jails (ASJ) and Census of Jails (COJ). The ASJ has been fielded 25 times between 1985 and 2014 and captures data for a sample of several hundred jails; in 2014, the sample was approximately 800 counties, which included the 250 largest jails, and a stratified sample of the remaining counties. The COJ captures data for nearly all counties and has been fielded 10 times: 1970, 1972, 1978, 1983, 1988, 1993, 1999, 2005, 2006, and 2013.⁶

Incarceration rate

The tool calculates incarceration rates using the county population collected by the U.S. Census Bureau. To get a more accurate picture of incarceration rates, people under the age of 15 and over 64 are excluded from the general population since these groups are at very low risk of jail incarceration. Also, because the proportion of these groups varies greatly

by county—less than 50 percent in some counties to over 75 percent in others—including them would skew rates and make comparisons between counties difficult. Note that this method differs from most other calculations of statewide and national incarceration rates, which use either the total resident population or the population aged 18 and older. Due to limits in the U.S. Census data, single year estimates at the county level using the current standard federal race and ethnicity categories are only available from 1990 to present.

Demographic data and group identifiers

This report relies on federal datasets and follows federal Office of Management and Budget standards for the reporting of data on race and ethnicity. The ASJ and the COJ ask responding jurisdictions the race of the people confined in their facilities, using nine categories: American Indian/Alaska Native, not of Hispanic origin; Asian, not of Hispanic origin; Black or African-American, not of Hispanic origin; Hispanic or Latino; Native Hawaiian or Other Pacific Islander, not of Hispanic origin; White, not of Hispanic origin; two or more races not of Hispanic origin; a blank category for jurisdictions to submit an additional category in their system; and not known. The race categories based in U.S. Census data include the categories: American Indian or Alaska Native; Asian or Pacific Islander; Black or African-American; Hispanic or Latino of any race, and White. However, in the earliest years there were fewer categories; and furthermore, census data on resident populations has used different racial categories over the years as well. In order to get county-level estimates of population by race that are comparable over the study period, Vera researchers use data by the National Center for Health Statistics. These estimates are called “bridged,” because they connect different historical racial categorization systems. They include the categories: American Indian or Alaska Native; Asian or Pacific Islander; Black or African-American; Hispanic or Latino of any race; and White; and thus Vera uses corresponding categories from the jail data.





The Incarceration Trends data tool: sources and units of analysis (cont'd)

Urban-rural classification

Vera's analysis of the urban-rural continuum collapses the six categories (urban, suburban, medium metropolitan, small metropolitan, micropolitan, and non-core) defined by the National Center for Health Statistics (NCHS) Urban-Rural Classification Scheme for Counties to four, by combining medium with small metropolitan areas, and micropolitan (an urban area with a population of at least 10,000 but less than

50,000) with noncore areas (all other areas not considered metropolitan or micropolitan).^b Vera counts the latter as "rural." A county is labeled "urban" if it is one of the core counties of a metropolitan area with a million or more people, and a county is labeled "suburban" if it is within that surrounding metropolitan area. Rural areas make up the most numerous category, with more than 1,900 counties.

Population and jail statistics for urban to rural counties (2013)

	Number of counties	Millions of residents	Percent of population	People in jail	Percent of jail population
 Large metro (urban)	62	94	31%	207,873	28%
 Large metro (suburban)	361	76	25%	152,327	20%
 Small and medium metro	715	90	29%	242,326	32%
 Rural areas	1,936	45	15%	146,475	20%
Total	3,074	306	100%	749,001	100%

Note: Excludes county data for six states (Alaska, Connecticut, Delaware, Hawaii, Rhode Island, and Vermont) that do not have local jails because there is a "unified" state prison-jail corrections system.

^a For more details on sources, see Jacob Kang-Brown, *Incarceration Trends: Data and Methods for Historical Jail Populations in U.S. Counties, 1970-2014* (New York: Vera Institute of Justice, 2015), <https://perma.cc/3JRN-QF6Y>.

^b See D. D. Ingram and S. J. Franco, "2013 NCHS Urban-Rural Classification Scheme for Counties," *Vital and Health Statistics 2*, no. 166 (2014), 1-73, 14 & table 2, <https://perma.cc/M3RX-ML6Y>.

Black and white jail incarceration rates, 1990-2013: A snapshot of findings

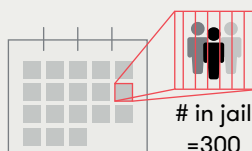
Profound disparities still persist in the country's use of prisons, although recent data suggests that such disparities have been declining along with prison populations since 2009.¹⁰ Black people remain incarcerated in state prisons at a rate more than five times the imprisonment rate of white people — and, in some states, at a rate that is more than 10 times that of white people.¹¹ Although less attention has been paid historically to the differences in either group's experiences of local incarceration, national data indicates that black jail incarceration appears to be experiencing similar trends as those being observed in prisons. This section maps the trajectories of black and white jail incarceration rates across different regions and the urban-rural axis.

National data indicates that black jail incarceration appears to be experiencing similar trends as those being observed in prisons.

Numbers versus rates

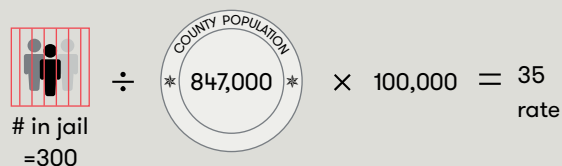
This report considers two key metrics of understanding jail use: population and incarceration rate. Jail population is the number of people in the jail on a given day. The jail population is used to calculate the jail incarceration rate, which reflects the number of people in jail for every 100,000 people aged 15 to 64 in the county. Because an incarceration rate takes into account the population size of a county, it can be used to more closely compare jail use among counties of different sizes

1. Number: Jail population is the number of people in the jail on a given day.



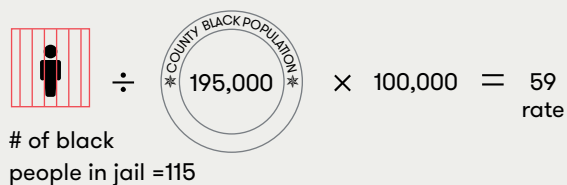
Example: If the county jail population is 300 on a given day...

2. Rate: The jail population is used to calculate the jail incarceration rate, which reflects the number of people in jail for every 100,000 people aged 15 to 64 in the county. Because an incarceration rate takes into account the population size of a county, it can be used to more closely compare jail use among counties of different sizes.



Example (cont'd): ...and there are 847,000 people aged 15 to 64 in the county, the jail incarceration rate is 35. For every 100,000 people, there are 35 people incarcerated.

3. Rate for a particular racial group: The jail incarceration rate for a particular racial group is calculated using the number of people of that group in the jail and reflects the number of people of that group within the community. Because an incarceration rate for a particular group takes into account that group's population size in a county, it can be used to track changes within a group over time and to compare changes between different groups.



Example (cont'd): If there are 115 black people, for instance, in jail and 195,000 black people aged 15 to 64 in the county, the black jail incarceration rate is 59. For every 100,000 black people, there are 59 black people incarcerated.

Challenges surrounding the collection of jail data about race and ethnicity

National perspective. The most accurate national perspective of local incarceration rates comes from the Bureau of Justice Statistics' (BJS) Annual Survey of Jails and its Census of Jails, which are represented visually through Vera's Incarceration Trends tool.^a While both surveys convey a great deal of information — including jail admissions, age, pretrial status, charge level, and community supervision statistics — the vast majority of data is not sorted by race or ethnicity. To date, race and ethnicity information are only collected to capture the demographic composition of the national jail population on a specific snapshot date, usually the last weekday in June.^b And although federal agencies are required to use current Office of Management and Budget (OMB) standards for the reporting of data on race and ethnicity, these do not apply to states and local governments, which can result in inconsistent data collection methods on race among federal, state, and local agencies. (The current OMB standard dates to 1997 and includes five racial categories and two ethnicity categories — “Hispanic or Latino” and “not Hispanic or Latino” — and recommends that people be allowed to self-identify.)^c

The data is also limited in other ways critical to understanding how different demographic identities intersect and produce disparities in jail incarceration.^d For example, data collection methods have changed over time and, from 1993 to present, jail data no longer separates out gender-specific numbers by race and ethnicity. This masks how trends may differ for men and women of the same racial or ethnic group.^e

Identity and data. The evolving understanding of race and ethnicity as they relate to identity is another challenge in collecting and analyzing data on race. Categories used on intake forms and within databases, which vary from jurisdiction to jurisdiction (and even from agency to agency within a single jurisdiction), represent generalizations of groups — based on broad groupings of geographic regions,

common language, or skin color—that may not align with how people personally identify. For example, a test study for the 2020 U.S. Census survey showed that the structure of questions in the survey (in other words, whether people were allowed more detail and nuance in their racial identification) impacted how, and how often, Latino/Hispanic people responded to the survey. The results found many did not feel the current categories provided accurate representation and preferred to identify with their family's country of origin, rather than as Hispanic or Latino.^f Moreover, that research found that when questions about race and ethnicity allow for greater specificity, they receive higher response rates, in addition to helping people feel more accurately represented.^g Indeed, BJS's most recent report on prisoners in 2016 found when prisoners have the ability to self-identify—through its Survey of Prison Inmates—a higher percentage of both male and female state prisoners reported Hispanic origin or multiple races, and fewer identified as non-Hispanic white and non-Hispanic black than in the National Prisoner Statistics program data.^h

Even when data systems have greater capacity to record trends on race and ethnicity, and do so consistently, human error can still lead to inaccurate data if institutions rely on observer-selected race instead of self-selected race.ⁱ Indeed, many jails do not ask people their race or ethnicity directly, and merely record apparent race at booking. Those that ask people's race may not elicit actual identity because the options may be limited. For instance, in California's prisons, people at intake were asked to choose between “black, White, or Hispanic” for many years.^j

^a The Census of Jails was first distributed in 1978 and is distributed every five years “[t]o provide current and comprehensive data on local jail facilities, populations, and programs.” The survey covers “[a]ll correctional facilities that are administered by county or

Challenges surrounding the collection of jail data about race and ethnicity (cont'd)

municipal governments (directly or under contract)” and excludes combined jail and prison systems in Alaska, Connecticut, Delaware, Hawaii, Rhode Island, and Vermont. The Census includes 15 locally operated jails in Alaska. See U.S. Census Bureau, “Jail Census,” <https://perma.cc/UD67-8FE7>; and Bureau of Justice Statistics (BJS), “Data Collection: Census of Jails,” <https://www.bjs.gov/index.cfm?ty=dcdetail&iid=254>. The Annual Survey of Jails was first started in 1982 and is also distributed every five years to “track changes in the demographic characteristics of the jail population [and] changes in the size of the jail population, jail capacity and crowding, the flow of inmates moving into and out of jails, and use of jail space by other correctional institutions.” See BJS, “Data Collection: Annual Survey of Jails,” <https://perma.cc/3CVC-ZQDD>; and Todd Minton, “Nonsubstantive change request for the Annual Survey of Jails: OMB Control No: 1121-0094,” Memorandum to Jennifer Park, Office of Statistical Policy and Planning, Office of Management and Budget (Washington, DC: BJS, 2017), 2.

^b Minton, “Nonsubstantive Change Request for the Annual Survey of Jails (2017), 1. Both the Census of Jails and the Annual Survey of Jails only collect information about those in custody—either between a certain time period or on an exact date—and do not collect data from other discretionary points, such as arrest, charge, or bail. Some questions, like admissions, ask for information collected within the calendar year, while other questions ask for mid-year (June 30) and end-of-year (December 31) numbers. For samples of the 2016 surveys, see BJS, *Annual Summary of Inmates in Private and Multijurisdictional Jails* (Washington, DC: BJS, 2016), <https://perma.cc/L7VK-KFF9>; and BJS, *Annual Summary on Inmates Under Jail Jurisdiction* (Washington, DC: BJS, 2016), <https://perma.cc/8HZ4-93GM>.

^c OMB, “Revisions to the Standards for the Classification of Federal Data on Race and Ethnicity,” Federal Register notice (Washington, DC: OMB, October 30, 1997), <https://perma.cc/F5BN-3DMV>.

^d Elizabeth Swavola, Kristine Riley, and Ram Subramanian, *Overlooked: Women and Jails in an Era of Reform* (New York: Vera Institute of Justice, 2016), 11-12, <https://perma.cc/S28B-HEHC>; and Urban Institute, “The Alarming Lack of Data on Latinos in the Criminal

Justice System,” accessed September 29, 2017, <https://perma.cc/L2CF-R9Y5>.

^e Indeed, until 1985, there were no questions about race. From 1985 to 1994, they included race by Hispanic/Latino, and race by gender.

^f D’Vera Cohn, “Seeking Better Data on Hispanics, Census Bureau May Change How It Asks About Race,” Pew Research Center, April 20, 2017, <https://perma.cc/XDN8-RKLY>.

^g Ibid. Also see Paul Taylor, Mark Hugo Lopez, Jessica Martinez, and Gabriel Velasco, *When Labels Don’t Fit: Hispanics and Their Views of Identity* (Washington, DC: Pew Research Center, 2012) (a majority of Hispanics most often identify themselves by their family’s country of origin, while 24 percent prefer a pan-ethnic label), <https://perma.cc/7U37-FGFU>.

^h See E. Ann Carson, *Prisoners in 2016* (Washington, DC: U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, 2018), 7 & table 5.

ⁱ For example, a comparison of next-of-kin racial identifications versus race identifications made by officials on death certificates found that a large proportion of black Hispanics are misidentified. Gary D. Sandefur, Mary E. Campbell, and Jennifer Eggerling-Boeck, “Racial and Ethnic Identification, Official Classifications, and Health Disparities,” in *Critical Perspectives on Racial and Ethnic Differences in Health in Late Life*, edited by Norman B. Anderson, Rodolfo A. Bulatao, and Barney Cohen (Washington, DC: National Academies Press, 2004), <https://perma.cc/FTG4-F4ET>.

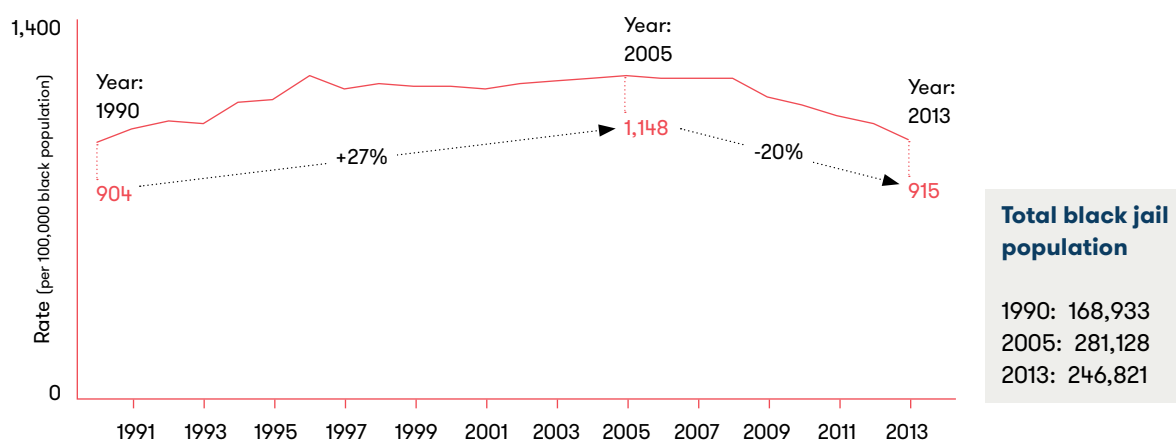
^j Philip Goodman, “It’s Just Black, White, or Hispanic: An Observational Study of Racializing Moves in California’s Segregated Prison Reception Centers,” *Law & Society Review* 42, no. 4 (2008), 735-70.

Trends in black jail incarceration rates

While the black jail incarceration rate is relatively the same today as it was almost 25 years ago — with 904 black people in jail per 100,000 black people in the community in 1990 compared to 915 per 100,000 in 2013 — this masks a much more complicated and dynamic story. Between 1990 and 2005, the national rate of black jail incarceration grew by 27 percent — peaking at 1,148 per 100,000 in 2005. Moreover, since 1990, the number of black people held in jail on any given day nationally grew by nearly 50 percent, from around 169,000 people to 247,000 people in 2013. Between 2005 and 2013, however, the black jail incarceration rate declined by 20 percent. Not only did the rate of black incarceration decline nationally, but so did the number of black people held in jails, with 34,000 fewer black people held in jails on any given day in 2013, compared to 2005. (See Figure 1, below.)

Figure 1

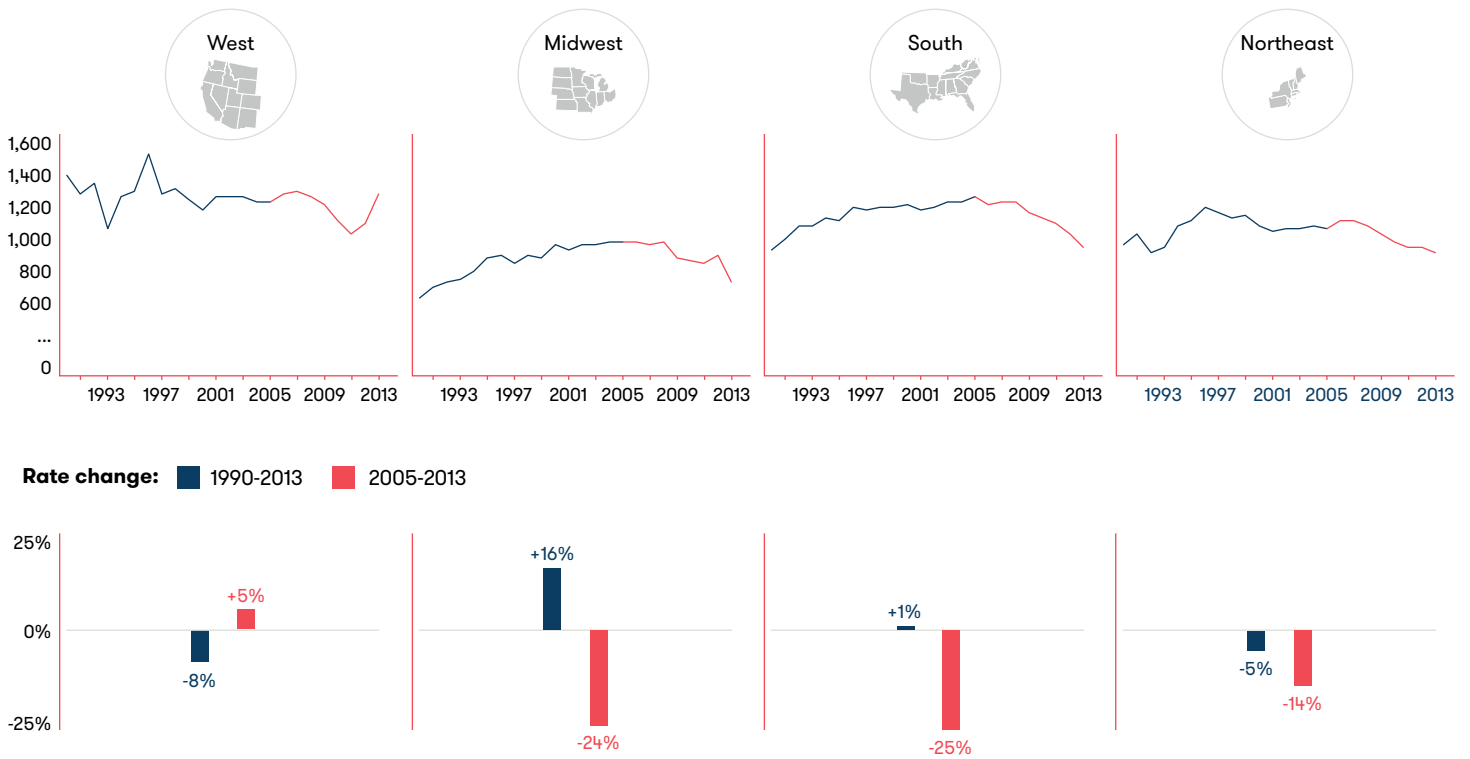
Black incarceration rate



This arc in local incarceration rates for black people holds across the four major regions of the United States — West, Midwest, South, and Northeast — as well as along the urban-rural continuum. But this arc has followed two distinct timelines. While black jail incarceration rates peaked in the West and Northeast in 1996, the South and Midwest experienced more prolonged growth, peaking a decade later before subsequently dropping. (See Figure 2, on page 17.)

Figure 2

Black incarceration rate by region (per 100,000 black population)

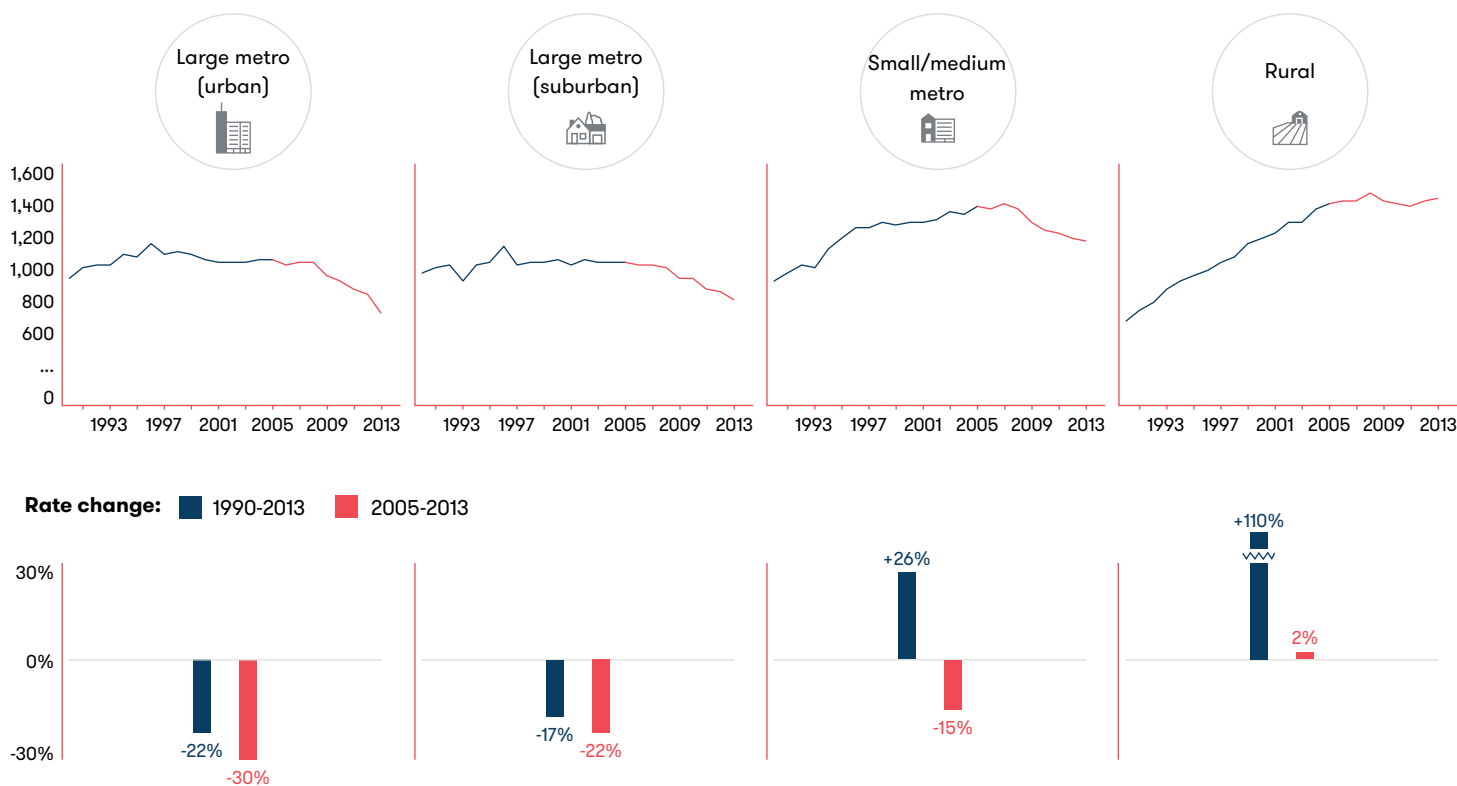


Similarly, along the urban-rural axis, incarceration rates for blacks peaked in 1996 in both urban and suburban jurisdictions before witnessing steep declines after 2005—dropping 30 and 22 percent respectively. Smaller jurisdictions experienced sharp growth into the late 2000s before rates began to drop in 2008, but by smaller magnitudes—just 14 percent in small/medium metros and 2 percent in rural areas. (See Figure 3, on page 18.)

Despite these similarities in growth and decline patterns, there are still a number of notable differences in black jail incarceration rate trends between regions of the country and jurisdictions of different sizes. For

Figure 3

Black incarceration rate by jurisdiction size (per 100,000 black population)



example, despite recent declines, black jail incarceration in rural areas has, overall, been a story of growth, with the black incarceration rates in rural jails more than doubling between 1990 and 2013, from 673 to 1,411 per 100,000. By 2013, there were nearly three times the number of black people held in rural jails on a given day than in 1990, increasing from approximately 14,000 in 1990 to about 38,000 in 2013.

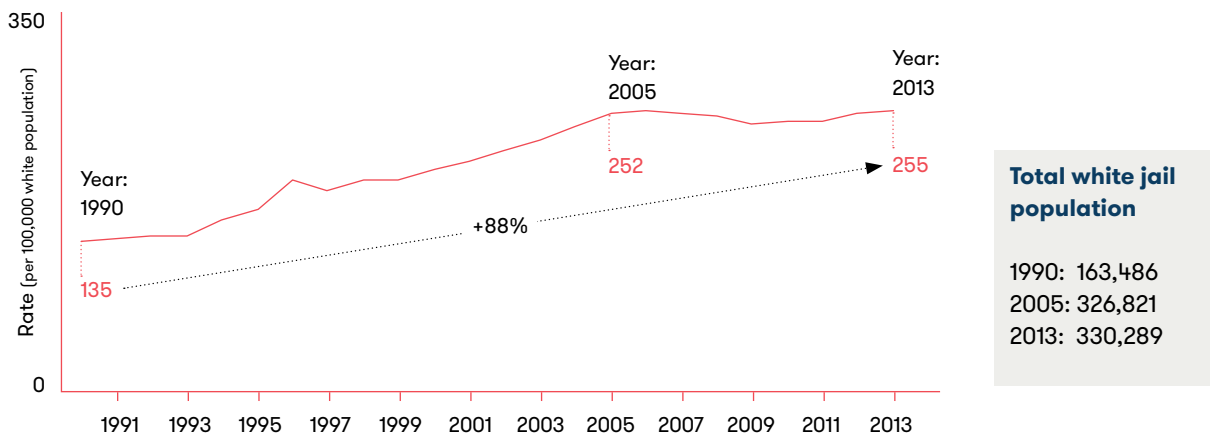
Trends in white jail incarceration rates

In contrast to the jail incarceration trajectory for blacks in recent years, the local incarceration of whites appears to be a story of continuous and steady growth. Between 1990 and 2013, the jailed white population doubled, increasing from about 163,000 to 330,000 white people in local jails on any given day. This increase also nearly doubled the national white jail incarceration rate — from 135 per 100,000 in 1990 to 255 per 100,000 in 2013, an 88 percent increase. As the black jail incarceration rate

experienced its decline after 2005, the white rate has plateaued. (See Figure 4, below.)

Figure 4

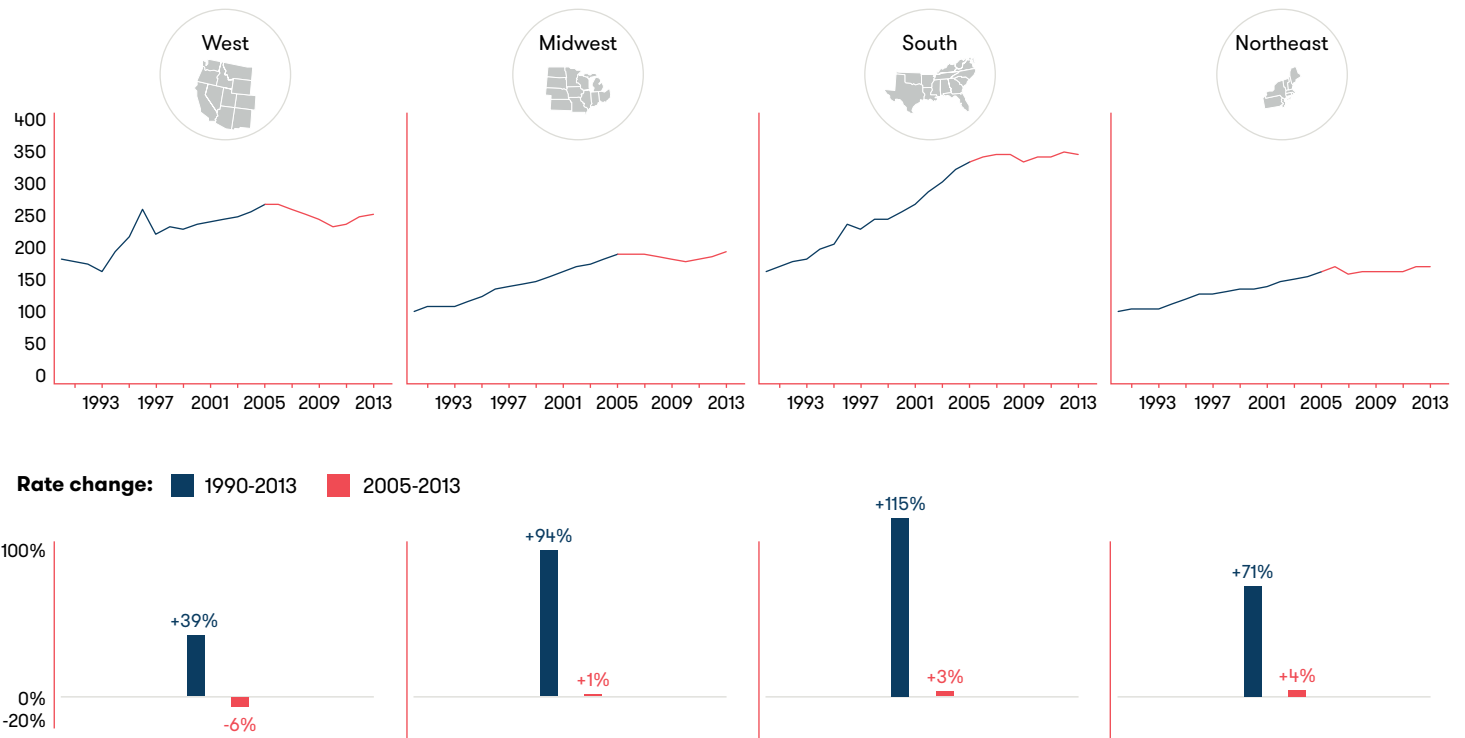
White incarceration rate



This overall upward march in white jail incarceration holds across all U.S. regions. Between 1990 and 2013, jail incarceration rates for white people across the West, Midwest, South, and Northeast all experienced sizeable increases — 39 percent, 94 percent, 115 percent, and 71 percent, respectively. (See Figure 5, on page 20.) By 2013, the South had the highest rate of white jail incarceration (348 per 100,000), while the Northeast had the lowest (168 per 100,000). Growth in the South was so great that by 2013, the South held around the same number of white people in jail on any given day (160,000) as the other three regions combined (171,000).

Figure 5

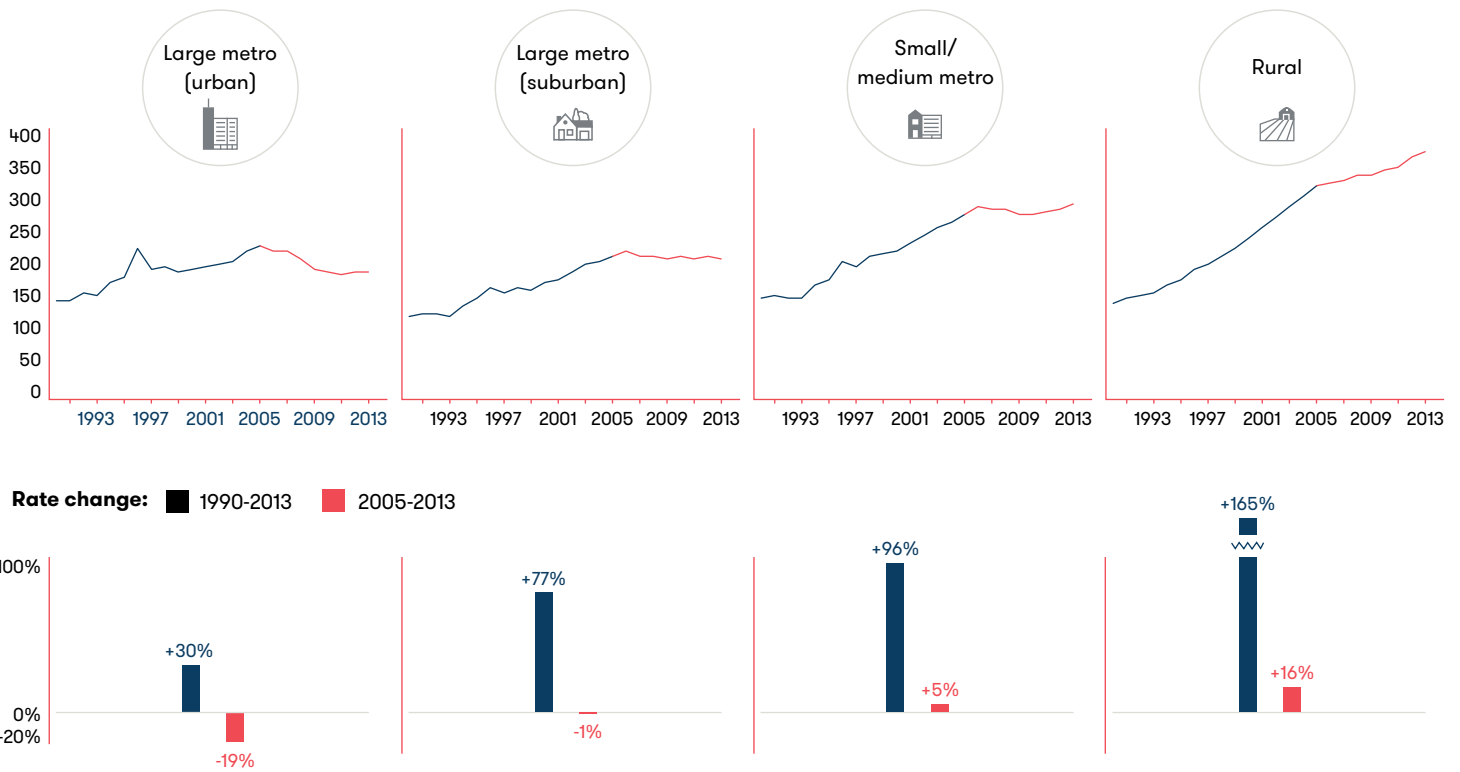
White incarceration rate by region (per 100,000 white population)



Vera’s analysis found that white jail incarceration rates similarly increased between 1990 and 2013 across all jurisdiction types along the urban-rural axis. However, growth in rates varied. Smaller jurisdictions registered the highest percentage increases, with a 165 percent increase in rural areas and a 96 percent increase in small/medium metros. In contrast, urban areas saw more modest growth, increasing 30 percent. When looking at white jail incarceration rates in urban areas in recent years, however, the story is one of decline, similar to that of black urban jail incarceration rates. Since 2005, white jail incarceration rates in urban areas declined 19 percent and white incarceration rates in suburban areas declined 1 percent, as white incarceration rates in other areas continued to grow. Today, the areas with the greatest number of white people incarcerated in jail on any given day are smaller places, including rural areas and small/medium metros, which together hold a greater number of white people in jail (205,000) than the combined white populations of urban and suburban jails (125,000). (See Figure 6, on page 21.)

Figure 6

White incarceration rate by jurisdiction size (per 100,000 white population)

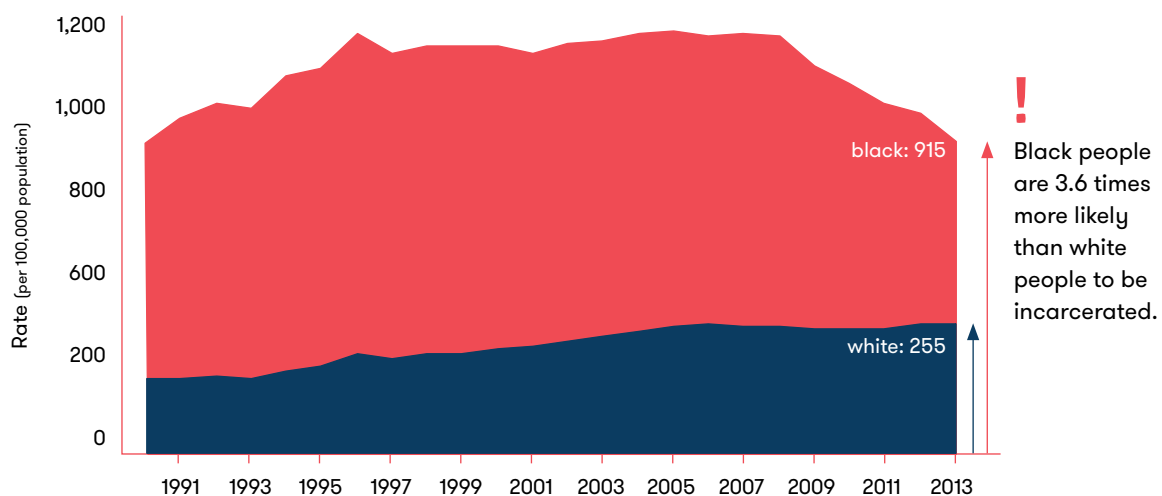


Changes in racial disparities in jail incarceration rates

As white and black jail incarceration rates have changed over time, the data indicates that the racial composition of the country's 3,000 local jails has begun to shift. As the result of recent trends, the disparity between the jail incarceration rates of black and white people is now smaller than it was in 1990, when black people were nearly seven times more likely than white people to be held in local jails. (See Figure 7, on page 22.)

Figure 7

Black and white incarceration rates



Yet there remains a wide gulf between white and black jail incarceration rates. While recent declines in black rates may indicate some progress in reducing racial imbalances in jail incarceration, black people remain 3.6 times more likely to be incarcerated in local jails nationally than white people. And narrowing disparities appear to be due in part to increasing jail incarceration of white people — a trend that should be alarming given recent efforts across the nation to downsize the overall footprint of local jail incarceration. (For the number of black and white people in jail, and the black and white jail incarceration rates, for the years 1990, 1996, 2005, 2008, and 2013, see the Appendix.)

Searching for explanations

Despite this critical moment in jail and local justice system reform, there aren't obvious explanations for why black and white jail incarceration rates experienced such differing trajectories between 2005 and 2013. As mentioned earlier, most studies seeking to understand patterns of racial disparities in incarceration examine the sentencing decision.¹² As it relates to jails, this only provides a partial view, since more than a third of people in jail are there because of a judicially-imposed sentence upon conviction.¹³ Most people end up in jail in a multiplicity of other ways. This is because jail incarceration is the product of a complex web of highly discretionary decisions made within a connected, but not always synchronized, local justice system.¹⁴ This includes many different autonomous system actors, all of whom exercise varying degrees of influence over who ends up in jail and for how long; and who act according to different incentives and answer to different constituencies.¹⁵ These include:

- › law enforcement officers who choose to arrest, release, or book people into jail;
- › prosecutors who determine what charges to pursue or decline; whom to divert from prosecution; and the content of plea bargains they decide to offer;
- › judicial officers, including magistrates or bail commissioners, who decide to detain or release people pretrial, and under what conditions;
- › court actors whose action or inaction can determine how long a person's case lasts and, if that person is in custody pending case resolution, how long a person may languish in jail;
- › judges who can sentence someone to serve time in a local jail instead of in a state prison or in the community; and
- › probation and parole officers who decide whether to process people through local jails as part of sanctioning someone for not following supervision conditions.

The reasons that underlie emerging differences in jail incarceration rates between white and black people are likely a function of the priorities and practices of a particular locale.

Because there are many links in the causal chain that can lead to jail incarceration, disparate treatment can emerge from any one decision point in the criminal justice process or, indeed, at *multiple* decision points, each of which can interact in concert to produce differences in jail incarceration between different demographic groups.¹⁶ If disparities can accumulate across decision points, then concerted actions can diminish disparities in treatment that emerge earlier in the process.¹⁷ For example, in a jurisdiction with a known pattern of over-arresting black residents on spurious charges, prosecutors may undertake corrective action by declining to accept such cases or dismissing them early in the process.¹⁸

Given these complexities, how do policymakers, researchers, and the public begin to collectively understand the potential factors driving changing jail incarceration outcomes for white and black Americans? Although it may be presumed that differences in criminal behavior serve as a potential explanation for diverging trends between the two, arrest and victimization rates were down for both black and white people between 2005 and 2013. While these declines might partially explain the decline in

black incarceration rates, one would also expect white incarceration rates to decline as well.¹⁹

Instead, the reasons that underlie emerging differences in jail incarceration rates between white and black people are more likely a function of the priorities and practices of a particular locale.²⁰ Criminal law and related policies are not practiced uniformly across towns, cities, and counties as dictated from the political cockpits of state capitals (or Washington, DC). Rather, they are refracted through the prevailing legal norms of a certain place, influencing the ways in which laws are enforced; how cases are selected, heard, and disposed; and the ways in which a jurisdiction uses its jail.²¹ And these norms and practices are also shaped both by local socioeconomic conditions and the political attitudes of those who are tasked to investigate and dispense justice.²²

There are a number of critical questions that may begin to shine a light on recent jail incarceration trends by race. These questions can be used to identify avenues for further investigation to help broaden understandings of how disparities may manifest between regions, counties, cities, or towns and, with such understanding, targeted solutions can be developed and tested.

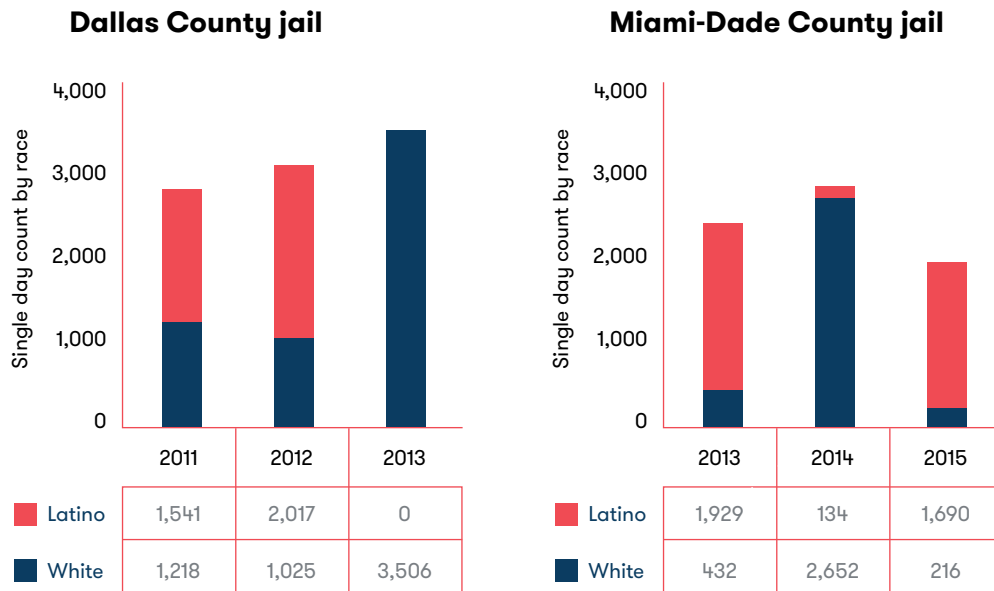
Does identification of Latinos as white account for any portion of increased white jail incarceration rates?

Recent increases in white jail incarceration rates may be due in part to inaccurate data entry practices in some places that impact how white and Latino/Hispanic people are counted, rather than a true reflection of changes in the rate at which either group is sent to jail. According to currently available national data, Latinos/Hispanics constitute the third largest demographic group in prisons and jails after whites and blacks. Jail incarceration rates for this group fluctuated in the 1990s, before declining by one-third between 1996 and 2013. However, because of data quality

Figure 8

Inconsistent Latino classification

Changes in how Latino and white people are classified can lead to wide variations in the number of people reportedly incarcerated in each group from year to year within the same jurisdiction.



concerns, there are limitations to what can be gleaned from national and local data about Latino/Hispanic people incarcerated in local jails. Inconsistent data collection practices and complexities inherent in the social constructions of race and ethnicity may be skewing how the country understands Latino/Hispanic jail incarceration rates, both in places where Latino people are a small and growing share of the population, and in those where Latinos have long been the majority, like Miami. (See “Challenges surrounding the collection of jail data about race and ethnicity” on page 14). Importantly, there are many places that do not record “Hispanic or Latino” at all when collecting criminal justice data.²³

In jurisdictions that do not regularly collect demographic data to analyze the rates of Latinos in their jails — sometimes because their data collection methodology does not consider these identities as a “race” category — people who come into contact with a local jail and identify as Latino are often categorized as white.²⁴ For example, the jails in Guilford and Forsyth counties in North Carolina — despite housing a significant number of Hispanic or Latino people held under federal immigration laws — did not report a single person considered Latino in their custody.²⁵ Harris County (Houston), Dallas County, and Miami-Dade County also have in recent years reported either no or very low numbers of Hispanic

or Latino people in custody, and correspondingly large increases in white people in custody, suggesting that the racial classification is not consistent from year to year. (See Figure 8, on page 26.) Notably, of the 20 jurisdictions that registered the highest increases in their white jail incarceration rate between 1990 and 2013, five — St. Louis city, Missouri; Wake County, North Carolina; Salt Lake County, Utah; Virginia Beach city, Virginia; and Duval County, Florida — stopped reporting data on Latino people in their jails.

Are recent reforms to criminal justice policies and practices impacting groups differently?

Broad-based criminal justice reform efforts enacted over the last decade may be changing the racial dynamics of local jail incarceration. New policies specifically dialing back practices that have historically impacted black Americans in a disproportionate way may be leading to larger reductions in black jail incarceration rates. For example, the recent decline in some large cities of stop-and-frisk — the policy allowing police to stop, question, and physically search people while on street patrol — or the increase in the use of cite-and-release policies, may have decreased the overall number of custodial arrests of black people, and thus admissions to local jails in urban areas.²⁶ Although more study is required to understand and locate cause and effect, changes to punishment policies related to drug use may also have lessened the risk of black jail incarceration.²⁷ These changes may have resulted in more instances of pretrial release, diversion from prosecution, or sentences to community supervision for people arrested on drug charges — all of which can work together to minimize time spent in jail.²⁸

Moreover, anecdotal evidence suggests that smaller, majority-white jurisdictions (many of which have registered increases in jail incarceration for both black and white people) may sometimes be slower to adopt jail reduction strategies, in part due to the distance of these areas — both geographic and cultural — from what are often urban-based, urban-resourced, and urban-focused criminal justice reform efforts.²⁹

Are differences in access to certain resources contributing to different outcomes between urban and rural areas?

Access to certain resources impacts the implementation of many popular diversion programs that jurisdictions are increasingly adopting to stem the flow of people being sent to jail — such as drug courts or pretrial drug treatment diversion programs. Urban areas — places with typically more heterogeneous populations, and where black and white jail incarceration rates have declined the most — may be better positioned than other areas to realize the promise of such programs, since metropolitan areas are often endowed with a rich array of community-based treatment and other services with which criminal justice agencies can partner.³⁰ And, in some cases, urban-based programs are able to offer services other than treatment, like housing, educational help, money management, and accessible social and athletic activities.³¹ Rural areas — where white jail incarceration rates have been on the rise — may struggle with a shortage of trained addiction professionals and a lack of nearby drug treatment services and other social service programs, such as supportive housing.³²

Are jail capacity and resource constraints influencing the numbers?

Local justice systems can sometimes respond to jail capacity or resource issues by making ad hoc changes in policy or practice that may impact the demographic make-up of local jails over time, but few have studied how such practices might do so. This can be a formal decision, such as “capacity” releases — local policies that authorize sheriffs to regularly release people shortly after arrest in lieu of getting booked into jail, or after serving as little as 10 percent of a custodial jail sentence.³³ System actors may also modify their behavior in response to a lack of jail capacity or resources — for example, arresting officers or sentencing judges may decide to use facilities in neighboring counties to process or sentence people rather than their own local jails, due to overcrowding.³⁴ Especially in jurisdictions that operate under a court-mandated population cap imposed as a result of a lawsuit, localities may also decide to send people to facilities in other communities. While renting beds in this way will necessarily register declines in local jail populations and incarceration

A tale of three counties

More research is needed to pinpoint the specific factor, or combination of factors, that are driving jail incarceration rates of white or black people, and why they differ from place to place. As discussed above, recent trends may be due to the interplay of several possible causes that have occurred over time. A look at the experiences of three counties shows how various scenarios can play out on the ground, driving growth and reductions in both black and white jail incarceration rates.

Under federal oversight for nearly a decade between 2005 and 2013, the jail system in **Fulton County, Georgia (Atlanta)**, implemented a number of jail population reduction strategies and successfully reduced its jail population by 28 percent by 2013.^a This included a decline in both the black and white jail incarceration rates (by 48 percent and 54 percent, respectively), with blacks benefiting more numerically from the county's jail reduction efforts (-1,282 versus -287 for whites).

More study is required to understand the impact of the county's jail population reduction strategies on the observed declines in the white and black incarceration rates. For example, it is as yet unknown whether a number of newly-implemented policies, including a series of accountability courts—drug courts, veterans' courts, and mental health courts—as well as crisis intervention training for law enforcement, have differently impacted blacks to cause the larger decline in the white jail incarceration rate. It is also unknown whether the county's strategy of renting jail beds in other communities artificially inflated declines among black and white people, while distorting the racial makeup of jails in the receiving counties — such as Hall County, a rural county east of Atlanta, where black incarceration rates doubled between 2006 and 2010.^b

Like many rural Appalachian counties, **Bell County, Kentucky**, has keenly felt the impact of the nation's opioid epidemic. In 2011, the county had the highest rate of deaths related to prescription drugs in Kentucky and the eighth worst rate in the nation, with nearly 54 deaths per 100,000 people.^c Deaths attributable to opioids in 2013 were nearly double that of any other Kentucky county.^d

Those numbers have impacted the local criminal justice system. Its sheriff estimated in 2011 that 98 percent of the county's crime was drug-related, a major portion due to prescription drugs. According to the head of the county's jail, trafficking in prescription drugs and methamphetamines—as well as crimes related to drugs, like theft—are the leading reasons for incarceration. The county of approximately 27,000 people spends over a million dollars annually on its jail.^e

Bell County, which is predominantly white, has thus found itself at the center of an issue that has primarily affected white Americans (see “Has the opioid epidemic contributed to rising white incarceration rates in rural areas?” at page 31); and this trend may be driving its white jail incarceration patterns.^f The growth in its jail incarceration rates—from 340 per 100,000 population in 2005 to 390 per 100,000 in 2013—has been a story of white increases and black declines. During that time period, the number of white people held in the jail nearly doubled, from 43 to 80, while the number of black people held fell by nearly three-quarters, from 11 to three.

Between 2005 and 2013, the jail population in **Morrow County**—a suburban county in **Ohio**—saw major changes. During this period, both black and white incarceration rates declined significantly. The jail also began housing immigration detainees (“ICE detainees”) for the federal government. While the entire jail population in 2005 was made up of local people, by 2013, more than two-thirds of the county's jail population comprised ICE detainees.

Although further study is required to understand the drivers of these changes, it appears that financial distress may have played a significant role. In 2004, lawmakers phased out or reduced certain local taxes that funded many of the county's key public services. Compounding this, the 2008 recession further devalued taxable property, prompting county commissioners to cut the jail budget in half, and the law enforcement budget by about 40 percent. Meanwhile, in 2011, the Morrow County Municipal Court reduced its workweek to four days (after placing a three-month moratorium in 2009 on case filings because they had run out of money for paper), and the state reduced aid by 8 percent—a reduction that would last until 2013.^g

^a See Charlie Ban, “Fulton County Moving Far Away from Jail's Troubled Past,” National Association of Counties, October 3, 2016, <https://perma.cc/T2R5-QGVR>.

^b See Stephen Gurr, “Fulton County Inmates Fill Out Hall County Jail,” *Gainesville Times*, May 7, 2009, <https://perma.cc/6HC7-7DMH>.

^c Emily Hagedorn, “Kentucky's Bell County Devastated by Prescription Drug Deaths,” *Louisville Courier-Journal*, January 30, 2011, <https://perma.cc/F28U-JHB8>. Also see John C. Tilley, *2016 Overdose Fatality Report* (Lexington, KY: Kentucky Office of Drug Control Policy, 2017) (Bell County's overdose death rate per capita was 58.53 per 100,000 in 2016, the second highest in Kentucky), <https://perma.cc/7TBP-QU4J>.

A tale of three counties (sources)

^d Brian MacQuarrie, “Disparate States, a Common Horror: Kentucky’s Opioid Epidemic has Warning, Lesson for Massachusetts,” *Boston Globe*, August 10, 2015, <https://perma.cc/H5KY-CQF9>.

^e Hagedorn, 2011.

^f Bell County’s population is 94 percent white and 2 percent black. U.S. Census Bureau, “QuickFacts: Bell County, Kentucky,” <https://perma.cc/6ZER-B3HA>.

^g See Wendy Patton, *Cuts to Cities, Counties, Threaten Local Services: Safety, Roads, Recreation and More* (Cleveland, OH: Policy Matters Ohio, 2015), <https://perma.cc/T3VP-RUP8>; Laura Arenschiold, “Morrow County Recovering from Financial Emergency,” *Columbus Dispatch*, March 15, 2014, <https://perma.cc/B5YQ-AMR5>; John Schwartz, “Critics Say Budget Cuts for Courts Risks Rights,” *New York Times*, November 26, 2011, <http://www.nytimes.com/2011/11/27/us/budget-cuts-for-state-courts-risk-rights-critics-say.html?mcubz=0>; and “Paperless Court is Motionless,” *Columbus Dispatch*, March 14, 2009, <https://perma.cc/C6Z7-YT76>.

rates — particularly among groups that had been disproportionately represented in the jail prior to reforms — it will likely distort numbers and rates in the counties that hold people from other jurisdictions, often systemically under-resourced and cash-strapped places. (See Fulton County in “A tale of three counties” on page 29.)

Economic downturn and tightening budgets may also be a driving catalyst of changing racial and ethnic composition of jail populations — particularly in jurisdictions that have experienced declines in jail incarceration across all demographic groups. Less money may mean smaller budgets for law enforcement, the court system, and the jail. This in turn can mean fewer officers on the street, and thus fewer arrests; limited court hours, resources, or personnel to process cases; and fewer available jail beds to accommodate the in-flow of people — all of which can act together to alter a jail’s population makeup. (See Morrow County in “A tale of three counties” on page 29).

Has the opioid epidemic contributed to rising white incarceration rates in rural areas?

America is currently facing an epidemic of opioid abuse, with the growth in both opioid use and overdose deaths related to opioids leading the White House to declare a national public health emergency.³⁵ Between 1999 and 2010, the number of opioid prescriptions in the United States quadrupled — as did the number of overdose fatalities related to prescription opioids and opioid use disorder treatment admissions.³⁶ Between 2000 and 2013, the rate of people using heroin doubled, increasing from 100 per 100,000 to 200 per 100,000.³⁷ The crisis has led to an increase in criminal justice involvement for many users: an estimated one-third of all individuals addicted to opioids — over 200,000 people — pass through America's corrections system each year.³⁸

The crisis has largely been one affecting white people, who accounted for nearly 90 percent of new opioid users between 2000 and 2010, and suffered 82 percent of all opioid-related overdoses in 2015.³⁹ The crisis is also primarily rural: prescription opioid abuse has been concentrated in U.S. states with large rural populations, including Kentucky, West Virginia, Alaska, and Oklahoma.⁴⁰ Those two facts go hand-in-hand, as rural areas tend to be predominantly populated by white people.⁴¹

The example of Fairfield County, Ohio illustrates how the opioid crisis may be driving increased white jail incarceration rates, particularly in rural areas. Fairfield County has a population of around 150,000, more than 85 percent of it white.⁴² The impact of the epidemic on the community can be seen in its jail numbers.⁴³ Between 1999 and 2013, the county's jail incarceration rate more than doubled — from 106 per 100,000 to 272 per 100,000 — and the incarceration rate for white people in the county more than tripled, from 66 per 100,000 to 235 per 100,000. While many different factors may contribute to jail population growth, the county reported a 375 percent increase in heroin users among new arrests between 2003 and 2008.⁴⁴ Other neighboring rural counties in Ohio — including Adams, Fayette, and Muskingum — have also seen steady or increased opioid fatalities along with rising white incarceration rates.⁴⁵

While these statistics point to opioid use as a potential driver of rising jail incarceration rates among white people, more research is needed to definitively tie the two together — both in general, and in rural counties in particular.

Disentangling race: A path forward

Although racial differences in local incarceration are longstanding, the distribution of incarceration patterns by race is changing. Yet so far, little is known about the factors behind these trends, including why significant disparities still exist between white and black jail incarceration rates despite recent declines in black rates. Left understudied, racial imbalances in jail incarceration cast a long shadow, threatening to undermine the legitimacy of, and trust in, local justice systems. Such imbalances also open the door for unfounded racialized explanations and conjecture to loom like truth — a hazard too large, given the country’s legacy of race relations.⁴⁶ Indeed, perceptions about race and crime — such as exaggerated associations of crime with people of color — have historically been used as justifications for expanding punitive action (including more incarceration), deepening existing racial divisions, and inviting further social fragmentation.⁴⁷

It is in this context that gathering, analyzing, and disseminating more data about race and the criminal justice system — both quantitative and qualitative — will likely have a clarifying effect. For one, filling in the current gaps in knowledge about race and jails holds the promise of moving the conversation away from perception and toward the factual.⁴⁸ To begin to execute an ambitious agenda to close the many knowledge gaps that exist and move policymakers and practitioners toward achieving racial equity in the use of jails, jurisdictions should consider the following:

- › **Collect more race and ethnicity data about jails.** Crucial questions about the intersection of race and jails remain surprisingly unquantified. This may be exacerbated in part by outdated data collection systems, aging technological infrastructure, and the lack of resources needed to improve them.⁴⁹ For example, the Justice Department’s Bureau of Justice Statistics only reports the racial breakdown of the country’s jail population on a selected snapshot date,

but not for jail admissions or conviction status—despite millions of jail admissions annually, or the fact that three out of five people held in jail are only charged with, but not yet convicted of, a crime. In the absence of comprehensive national data, policymakers and researchers must rely on localities—many of which may not collect such information by race regularly or use uniform identifiers consistent across agencies and jurisdictions, rendering both single jurisdiction analyses and cross-jurisdictional comparisons challenging. Yet having such data on both a local and national level would help signal how racial imbalances in jail incarceration could be remedied. For example, with such data—perhaps coupled with a breakdown by race on why people are held pretrial—policymakers could be more confident in determining whether certain pretrial practices—such as bail setting or court processing delays—impact one group disproportionately.

- › **Measure and study how discretion is exercised.** Since jail incarceration is largely the end result of a range of discretion-based decisions that law enforcement, prosecutors, judicial officers, and others make on a daily basis, access to, and study of, these decisions is paramount to understanding changing trends in jail incarceration across the country. Discretion is “a residual concept” that refers simply to “the room left for subjective judgment” to choose between two or more courses of conduct, based on a set of applicable “statutes, administrative rules, judicial decisions, social patterns and institutional pressures.”⁵⁰ (For example, prosecutors’ decisions regarding whether, or how, to pursue a criminal case; or law enforcement’s decision whether to arrest or decline intervention when criminal activity is reported or observed.) But measuring the use of discretion in the criminal justice system perpetually vexes policymakers and researchers alike because of the difficulty in collecting and analyzing data on the countless low-visibility daily decisions and procedures—arrest, charge, dismissal, bargaining, and sentencing—that drive jail incarceration, many of which are not routinely announced, documented, tracked, or reviewed, and are often made without anticipation of public view or comment.⁵¹ Increased data collection around some of these choices—for example around prosecutorial decision making—may provide a critical opportunity for key decision makers to understand the jail-impact of their decisions, identify any undesired patterns that impact racial groups differently, and create a feedback loop that may encourage more racially equitable use of their discretionary power.⁵²

- › **Expand research approaches to examine root causes.** As noted by others, most empirical research that examines racial disparities in the criminal justice system is “descriptive rather than analytic” — seeking to determine whether, and to what extent, differential treatment exists in the criminal justice process in ways that produce racial disparities, often with the goal of identifying the source of discriminatory action or intent, whether by individual or institutional malefactors in the system.⁵³ These racial disparity studies typically take a narrow view of race discrimination by attempting to isolate the effect of race in the incarceration gap by filtering out (or “controlling” for) relevant factors that are associated with incarceration outcomes (such as severity of offense or criminal history, a defendant’s socioeconomic status, type and quality of defense services, etc.).⁵⁴

But because it can be quite difficult to identify individual instances of deliberate discriminatory decision making — whether explicit or implicit — most studies focus on outcomes, rather than attempting to elucidate their bases.⁵⁵ Building on the large body of research examining the relationship between race, crime, and structural disadvantage — such as lack of economic opportunity — future research on local incarceration should likewise attempt to trace how racial disparities in jail incarceration may also be rooted in such structural differences across towns, cities, and states, and integrate an examination of whether such differences are themselves due to policies or practices that systematically disadvantage a particular group or a particular location.⁵⁶ In doing so, localities will better understand the extent to which these attributes or factors are implicated in the distribution of crime-producing conditions by race (for example, social disorder, neighborhood dysfunction, and material insecurity), or the various responses to crime in a particular locale — including how it uses its jail.⁵⁷

Without a better understanding of the many ways in which broader race inequities in society operate to help produce racial imbalances in jail incarceration, ad hoc system responses or solutions will likely fall short. Only by tracing their precise lineage can jurisdictions begin to address the structural barriers that exist in particular communities that serve to increase people’s risk of incarceration in the first place.

Conclusion

Despite the importance of understanding the intersection of race and incarceration, empirical answers remain largely out of reach as to how race matters in relation to local jails. Recent data indicates that black jail incarceration rates are declining, while white ones are rising. This merits more attention. In this context, further race data and analyses have the power to uncover the hidden stories behind recent jail trends, focus the attention of policymakers and the public, and drive the substance of proposed reform. In this way, data may be the vital crucible for galvanizing more race-conscious jail reduction efforts.⁵⁸ Data can provide a picture of where disparities exist — and serve as an important tool for surfacing strategies that might minimize disproportionate representation in the country's thousands of jails. And if current analytical approaches are broadened to take into account how race's "cumulative weight" influences disparate domains of material life beyond the criminal justice process — whether political, social, or cultural — policymakers, researchers, and the public may also begin to uncover how differences in social and environmental conditions such as poverty or lack of access to education or health care can help widen a group's risk of jail incarceration.⁵⁹ Such an approach could also potentially reveal how such conditions can change over time to produce changes to intergroup differences in jail trajectories.

However, data must be interpreted judiciously and results must acknowledge how disparate racial treatment adds substance to the lived realities of injustice and runs counter to shared principles of fairness — and, as such, is significant in and of itself.⁶⁰ To move toward a less incarcerated, more racially equitable future, accurate and complete data, responsibly analyzed, holds much promise — and may reveal further important axes of inquiry. Certainly, it will be essential in equipping policymakers and others with better tools for amplifying decreasing jail incarceration rates among blacks, stemming the tide of increasing white jail incarceration, and closing the still very significant gap in incarceration between the two groups.

Appendix

This appendix provides the numbers of black and white people in jail, and the black and white incarceration rates, for the years 1990, 1996, 2005, 2008 and 2013.

Overall

	Black		White	
	Number	Rate	Number	Rate
1990	168,933	904	163,486	135
1996	239,414	1,143	238,017	191
2005	281,128	1,148	326,821	252
2008	291,801	1,136	327,310	251
2013	246,821	915	330,289	255

Region

	Black							
	West		Midwest		South		Northeast	
	Number	Rate	Number	Rate	Number	Rate	Number	Rate
1990	24,182	1,361	22,747	624	90,708	911	31,295	944
1996	28,437	1,488	35,242	880	134,268	1,171	41,467	1,166
2005	27,067	1,200	43,425	961	169,700	1,232	40,936	1,042
2008	29,149	1,228	44,913	957	175,444	1,201	42,294	1,052
2013	31,533	1,257	35,243	727	142,739	923	37,305	896

	White							
	West		Midwest		South		Northeast	
	Number	Rate	Number	Rate	Number	Rate	Number	Rate
1990	41,769	183	32,875	98	65,371	162	23,470	98
1996	62,266	260	45,891	133	100,547	236	29,312	126
2005	69,291	270	66,614	188	153,354	338	37,562	161
2008	65,258	252	65,136	184	159,253	347	37,663	162
2013	65,391	254	66,768	191	159,782	348	38,347	168

Jurisdiction size

	Black							
	Large metro (urban)		Large metro (suburban)		Small/medium metro		Rural	
	Number	Rate	Number	Rate	Number	Rate	Number	Rate
1990	84,571	928	30,925	966	39,539	917	13,898	673
1996	111,629	1,145	43,963	1,116	61,322	1,242	22,500	974
2005	111,269	1,037	55,062	1,032	79,552	1,356	35,245	1,383
2008	112,221	1,022	57,490	988	84,326	1,345	37,765	1,437
2013	82,583	723	50,472	804	76,210	1,151	37,556	1,411

	White							
	Large metro (urban)		Large metro (suburban)		Small/medium metro		Rural	
	Number	Rate	Number	Rate	Number	Rate	Number	Rate
1990	43,120	141	35,594	116	54,682	146	30,090	138
1996	65,327	218	51,411	160	77,920	199	43,359	188
2005	66,679	224	71,552	206	113,397	272	75,193	316
2008	59,999	203	72,079	207	117,030	278	78,202	329
2013	54,147	183	71,011	204	120,293	287	84,838	365

Endnotes

- 1 For 2015 prison population data, see E. Ann Carson and Elizabeth Anderson, *Prisoners in 2015* (Washington, DC: U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, 2016), 8, <https://perma.cc/27C5-WHSG>. For comparison general population numbers, see U.S. Census Bureau, “U.S. Census QuickFacts,” <https://perma.cc/3Z88-TF6Q>. For lifetime chance of going to prison, see Thomas Bonczar, *Prevalence of Imprisonment in the U.S. Population* (Washington, DC: U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, 2003), 8 & table 9, <https://perma.cc/3HT3-RS67>. Note that this is based on 2001 levels of imprisonment.
- 2 There is a vast amount of research looking into racial disparities at first law enforcement contact. For example, research has demonstrated that race can raise the risk of arrest (see for example Tammy Rinehart Kochel, David B. Wilson, and Stephen D. Mastrofski, “Effect of Suspect Race on Officers’ Arrest Decisions,” *Criminology* 49, no. 2 [2011], 473-512); vehicle and person searches (see for example Robin S. Engel and Richard Johnson, “Toward a Better Understanding of Racial and Ethnic Disparities in Search and Seizure Rates,” *Journal of Criminal Justice* 34, no. 6 [2006], 605-17); traffic stops (see for example Brian R. Kowalski and Richard J. Lundman, “Vehicle Stops by Police for Driving While Black: Common Problems and Some Tentative Solutions,” *Journal of Criminal Justice* 35, no. 2 [2007], 165-81; Patricia Warren, Donald Tomaskovic-Devey, William Smith, Matthew Zingraff, and Marcinda Mason, “Driving While Black: Bias Processes and Racial Disparity in Police Stops,” *Criminology*, 44, no. 3 [2006], 709-38; and James Evan Lange, Mark B. Johnson, and Robert Voas, “Testing the Racial Profiling Hypothesis for Seemingly Disparate Traffic Stops on the New Jersey Turnpike,” *Justice Quarterly* 22, no. 2 [2005], 193-223); pedestrian stops (see for example Andrew Gelman, Jeffrey Fagan, and Alex Kiss, “An Analysis of the New York City Police Department’s ‘Stop-and-Frisk’ Policy in the Context of Claims of Racial Bias,” *Journal of the American Statistical Association* 102, no. 479 [2007], 813-23); and drug arrests (see for example Ojmarrh Mitchell and Michael S. Caudy, “Examining Racial Disparities in Drug Arrests,” *Justice Quarterly* 32, no. 2 [2013], 288-313, 309-10; and Katherine Beckett, Kris Nyrop, and Lori Pfingst, “Race, Drugs, and Policing: Understanding Disparities in Drug Delivery Arrests,” *Criminology* 44, no. 1 [2006], 105-37). There has been equally voluminous research examining racial disparities in sentencing. For a meta-analytic synthesis of empirical research assessing the influence of race/ethnicity on non-capital sentencing decisions in U.S. criminal courts, see Ojmarrh Mitchell and Doris L. MacKenzie, “A Meta-Analysis of Race and Sentencing Research: Explaining the Inconsistencies,” *Journal of Quantitative Criminology* 21, no. 4 [2005], 439-66 (finding that of 85 studies reviewed, black and Latino people were sentenced more harshly, on average, than white people; though the magnitude of this race effect was statistically significant but small and highly variable, larger estimates of unwarranted sentencing disparity were found in studies that examined drug offenses, imprisonment, or discretionary sentencing decisions, and in recent analyses of federal court data). For an earlier review, see Cassia Spohn, “Thirty Years of Sentencing Reform: The Quest for a Racially Neutral Sentencing Process,” in *Policies, Processes, and Decisions of the Criminal Justice System: Criminal Justice 2000—Volume 3*, edited by Julie Horney (Washington, D.C.: National Institute of Justice, 2000), 427-501, <https://perma.cc/25D7-4NZH>.
- 3 An older study that looked at racial disparities in jail sentences is J. F. Nelson, “A Dollar or a Day: Sentencing Misdemeanants in New York State,” *Journal of Research on Crime and Delinquency* 31, no. 2 [1994], 183-201. Local concern about racial disparities in jails has recently directed more research and analysis on jails. For example, Dane County, Wisconsin, commissioned a report in 2014 to look into racial disparities and mental health problems in its jail. See Dane County Criminal Justice Workgroups, *Investigating Solutions to Racial Disparities and Mental Health Challenges in the Dane County Jail and throughout Dane County’s Criminal Justice System: Workgroup Recommendations* (Madison, WI: Dane County Criminal Justice Workgroups, 2015), <https://perma.cc/GJT2-KT2T>. For similar work in San Francisco, see W. Haywood Burns Institute, *San Francisco Justice Reinvestment Initiative: Racial and Ethnic Disparities Analysis for the Reentry Council* (Oakland, CA: W. Haywood Burns Institute, 2015) <https://perma.cc/8YBU-YVZA>. Also see Alexander Jones and Ben Forman, *Exploring the Potential for Pretrial Innovation in Massachusetts* (Boston, MA: MassINC, 2015) (uncovering large racial and ethnic disparities in the population awaiting trial in jails in Barnstable County, Franklin County, and Norfolk County, and recommending solutions), <https://perma.cc/BT3H-P9B8>. For ongoing work in Contra Costa County, which convened a 15-member Racial Justice Task Force in 2016—with membership coming from law enforcement, courts, school districts, and community groups—to study racial disparities in its jail. See Contra Costa County, California, “Racial Justice Task Force,” <https://perma.cc/UB6Z-95UE>. Also see Matthew Artz, “Contra Costa to Study Racial Disparities in Criminal Justice System,” *Bay Area News Group*, January 1, 2016, <https://perma.cc/4K8E-G4MJ>.
- 4 For 2015 jail admissions data, see Todd D. Minton and Zhen Zeng, *Jail Inmates in 2015* (Washington, DC: U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, 2016), 8, <https://perma.cc/YCP4-96ST>. For 2015 prison admissions data, see Carson and Anderson, *Prisoners in 2015* (2016), at 11.
- 5 Though far from standard, more and more publications and initiatives have explicitly committed to reducing racial and ethnic disparities in jails. For example, the John T. and Catherine D. MacArthur Foundation’s Models for Change and Safety and Justice Challenge asked communities to reduce the misuse of incarceration in the juvenile and adult justice systems, respectively, with an intentional focus on reducing racial and ethnic disparities. For more information on the work the MacArthur Foundation

has done to reduce racial and ethnic disparities—as well as to access resources and guidance—see John T. and Catherine D. MacArthur Foundation, “Models for Change: System Reform in Juvenile Justice,” <https://perma.cc/N2YW-DDGX>; and John T. and Catherine D. MacArthur Foundation, “Safety and Justice Challenge: About the Challenge,” <https://perma.cc/8HQ7-SXWG>. Leaders in justice reform have provided technical support, research, and literature that help jurisdictions investigate, understand, and work to reduce racial and ethnic disparities in the justice system. See Tyler Whittenberg, “Racial Disparities: Community Tools to Change Mass Incarceration for Youth of Color,” W. Haywood Burns Institute, <https://perma.cc/G3PM-6BN6>; The Sentencing Project, “Racial Disparities,” <https://perma.cc/NHE4-SPMT>; and Jessica Eaglin and Danyelle Solomon, *Reducing Racial and Ethnic Disparities in Jails: Recommendations for Local Practice* (New York: Brennan Center for Justice, 2015), <https://perma.cc/VNB7-9VT4>.

- 6 Many social justice movements have drawn attention to racial disparities experienced by black men and women who come into contact with the justice system—particularly in the wake of growing awareness of fatal shootings of black people by police. See for example The Movement for Black Lives, “A Vision for Black Lives: Policy Demands for Black Power, Freedom, and Justice,” <https://perma.cc/EG6C-323F>; African American Policy Forum, “#SayHerName,” <https://perma.cc/T2N2-S4L5>; and Black Women’s Blueprint, “Our Initiatives: Working at the Intersection of Criminal Justice,” <https://perma.cc/PAQ2-85Z3>. Meanwhile, there have been a variety of government commissions tasked to study disparate racial contact with the criminal justice system. See for example California AB 953 (2015)—a law that established the Racial and Identity Profiling Advisory Board, which is tasked with eliminating racial and identity profiling and is required to investigate and analyze state and local law enforcement agencies’ racial and identity profiling policies and practices, annually hold public meetings, and make publicly available its findings and policy recommendations. Also see Research Working Group of the Task Force on Race and the Criminal Justice System, “Preliminary Report on Race and Washington’s Criminal Justice System,” *Washington Law Review*, 87, no. 1 (2012), 1-49, <https://perma.cc/7DSW-AQ4K>; and Jesse Norris, “State Efforts to Reduce Racial Disparities in Criminal Justice: Empirical Analysis and Recommendations for Action,” *Gonzaga Law Review* 47, no. 2 (2011-2012), 493-530 (stating that a plurality of states have created high-level committees—nearly all initiated by a state’s court system—to determine the prevalence of, and ultimately reduce, racial disparities in their criminal justice systems), <https://perma.cc/88TV-97FH>. States are also increasingly requiring “racial impact” statements for proposed legislation, especially those related to criminal law. See Jessica Erickson, “Racial Impact Statements: Considering the Consequences of Racial Disproportionality in the Criminal Justice System,” *Washington Law Review* 89, no. 4 (2014) 1425-65, 1426-27, <https://perma.cc/WF6E-Z86L>. Also see Catherine London, “Racial Impact Statements: A Proactive Approach to Addressing Racial Disparities in Prison Populations,” *Law and Equality* 29, no. 1 (2011), 211-48, <https://perma.cc/56V2-CCX3> and Nicole D. Porter, *Racial Impact Statements* (Washington, DC: The Sentencing Project, 2014), <https://perma.cc/2XWK-SYPF>. For an example of legislative reform that was enacted to reduce racial disparities, see the Fair Sentencing Act of 2010, Pub. L. 111-220, 124 Stat. 2372—a historic piece of legislation that reduced the controversial weight ratio of the amount of crack and powder cocaine needed to trigger mandatory sentencing from 100:1 to 18:1 and eliminated the five-year mandatory minimum sentence for first-time possession of crack. It was enacted in large part because of an abundance of evidence that demonstrated that previous crack cocaine penalties disproportionately impacted black people. For examples of jurisdictions interested in reducing jail population and addressing racial disparities in local jails, see MacArthur Foundation, “20 Diverse Communities Receive MacArthur Support to Reduce Jail Populations, Improve Local Systems, and Model Reforms for the Nation,” press release (Chicago: MacArthur Foundation, April 12, 2016), <https://perma.cc/7C55-GQES>.
- 7 For examples of jurisdictions and strategies that explicitly seek to reduce racial and ethnic disparities in local jails, see John T. and Catherine D. MacArthur Foundation, “Safety and Justice Challenge: About the Challenge”; National Association of Counties (NACo) and the W. Haywood Burns Institute, “Reducing Racial and Ethnic Disparities (RED) in County Justice Systems (video),” (Washington, DC: NACo, 2016), <https://perma.cc/T7FZ-G4YA>; and Vera Institute of Justice, *A Prosecutor’s Guide for Advancing Racial Equity* (New York: Vera Institute of Justice, 2014), <https://perma.cc/X4W4-Z6E8>.
- 8 A term used by President John F. Kennedy in relation to the impacts of general economic improvements, Paul Butler applied it to the prevalence of color-blind solutions to criminal law. See Paul Butler, “One Hundred Years of Race and Crime,” *Journal of Criminal Law & Criminology* 100, no. 3 (2010), 1043-60, 1059 (stating that if “remedies are all color blind, then the symptoms are treated, but the disease remains”). Moreover, reform does not always equate to equitable justice and has even been found to increase disparities in some cases. For example, the ACLU found that even though Massachusetts reduced its overall marijuana possession arrests by 86 percent after decriminalizing adult possession of an ounce or less in 2008, disparities in arrest rates between blacks and whites increased 54 percent from the year before to the year after decriminalization. See American Civil Liberties Union (ACLU), *The War on Marijuana in Black and White: Billions of Dollars Wasted on Racially Biased Arrests* (New York: ACLU, 2013), 52 & n.40, <https://perma.cc/BVC9-4ZAU>. Overall, disparities for marijuana arrests increased nearly 33 percent from 2001 to 2010. *Ibid.* at 48.
- 9 See for example Michelle Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness* (New York: The New Press, 2010) (arguing that that mass incarceration of blacks is the latest manifestation of a long history of racial subordination in this country); and Ta-Nehisi Coates, “The Black Family in the Age of Mass Incarceration,” *Atlantic*, October 2015, <https://perma.cc/QJG2-6GVQ>. Also see Loïc Wacquant, “Deadly Symbiosis: When

- Ghetto and Prison Meet and Mesh,” *Punishment & Society* 3, no. 1 (2001), 95-134 (arguing that incarceration policies deliberately target “lower-class black men trapped in the crumbling ghetto”); and Ian F. Haney-López, “Post-Racial Racism: Racial Stratification and Mass Incarceration in the Age of Obama,” *California Law Review* 98, no. 3 (2010), 1023-74, 1028-39 (arguing that racial backlash politics—for example, opposition to the Civil Rights Movement, and anti-welfarism—contributed to the rise of mass incarceration of people of color; the author also ties crime control policy with a history of racial stratification, based on the exclusion and exploitation of racial and ethnic minorities), <https://perma.cc/FR5X-9WFK>. The “Jim Crow” narrative has become so dominant it is often used rhetorically. See also the title of a recent report by the Drug Policy Alliance & Marijuana Arrest Research Project, *Unjust and Unconstitutional: 60,000 Jim Crow Marijuana Arrests in Mayor de Blasio’s New York* (New York: Drug Policy Alliance, 2017), <https://perma.cc/8CQ7-YTBP>. For an opposing view, see James Forman, Jr., “Racial Critiques of Mass Incarceration: Beyond the New Jim Crow,” *New York University Law Review* 87, no. 1 (2012), 102-46, <https://perma.cc/9FRU-A8BS>.
- 10 See E. Ann Carson, *Prisoners in 2016* (Washington, DC: U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, 2018), 8 & table 6, <https://perma.cc/7SPK-BDUQ>.
- 11 Ashley Nellis, *The Color of Justice: Racial and Ethnic Disparity in State Prisons* (Washington, DC: The Sentencing Project, 2016) (in five states—Iowa, Minnesota, New Jersey, Vermont, and Wisconsin—the disparity is more than 10 to one), <https://perma.cc/M3NF-T443>.
- 12 See note 2.
- 13 Minton and Zeng, *Jail Inmates in 2015* (2016), 4 & table 3.
- 14 Ram Subramanian, Ruth Delaney, Stephen Roberts, Nancy Fishman, and Peggy McGarry, *Incarceration’s Front Door: The Misuse of Jail in America* (New York: Vera Institute of Justice, 2015), 18-19, <https://perma.cc/TT3J-QN5F>.
- 15 *Ibid.*
- 16 Eric P. Baumer, “Reassessing and Redirecting Research on Race and Sentencing,” *Justice Quarterly* 30, no. 2 (2013), 231-61, 240. Also see Robert D. Crutchfield, April Fernandes, and Jorge Martinez, “Racial and Ethnic Disparity and Criminal Justice: How Much is Too Much,” *Journal of Criminal Law & Criminology* 100, no. 3 (2010), 903-32, 909-10; and Sharon L. Davies, “Study Habits: Probing Modern Attempts to Assess Minority Offender Disproportionality,” *Law and Contemporary Problems* 66, no. 3 (2003), 17-48, 20-21, <https://perma.cc/7MV4-7YRH>. This idea is not new. In 1974, John Hagan thought that studies should better capture “transit through the criminal justice system” since it operates “cumulatively to the disadvantage of minority group defendants.” John Hagan, “Extra-Legal Attributes and Criminal Sentencing: An Assessment of a Sociological Viewpoint,” *Law & Society Review*, 8, no. 3 (1974), 357-84, 382. Also see Sonja B. Starr and M. Marit Rehavi, “Mandatory Sentencing and Racial Disparity, Assessing the Role of Prosecutors and the Effects of Booker,” *Yale Law Journal* 123, no. 1 (2013), 1-265, 2, 7 & 16-17 (critiquing the narrow focus of most sentencing disparity studies on the final sentencing decision in isolation, ignoring earlier discretionary processes such as charging, plea bargaining, and sentencing fact finding.)
- 17 Starr and Rehavi, “Mandatory Sentencing and Racial Disparity” (2013), at 7. Data is vital in spurring such efforts to alter racial disparities in prosecution. For example, in Milwaukee County, a Vera study found racial disparities in decisions to decline prosecution: in drug paraphernalia possession cases prosecutors declined prosecutions in 41 percent of arrests involving white people, but only 27 percent involving black people. In cases of resisting arrest or obstructing an officer, most of those charged—77 percent—were black. Not all disparities favored white people: “in six of the nine categories of offenses examined, the cases against blacks were declined at a slightly higher percentage than those against whites.” Vera Institute of Justice, *A Prosecutor’s Guide for Advancing Racial Equity* (2014), at 16-17. In light of these findings, the Milwaukee County prosecutor’s office, led by District Attorney John Chisholm, stopped bringing cases for possession of drug paraphernalia and overall misdemeanor prosecutions in the county fell from 9,000 to 5,200. Chisholm also instituted a policy requiring burglary charges to be approved by a senior prosecutor, and “the disparity that led to more cases against white alleged thieves than black ones faded.” Jeffrey Toobin, “The Milwaukee Experiment,” *New Yorker*, May 11, 2015, <https://perma.cc/PLV6-5EJ4>.
- 18 See for example Besiki Kutateladze, Whitney Tymas, and Mary Crowley, *Race and Prosecution in Manhattan* (New York: Vera Institute of Justice, 2014), 5, <https://perma.cc/NP3C-LPLN>. Researchers found that people of color were more likely than similarly-situated white people to have their cases dismissed. Researchers speculated that this could have been because of leniency or because prosecutors believed that the arrest charges in these cases were not viable. Similarly, in Mecklenburg County, North Carolina (Charlotte), after the district attorney’s office converted its paper-based recordkeeping system to a computer-based one, more robust tracking identified racial disparities in case dismissals—black people “were more likely to have more arrest charges and more serious arrest charges than whites,” but also were “more likely to have their top arrest charge rejected.” Vera Institute of Justice, *A Prosecutor’s Guide for Advancing Racial Equity* (2014), at 15. In response to these findings, the district attorney hired new supervisory staff and instituted more rigorous case screening procedures, which resulted in a decrease in both the total number of prosecutions and in the number of dismissals later in the process, as weak cases were weeded out at earlier stages. *Ibid.* Also see Christopher L. Griffin, Jr., Frank A. Sloan, and Lindsey M. Eldred, “Corrections for Racial Disparities in Law Enforcement,” *William & Mary Law Review* 55, no. 4 (2014), 1365-1427, 1396 & 1401 (finding that although Hispanic males are arrested for, or convicted of, DWI charges at higher rates, either charges

- are not pursued as often, or they are given more lenient sentences, when compared to other groups), <https://perma.cc/7XDL-WDEG>.
- 19 Rates of violent victimization among black people dropped by 23 percent and among white people by 17 percent between 2005 and 2013. Rates of property victimization were also down for both groups—by 2 percent and 21 percent for blacks and whites, respectively. Bureau of Justice Statistics, “Rates of violent victimizations by race, 2005-2015” and “Rates of property victimizations by race of head of household, 2005-2015,” generated using the NCVS Victimization Analysis Tool at <https://perma.cc/C466-ER5Q>. The total arrest rate and violent arrest rates for both black and white people declined from 2005 to 2013. See Federal Bureau of Investigation, Uniform Crime Reports, “Crime in the United States, 2005,” <https://perma.cc/H8PE-TPFM>; and Federal Bureau of Investigation, Uniform Crime Reports, “Crime in the United States, 2013,” <https://perma.cc/QXD5-3VL8>.
 - 20 For an excellent discussion on how criminal law is local in practice, see Mona Lynch, “Mass Incarceration, Legal Change, and Locale: Understanding and Remediating American Penal Overindulgence,” *Criminology & Public Policy* 10, no. 3 (2011), 673-98, 674 & 682-86 (discussing how “law in action indicates much more microlevel variation shaped by local norms and culture related to how the business of criminal justice happens in any given place”), <https://perma.cc/TW97-942A>. One example of this is how the application of California’s three-strikes law varies significantly from county to county. See for example Legislative Analyst’s Office, *A Primer: Three Strikes—The Impact After More Than a Decade* (Sacramento, CA: Legislative Analyst’s Office, 2005) (noting, for example that Kern County with 1,518 strikers per 100,000 adult felony arrests is more than 13 times more likely to send an arrestee to state prison with a strike enhancement than San Francisco County, with only 113 strikers per 100,000 adult felony arrests).
 - 21 Lynch, “Mass Incarceration, Legal Change, and Locale” (2011), at 682-86.
 - 22 For an example of how political attitudes can influence how incarceration is used, see Josh Keller and Adam Pearce, “This Small Indiana County Sends More People to Prison than San Francisco and Durham, N.C., Combined. Why?,” *New York Times*, September 2, 2016, <https://perma.cc/46EW-PPR8>. Also see Jacob Kang-Brown and Ram Subramanian, *Out of Sight: The Growth of Jails in Rural America*, (New York, NY: Vera Institute of Justice, 2017), 18-20 (discussing how rural counties often struggle to fund and deliver justice, including recruiting key justice personnel and providing even the most basic criminal justice services necessary to process criminal cases through the system), <https://perma.cc/CRT6-4L99>.
 - 23 In one study, 40 states were able to report data on race on their arrest records, but only 15 states could report on ethnicity. For more on gaps in state-level data on race and ethnicity in the justice system, see Urban Institute, “Feature: The Alarming Lack of Data in the Criminal Justice System,” accessed September 29, 2017, <https://perma.cc/2UTD-48FV>. For guidance and tools to assess responsibility of local justice systems to record and analyze data on traditionally overlooked racial and ethnic groups, see Michael Kane, Kristin Bechtel, Jesse Revicki, Erin McLaughlin, and Janice McCall, *Exploring the Role of Responsibility and Assessment with Hispanic and American Indian Offenders* (Boston: Crime and Justice Institute, 2011), <https://perma.cc/36HD-FTHZ>. Data limitations manifest on the county and local levels as well. Vera’s Incarceration Trends tool notes zero Latino people in jails in the following counties, despite the U.S. Census noting Latino populations in the community: Volusia County, Duval County, Clay County, and Calhoun County in Florida; and Brazoria County, Harris County, and Dallas County in Texas. Also see Darrell Steffensmeier and Stephen Demuth, “Ethnicity and Sentencing Outcomes in U.S. Federal Courts: Who is Punished More Harshly?” *American Sociological Review* 65, no. 5 (2000), 705-29, 706 (noting that Hispanic defendants are often categorized into either the white or black defendant groups), <https://perma.cc/7SY6-VDDA>.
 - 24 Nellis, *The Color of Justice* (2016), 4.
 - 25 Eric Ginsburg, “Records Misleadingly Show No Latinos in the Local Jails,” *Triad City Beat*, January 7, 2015, <https://perma.cc/5ALB-6YVL>.
 - 26 See for example Association of the Bar of the City of New York (ABCNY), *Report on the NYPD’s Stop-and-Frisk Policy* (New York: ABCNY, 2013), <https://perma.cc/JH3C-TP62>. For Chicago, see Jeremy Gerner and Dan Hinkel, “New Report Shows Chicago Police Street Stops Down, Minorities Still Stopped More,” *Chicago Tribune*, March 24, 2017 <https://perma.cc/PW7C-C4FU>. New Orleans is a good example of a law enforcement agency that has increasingly relied on citation and release instead of custodial arrest. Since the 2008 enactment of a city ordinance mandating the use of a summons rather than arrest when police encounter people who commit a municipal offense other than domestic violence—and another in 2010 creating a municipal offense for first possession of marijuana—the New Orleans Police Department has relied less on custodial arrest. From 2009 through 2011, the use of summonses in cases other than domestic violence and public intoxication increased from 41 percent to more than 70 percent. Arrests correspondingly dropped from 59 percent to 30 percent. See Criminal Justice Leadership Alliance, “Use of Summonses versus Custodial Arrest for Municipal Offenses,” December 8, 2010; and Criminal Justice Leadership Alliance, “Use of Summonses versus Custodial Arrest for Municipal Offenses,” July 14, 2011 (unpublished reports provided to Vera in its role as a member of the alliance). Also see Meghan Ragany, Rose Wilson, and Jon Wool, *Racial Disparity in Marijuana Policing in New Orleans* (New York: Vera Institute of Justice, 2016), 16 & figure 6 (noting that since 2012 data shows that police in New Orleans have issued summonses to black and white people at similar rates for offenses eligible for a summons), <https://perma.cc/D5GQ-8QCR>.
 - 27 Drug laws and their enforcement have historically had racially disparate impacts. For example, new drug enforcement policies based on the racialized rhetoric of the “war on drugs” incentivized

- police to emphasize crack cocaine offenses over those related to powder cocaine and other narcotics, which tend to be favored by white drug users. For an example of such an over-emphasis on crack offenses in practice, see Katherine Beckett, Kris Nyrop, and Lori Pfingst, "Race, Drugs, and Policing: Understanding Disparities in Drug Delivery Arrests," *Criminology* 44, no. 1 (2006), 105-37, 118-19. For additional information about crack sentencing disparities, see generally Alexander, *The New Jim Crow* (2010), at 5-6, 50-53 & 102; Paul Butler, *Chokehold: Policing Black Men* (New York: The New Press, 2017); and Elizabeth Kai Hinton, *From the War on Poverty to the War on Crime* (Cambridge, MA: Harvard University Press, 2016), 307-32. For a review of a recent state-level drug law reform, see Ram Subramanian and Rebecka Moreno, *Drug War Détente? A Review of State-level Drug Law Reform, 2009-2013* (New York: Vera Institute of Justice, 2014), <https://perma.cc/9SLW-B8VH>.
- 28 Subramanian and Moreno, *Drug War Détente?* (2014), at 6 (repealing or limiting mandatory penalties), 13 (modifying drug sentencing schemes), and 18 (expanding or strengthening community corrections).
- 29 See note 22.
- 30 A good example is the Brooklyn Treatment Court. See Jo Ann Ferdinand, Christine Edwards, and Joseph Madonia, *Addiction, Treatment, and Criminal Justice: An Inside View of the Brooklyn Treatment Court* (New York: Center for Court Innovation, 2012), <https://perma.cc/2SLS-E5P2>. Although in New York City black people comprise more than half of all drug court participants, there is some criticism that black people in other locales appear to be underrepresented in diversion programs, such as adult drug courts. See, for example, Jazmine Ulloa, "Drug Courts are Failing Black Offenders," *myStatesman*, December 26, 2015, <https://perma.cc/2VKB-ALAZ>. For New York City, see Amanda B. Cissner, Michael Rempel and Allyson Walker Franklin, *A Statewide Evaluation of New York's Adult Drug Courts: Identifying Which Policies Work Best* (New York: Center for Court Innovation, 2013), 28, <https://perma.cc/4YX8-2FVM>.
- 31 See Ferdinand, Edwards, and Madonia, *Addiction, Treatment, and Criminal Justice* (2012). Also see Aliyah Frumin, "In 2016 Race, Drug Courts Get Second Look," *MSNBC.com*, August 25, 2015, <https://perma.cc/ZS5K-J8BX>.
- 32 See for example Daniel Heimpel, "Battling Meth: A Rural Montana County Starts Drug Court to Reverse Surge of Kids in Foster Care," *Aces Too High News*, May 10, 2017, <https://perma.cc/U4NC-QXFK>; and Rick Rowan, "The Meth Effect: Montana Jail Offers Some Addicts First Crack at Treatment," *Missoulan*, June 2, 2017 (stating that there are 16 counties in Montana without a social worker, 18 without an addiction counselor, and 31 without a psychologist), <https://perma.cc/PU52-SVHH>. In relation to the lack of access to substance use treatment in rural areas more generally, see Jennifer D. Lenardson and John A. Gale, *Distribution of Substance Abuse Treatment Facilities Across the Rural – Urban Continuum* (Portland, ME: Muskie School of Public Service, University of Southern Maine, 2007), 1, <https://perma.cc/K2ZY-MDEK>; Karen Van Gundy, *Substance Abuse in Rural and Small Town America* (Durham, NH: Carsey Institute, 2006), 26, <https://perma.cc/Q4U9-XHCS>; and Lisa Pruitt, "The Forgotten Fifth: Rural Youth and Substance Abuse," *Stanford Law & Policy Review*, 20, no. 2 (2009), 259-304, 288-90.
- 33 See for example Paige St. John, "Early Jail Releases Have Surged Since California's Prison Realignment," *Los Angeles Times*, August 16, 2014, <https://perma.cc/TYV3-W7TV>; Los Angeles County Sheriff's Department, *Custody Division Year End Review 2015* (Los Angeles: Los Angeles County Sheriff's Department, 2016), <https://perma.cc/BQ3B-8HKG>; and Sonya Tafoya, Mia Bird, Viet Nguyen, and Ryken Grattet, *Pretrial Release in California* (San Francisco, CA: Public Policy Institute of California, 2017), <https://perma.cc/E3HZ-CUBY>.
- 34 Kathleen Gray, "Across Wayne Co., Shortened Jail Stays Frustrate Cops, Communities," *Police Officers Association of Michigan*, June 4, 2010, <https://perma.cc/U9UY-B8KC>. In Wayne County, Michigan (Detroit)—whose jail has been under a judicial consent decree since 1991 and whose director also has the authority to release people when the jail population goes over its court-ordered cap—local justice officials circumvented the use of the county's jail, and perceived risk of early release, by investing significant amounts of money in order to send people who have been sentenced for crimes such as drunken driving, malicious destruction of property, or domestic violence to jails in northern Michigan.
- 35 The White House, "President Donald J. Trump is Taking Action on Drug Addiction and the Opioid Crisis," press release (Washington, DC: The White House, October 26, 2017), <https://perma.cc/8YD4-KKTV>. The term opioid includes both synthetic drugs like methadone and fentanyl, as well as morphine, heroin, and prescription painkillers like Vicodin, Percocet, and OxyContin. See Centers for Disease Control and Prevention, "Opioid Basics," <https://perma.cc/LJ6Q-AAL5>; and U.S. Food & Drug Administration, "Opioid Medications," <https://perma.cc/GG3W-SQFS>.
- 36 Gery P. Guy Jr., Kun Zhang, Michele K. Bohm, et al., "Vital Signs: Changes in Opioid Prescribing in the United States, 2006-2015," *Morbidity and Mortality Weekly Report* 66, no. 26 (2017), 697-704.
- 37 Ruixuan Jiang, Inyoung Lee, Todd A. Lee, and A. Simon Pickard, "The Societal Cost of Heroin Use Disorder in the United States," *PLoS ONE* 12, no. 5 (2017), <https://perma.cc/9FNT-6C3F>.
- 38 In the first, and still one of the only, inquiries into the national overlap between opioid use and incarceration, researchers estimated between 24 and 36 percent of all people using opioids pass through the criminal justice system each year. See Amy E. Boutwell, Ank E. Nijhawan, Nickolas Zaller, and Josiah D. Rich, "Arrested on Heroin: A National Opportunity," *Journal of Opioid Management* 3, no. 6 (2007), 328-32.
- 39 For the increase in white users of opioids, see Theodore J. Cicero, Matthew S. Ellis, Hilary L. Surratt, and Steven P. Kurtz, "The Changing Face of Heroin Use in the United States: A Retrospective

- Analysis of the Past 50 Years,” *JAMA Psychiatry* 71, no. 7 (2014), 821-26, figure 3, <https://perma.cc/PT4E-DYEP>. For the percentage of opioid-related overdose deaths by race, see KFF.org, “Opioid Overdose Deaths by Race/Ethnicity: 2015,” (white people accounted for 82 percent of all deaths in 2015 from heroin or opioid overdoses, while black people accounted for 8 percent), <https://perma.cc/ZFY3-T2K9>. While opioid-related deaths for black and Latino people increased 63 and 43 percent respectively between 1999 and 2015, rates increased 240 percent for white people. See Holly Hedegaard, Margaret Warner, and Arialdi M. Miniño, *Drug Overdose Deaths in the United States, 1999-2015* (Washington, DC: Centers for Disease Control and Prevention, 2017), 6, <https://perma.cc/RWM4-EJ8P>.
- 40 Katherine M. Keyes, Magdalena Cerdá, Joanne E. Brady, et al., “Understanding the Rural-Urban Differences in Nonmedical Prescription Opioid Use and Abuse in the United States,” *American Journal of Public Health* 104, no. 2 (2014), e52-e59. Also see Josh Katz, “Short Answers to Hard Questions about the Opioid Crisis,” *New York Times*, August 10, 2017 (highest overdose rates related to opioids are in Appalachia, the Rust Belt, and New England), <https://perma.cc/BPW2-AAWK>.
- 41 White people make up a significant majority of America’s nonmetropolitan areas, which have an aggregate white population of 78 percent. William H. Frey, *Census Shows Nonmetropolitan America is Whiter, Getting Older, and Losing Population* (Washington, DC: The Brookings Institute), figure 1 (Brookings analysis of U.S. Census estimates released June 22, 2017), <https://perma.cc/97BN-SC3U>. Even in urban communities, such as the Bronx in New York City, where people of color make up 91 percent of the population, white people had the highest rate of opioid-related deaths in 2016. See Jose A. Delreal, “The Bronx’s Quiet, Brutal War with Opioids,” *New York Times*, October 12, 2017, <https://perma.cc/S6TY-SK3B>.
- 42 United States Census Bureau, “QuickFacts: Fairfield County, Ohio.”
- 43 For Fairfield County’s opioid-related overdose numbers, see the interactive map in Josh Katz, “Short Answers to Hard Questions about the Opioid Crisis,” *New York Times*, August 10, 2017, <https://perma.cc/HB2U-GHQ3>.
- 44 Dave Phalen and Omar Hall, *The Opioid Epidemic: What Works and What Doesn’t* (Fairfield, OH: Fairfield County Sheriff’s Office and Fairfield County Alcohol, Drug Addiction, and Mental Health Board, 2009), <https://perma.cc/YLH7-V2ZU>.
- 45 Between 1999 and 2013, Adams, Fayette, and Fairfield counties saw growth in white incarceration rates outpace their local jail incarceration rates: Adams County’s incarceration numbers increased 126 percent and their white jail incarceration rate grew 144 percent; in Fayette County those numbers were 50 percent and 78 percent, respectively; and, in Fairfield County, 157 percent and 256 percent. Though Muskingum County saw white incarceration rates grow more slowly than overall jail growth—it experienced a 90 percent increase in its overall incarceration rate and a 77 percent increase in its incarceration rates for white people—its average incarceration rates for black people began to plummet after 2005, while rates for whites remained stable.
- 46 See for example Nazgol Ghandnoosh, *Race and Punishment: Racial Perceptions of Crime and Support for Punitive Policies* (Washington, DC: The Sentencing Project, 2014), 13-17 <https://perma.cc/6SFP-R9TV>. Also see Davies, “Study Habits” (2003), at 44-46 (critiquing the either/or approach—“minority criminality” versus bad state actor—that three states used in assessing the extent to which people of color are overrepresented in their respective criminal justice systems), <https://perma.cc/7K8Y-9XHG>.
- 47 For example, see Ted Chiricos, Kelly Welch, and Marc Gertz, “Racial Typification and Support for Punitiveness,” *Criminology* 42, no. 2 (2004), 359-90, 375-76 (finding that white people who attributed higher proportions of crime to black people were more likely to support punitive policies); and Ryan D. King and Darren Wheelock, “Group Threat and Social Control: Race, Perceptions of Minorities and the Desire to Punish,” *Social Forces*, 85, no. 3, (2007), 1255-80, 1269 & 1276 (based on survey results, finding that white people who agreed that black people pose a greater threat to public safety were more likely to hold punitive views). Also see David A. Harris, “The Reality of Racial Disparity in Criminal Justice: The Significance of Data Collection,” *Law and Contemporary Problems*, 66, no. 3 (2003), 71-98, 72-4 (discussing the both the promise and the perils of data in understanding racial disparities in the criminal justice system: while race data can help uncover unwanted patterns, or frame the debate on race and criminal justice, it is also possible for statistics to be collected in the wrong way, used improperly, or interpreted incorrectly), <https://perma.cc/EN3N-BRTL>. Indeed, there is an open risk that statistics or other explanations for racial disproportionality can be converted into reasons for increased enforcement. Erik Luna, “Race, Crime, and Institutional Design,” *Law and Contemporary Problems* 66, no. 3 (2003), 183-220, 183-84 (discussing how statistics on black disproportionality in the criminal justice system can be used to justify law enforcement results), <https://perma.cc/U9ZZ-BJ2H>.
- 48 Harris, “The Reality of Racial Disparity in Criminal Justice (2003), at 73 & 76 (making this point in relation to race data on traffic stops). In fact, a number of states have recognized the importance of such data in understanding what is happening in particularly racially-charged law enforcement activities. For example, some states have enacted legislation requiring routine and standardized data collection and reporting around traffic stops (Maryland SB 413 (2015) and Rhode Island H 5819 & S 669 (2015)); or officer-involved shootings of civilians (California AB 71 (2015), Colorado SB 217 (2015), Illinois SB 1304 (2015), and Tennessee HB 2122 & SB 2304 (2016)).
- 49 Doug Chayka, “Is Washington Bungling the Census,” *Politico*, October 11, 2017 (discussing how some federal agencies are sharply cutting back on the scale and ambition of their data-gathering activities, including, reducing sample sizes, delaying investments

- and, in some cases, eliminating surveys altogether], <https://perma.cc/SPV6-KG7A>.
- 50 James Vorenberg, “Narrowing the Discretion of Criminal Justice Officials,” *Duke Law Journal* 1976, no. 4 (1976), 651-97, 654, <https://perma.cc/LH5P-9HTS>. As legal theorist Ronald Dworkin once observed, “discretion, like the hole in a doughnut, does not exist except as an area left open by a surrounding belt of restriction. It is therefore a relative concept.” See Ronald Dworkin, *Taking Rights Seriously* (London: Gerald Duckworth & Co., 1977), 31.
- 51 David Alan Sklansky, “The Nature and Function of Prosecutorial Power,” *Journal of Criminal Law & Criminology* 106, no. 3 (2016), 473-520, 474-77 & 480-91 (generally discussing the opaque nature of the prosecutorial function), <https://perma.cc/28GT-NS4S>. The author points out that in contrast to the varying degrees of information available about law enforcement and judicial decisions—prosecutors work behind closed doors. Prosecutors also do not typically pronounce, record, or provide reasons for their decisions. See for example Supplemental Statement of Assistant Attorney General Philip B. Heymann, Hearings Before the Committee on the Judiciary, U.S. Senate, 96th Cong., 2nd sess. (1980), 1046 (“[W]e can’t talk very much about our declinations.... So the public is often not given any detailed information on the reason for a declination; they simply learn that an investigation of an obvious scoundrel has been closed”), <https://perma.cc/6NJR-ENQF>. And because prosecutorial decision making behavior occurs outside of public view, and is typically based on an accumulation of unwritten office customs, internal policies, and daily practices, prosecutors’ decisions are largely unreviewable and unexamined, particularly by outside system actors or researchers. See Erik Luna, “Prosecutorial Decriminalization,” *Journal of Criminal Law & Criminology* 102, no. 3 (2013), 785-820, 797 (discussing how prosecutors, by virtue of their broad discretion, regularly “decriminalize” conduct, and do so without public notice). Also see Angela J. Davis, “Prosecution and Race: The Power and Privilege of Discretion,” *Fordham Law Review* 67 no. 1 (1998) 13-68, 20-25, <https://perma.cc/Q3GK-HSSK>.
- 52 Davis, “Prosecution and Race” (1998), at 54-57 & 64 (arguing for the collection and publication of race impact studies examining the entire prosecutorial process).
- 53 Noted, for example, by Darnell F. Hawkins in relation to the literature on race and crime. See Darnell F. Hawkins, “Things Fall Apart: Revisiting Race and Ethnic Differences in Criminal Violence amidst a Crime Drop,” *Race & Justice* 1, no. 1 (2011), 3-48, 35 & n.1. Also see Naomi Murakawa and Katherine Beckett, “The Penology of Racial Innocence: The Erasure of Racism in the Study and Practice of Punishment,” *Law & Society Review* 44, no. 3/4 (2010), 695-722, 697 (discussing how criminal justice research has too often adopted the standards of contemporary antidiscrimination law, which has come to narrowly redress racial inequality produced only by intentional harms with discrete and identifiable causes—where, per *McCleskey v. Kemp*, 481 U.S. 279 (1987), the burden of proof is on the plaintiff to prove “the existence of purposeful discrimination,” that has “‘had a discriminatory effect’”), <https://perma.cc/79US-CSGC>. The authors observed that to the extent that social science research on racism, like antidiscrimination law, “requires identification of intent, the study of criminal justice ultimately treats ‘bias’ as a deviation from an otherwise fair criminal justice system operating in a race-neutral context,” obscuring the role of race in social stratification more generally. *Ibid.* at 706. See also *Washington v. Davis*, 426 U.S. 229, 239 (1976) (creating the requirement of discriminatory intent for allegations of disparate impact under the Equal Protection Clause of the Fourteenth Amendment).
- 54 Starr and Rehavi, “Mandatory Sentencing and Racial Disparity” (2013), at 7. Also see Murakawa and Beckett, “The Penology of Racial Innocence” (2010), at 713-14; and Ian F. Haney-López, “Post-Racial Racism: Racial Stratification and Mass Incarceration in the Age of Obama,” *California Law Review* 98, no. 3 (2010), 1023-74, 1059-60 (critiquing methodological approaches that assume that “one can isolate race as an independent cause of social outcomes”). In Davies, “Study Habits,” (2003), at 20-23, the author similarly critiques the use by many racial disparity researchers of a false dichotomy between “legal”—assumed to be race neutral and objective—and “extra-legal” variables to “test the fairness of minority disproportionality.”
- 55 Also, studies attempting to estimate causal effects of race and ethnicity inevitably encounter a number of methodological problems, due to the fact that race is generally understood to be “assigned” at conception, and “immutable.” This means that researchers are unable to vary the race “treatment” to see if outcomes will vary, and that the host of characteristics for which most social scientists control (such as education, income, etc.) occur after the treatment is assigned and therefore have the potential to introduce post-treatment bias. Also complicating matters further, across groups and time the boundaries defining racial and ethnic categories are in flux and, within groups, there is substantial variation. For a discussion about these challenges, see Maya Sen and Omar Wasow, “Race as a ‘Bundle of Sticks’: Designs that Estimate Effects of Seemingly Immutable Characteristics,” *Annual Review of Political Science* 19, no. 1 (2016), 499-522, <https://perma.cc/DHV9-B7LA>. For the challenges ordinary antidiscrimination law faces in rooting out implicit biases, see Barbara J. Flagg, “‘Was Blind, But Now I See’: White Race Consciousness and the Requirement of Discriminatory Intent,” *Michigan Law Review* 91, no. 5 (1993), 953-1017, 958 (stating that existing Equal Protection Clause doctrine “perfectly reflects” white people’s failure to “scrutinize the whiteness of facially neutral norms”); Charles R. Lawrence III, “The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism,” *Stanford Law Review* 39, no. 2 (1987), 317-88, 323 (1987) (stating that existing Equal Protection Clause doctrine “ignores much of what we understand about how the human mind works” and “disregards...the profound effect that the history of American race relations has had on the individual and collective unconscious”); Reshma M. Saujani, “‘The Implicit Association Test’: A Measure of

- Unconscious Racism in Legislative Decision-Making,” *Michigan Journal of Race & Law* 8, no. 2 (2003), 395-424, 413 (asserting that existing Equal Protection Clause doctrine is “incapable of rooting out racial discrimination where it is most pernicious”); and Reva Siegel, “Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action,” *Stanford Law Review* 49, no. 5 (1997), 1111-48, 1137 (stating that “the empirical literature on racial bias suggests that . . . most race-dependent governmental decisionmaking will elude equal protection scrutiny”), <https://perma.cc/ZJ46-RFNR>.
- 56 For research examining the relationship between race, crime, and structural disadvantage, see for example Lauren J. Krivo and Ruth D. Peterson, “Extremely Disadvantaged Neighborhoods and Urban Crime,” *Social Forces* 75, no. 2 (1996), 619-647 (noting that a range of socio-economic vulnerabilities contributes to higher rates of crime, particularly violent crime, in both white and black neighborhoods that are extremely disadvantaged), <https://perma.cc/4ASN-GKWT>; and Lauren J. Krivo, Ruth D. Peterson, and Danielle C. Kuhl, “Segregation, Racial Structure, and Neighborhood Violent Crime,” *American Journal of Sociology* 114, no. 6 (2009), 1765-1802 (in study of citywide racial residential segregation on levels of violent crime in urban neighborhoods, finding that white people are able to reside in the most advantaged neighborhoods, while black and Latino people “live in the most disadvantaged urban communities and therefore bear the brunt of urban criminal violence”). Also see Robert Crutchfield, Ross Matsuenda and Kevin Drakulich, “Race, Labor Markets, and Neighborhood Violence,” in *The Many Colors of Crime: Inequalities of Race, Ethnicity and Crime in America*, edited by Ruth D. Peterson, Lauren J. Krivo, and John Hagan (New York: New York University Press, 2006) (finding that higher levels of social disorder in communities of color in Seattle are in part explained by higher levels of labor instability and lower median incomes, and that higher levels of violent crime rates in part accounted for higher levels of social disorder); and George S. Bridges and Robert D. Crutchfield, “Law, Social Standing and Racial Disparities in Imprisonment,” *Social Forces* 66, no. 3 (1988), 699-724 (finding that black incarceration was higher than white incarceration in places where the black population is small relative to whites, and is more likely to be concentrated in urban areas; and that economic inequality fosters disparity by increasing the likelihood of imprisonment for black people and decreasing the likelihood of imprisonment for white people). For research looking into the relationship between unemployment and incarceration, see for example Theodore G. Chiricos and William D. Bales, “Unemployment and Punishment: An Empirical Assessment,” *Criminology* 29, no. 4 (1991), 701-24 (finding that the greatest likelihood of both pretrial and post-sentencing incarceration is for black defendants who are unemployed, “especially those who are young males or charged with violent and public order crimes”).
- 57 For a comprehensive study that examines some of these crime-producing conditions, see for example, Ruth D. Peterson and Lauren J. Krivo, *Divergent Social Worlds: Neighborhood Crime and the Racial-Spatial Divide* (New York: Russell Sage Foundation, 2010).
- Also see Robert J. Sampson and William Julius Wilson, “Toward a Theory of Race, Crime, and Urban Inequality,” in *Crime and Inequality*, edited by John Hagan and Ruth D. Peterson (Stanford, CA: Stanford University Press, 1995) (using research to support their argument, the authors argue for a macro-level approach to disentangling the contextual bases for race and crime, which looks to isolate characteristics of communities, cities, or even societies—such as residential turnover, concentrated poverty, and family disruption—that lead to high rates of criminality, as well as produce differential rates of crime). Also see Robert J. Sampson and Janet L. Lauritsen, “Racial and Ethnic Disparities in Crime and Criminal Justice in the United States,” in *Crime and Justice Volume 21—Ethnicity, Crime, and Immigration: Comparative and Cross-National Perspectives*, edited by Michael Tonry (Chicago: University of Chicago Press, 1997) 311, 336-41.
- 58 A number of scholars have criticized the limitations of color blind—as supposed to race-conscious—criminal justice reform. See for example Haney-López, “Post-Racial Racism” (2010), at 1061-68. Also see Butler, “One Hundred Years of Race and Crime” (2010), at 1059 (critiquing the lack of explicit racial justice interventions), <https://perma.cc/QRM8-BBJC>.
- 59 Haney-López, “Post-Racial Racism” (2010), at 1060 (discussing how a “cumulative theory of racial stratification” suggests that race works on different levels, “with or without the presence of animus or caste-like structures;” and both produces and is produced by social, political, and market dynamics that may not be directly related to race). Lopez states that “[r]acial stratification organizes virtually every aspect of quotidian existence, vertically from the family to the state and the market, and horizontally across seemingly distinct arenas like employment, housing, education, agriculture, [and] public safety.” Ibid. at 1057. Barbara Reskin calls pervasive racial disparities across multiple domains and institutional spheres “über discrimination” and “an integrated system” or “meta phenomenon that maintains and exacerbates black-white disparities.” See Barbara Reskin, “The Race Discrimination System,” *Annual Review of Sociology* 38, no. 1 (2012), 17-35, 17-18. Reskin contends that this system needs to be taken into account when crafting policy responses to racial inequality in a given domain. Ibid.
- 60 Robert D. Crutchfield, April Fernandes, and Jorge Martinez, “Racial and Ethnic Disparity and Criminal Justice: How Much is Too Much?,” *Journal of Criminal Law & Criminology* 100, no. 3 (2010), 903-32, 932 (opining that the persistence of small racial disparities matter because they “add substance to the narrative of injustice” among communities of color), <https://perma.cc/4GCT-4E2N>. Also see Alfred Blumstein, Jacqueline Cohen, Susan E. Martin, and Michael H. Tonry, eds., *Research on Sentencing: The Search for Reform, Volume I* (Washington, DC: National Academies Press, 1983), 92, (stating that “even a small amount of racial discrimination is a matter that needs to be taken very seriously, both on general normative grounds and because small effects in the aggregate can imply unacceptable deprivations for large numbers of people”).

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