

**HOW MUCH IS ENOUGH?: MEASURING AGENCY AND CRIMINAL
RESPONSIBILITY AMONG AFRICAN-AMERICANS**

A thesis presented

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Abstract

This thesis examines the current American criminal justice system, which demonstrates the phenomenon of Black over-criminalization within the United States of America. According to current statistics, African-Americans make up 40% of those incarcerated, but only comprise of about 13% of the total U.S. population. Many scholars have attributed African-Americans' overrepresentation within the criminal justice system to factors such as poverty, unequal criminal policies, and racial discrimination. These factors play a huge part on African-Americans' chances of being a part of the criminal justice system, but it is not enough to just acknowledge this. It is necessary for one to look at further implications of these factors. What exactly do these factors affect? What does it mean to say that one was discriminated against? In my thesis, I analyze these questions as they relate to the concept of agency. The major question my thesis serves to answer is, "are current legal interpretations sufficient for analyzing the agency and criminal responsibility of African-Americans?" I answer this question through an analysis of a current court case in which I apply my own definition of agency. My definition of agency involves a connection between race and crime. Through an analysis of three historical cases, I show how race has consistently played a major influence on African-Americans' agency and criminal responsibility. Thus, it is important to recognize this long-time racial influence within the criminal justice system in order to solve African-Americans' overrepresentation within the criminal justice system. I show this importance through the development of my unique definition of agency. I end my thesis with policy recommendations within the current American criminal justice system as well within institutions that it directly affects in order to reverse the societal flaw of African-Americans' over-criminalization.

Introduction

The United States prides itself on freedom, fairness, and equality, but its criminal justice system is a direct contradiction of these most prized values. For instance, the current population of the American criminal justice system consists of 40% African-Americans¹, but in 2008, African-Americans represented only 13%² of the total U.S. population. If we were to go a little further in history, we would find that in 2004, there were more Black males incarcerated in the U.S. (4,919 per 100,000) than there were in South Africa under the apartheid regime (851 per 100,000 in 1993)³. South Africa, under apartheid was internationally condemned for its racist policies that oppressed South African Blacks. The fact that there existed over five times as many Black males incarcerated in the U.S. than in South Africa under apartheid is appalling and shows the injustice of the American criminal justice system. Going even further into history, we will see that this disproportionate criminal status of African-Americans is not a new phenomenon. It existed in 2001 when 16% of African-American males were current or former prisoners⁴ and in 2000, when more African-American men were in prison than in higher education, 791,600 vs. 603,032 respectively⁵. This high incarceration rate is not unique to African-American males but is also seen amongst African-American women. African-American women are incarcerated at an extreme rate compared to their female White counterparts. In 2000, African-American women

¹ Pager, Devah, Marked: Race, Crime, and Finding Work in an Era of Mass Incarceration (The University of Chicago Press 2007) 3.

² U.S. Census Bureau: <<http://www.census.gov/prod/www/abs/p20.html#black>>

³ Prison and Jail Inmates at Midyear 2004 as quoted in Prison Policy: <<http://www.prisonpolicy.org/articles/notequal.html>>

⁴ Guardian: <http://www.guardian.co.uk/world/2003/aug/19/usa.garyyounge>

⁵ Stop The Drug War: <<http://stopthedrugwar.org/chronicle-old/252/jpistudy.shtml>>

were incarcerated at rates between 10-35 times greater than the rates of White women in fifteen states⁶. These strikingly high incarceration rates from 2000 to 2008 are just a smaller scope of the constant trend of a disproportionate criminal status among African-Americans in recent history; thus, it is apparent that a serious reconsideration of the criminal justice system is necessary. This reconsideration involves an examination of some of the causes of the disproportionate criminal status of African-Americans as well an analysis of African-Americans' agency.

There is much debate about the causes of the overrepresentation of African-Americans within the criminal justice system and many attribute this phenomenon to factors such as poverty and racial discrimination. Michael W. Markowitz and Delores D. Jones-Brown express the significance of racial discrimination in determining criminal responsibility and punishment for African-Americans in their book *The System in Black and White: Exploring the Connections Between Race, Crime, and Justice*. Katherine Beckett and Theodore Sasson's *The Politics of Injustice: Crime and Punishment in America* argue that criminal policies, such as those of the "War on Poverty" campaign, cause high incarceration rates for African-Americans. Bruce Western explores the effects of both policies and poverty on mass incarceration rates of African-Americans in his book *Punishment and Inequality in America*. I chose these works due to their importance of explaining the injustice of the disproportionate representation of African-Americans within the criminal justice system. Although each of these works demonstrates various causes of this phenomenon, they do not explain how African-Americans' agency is affected by these causal factors. The knowledge of one's agency during the time of the criminal act is important for legal actors to determine proper criminal responsibility and punishment. My

⁶ Human Rights Watch:< <http://www.hrw.org/en/news/2002/02/26/us-incarceration-rates-reveal-striking-racial-disparities>>

thesis will include a unique definition of agency that will recognize racial discrimination, poverty, and criminal policies as contributing factors to the overrepresentation of African-Americans within the criminal justice system, but will also show how these factors can limit the agency of African-Americans—thus arguing for a change in how legal actors view criminal responsibility.

The concept of agency has been debated for many years. C.A. Strong defines agency as the process of deliberation in his 1918 scholarly piece titled “Fate and Free Will.” He defines sufficient agency as the ability to refrain from acting upon one’s initial thought. In his 1975 journal article “Free Action and Free Will,” Gary A. Watson defines agency as a ranking criteria in which one is not free unless one is able to do what one *most* values. Later in a 1993 essay, R.A. Duff defines sufficient agency in three criteria: the knowledge of the outcome of one’s actions, the opportunity to avoid an action if chosen, and the concept of *free opportunity*, which states that one should not be “deprived of the opportunity to obey the law.”⁷ This deprivation arises when one acquires undesirable consequences from obeying that law. Although each interpretation provides major insights into the philosophical debate of agency and highlights different time periods in which this school of thought has evolved and expanded, they focus on agency in general terms instead of connecting it with race and crime. The connection of race, crime, and agency are essential for determining criminal responsibility for African-Americans because as statistics has shown, race plays a major role in their criminalization. Unlike these philosophical interpretations, my definition of agency illuminates this connection.

In order to solve the problem of the overrepresentation of African-Americans within the criminal justice system, my definition of agency will serve as a standard for legal actors to

⁷ Duff, R.A. “Choice, Character, and Criminal Liability.” *Law and Philosophy*, Vol. 12, No.4 (1993): 345-383

adhere to when assigning criminal responsibility punishment for African-Americans. My agency chapter defines agency through the idea of *highly-valued options*, absence of coercion, and the concept of reason. *Highly-valued options* arise from the objective American values of self-preservation, self-sufficiency, and opportunity. I will examine these values through the context of environment. An environment that consists of *highly-valued options* is one that includes sufficient employment, quality education, and a low crime rate. All of these factors contribute to the American values of self-sufficiency, self-preservation, and opportunity. Coercion consists of institutional and policy restrictions on African-Americans' agency through my examination of the effects of felon laws in my agency chapter. Sufficient reasoning includes the cognitive ability to fully understand one's actions, which develops through maturity.⁸ This unique definition of agency explains the disproportionate criminal status of African-Americans as a disregard for their sufficient agency, which requires *highly-valued options*, lack of coercion, and sufficient reasoning. This new definition, if taken as a policy initiative within the criminal justice system, would allow for proper assigning of criminal responsibility and just punishment within the current American criminal justice system because it would require that legal actors examine a person's whole—including external factors that affect their choices--and not just a focused on the criminal act itself.

I should make clear the reason why my definition of agency focuses on African-Americans specifically, especially since the factors of poverty, coercion, and reason cross various groups. My focus on African-Americans is due to the higher incarceration rates this group receives in comparison to others. For instance, Black males have a 16.2% chance of being

⁸Although the concept of reason is essential for my definition of agency due to the importance for one to become fully aware of his or her available options as well as to have the ability to completely understand one's choices before blame is assigned, the case that I analyze (*Washington v. Poole (2007)*) does not effectively highlight this criterion and so I do not focus on it during my analysis. I assumed that a lack of sufficient reasoning was not an issue in this case.

incarcerated versus 9.4% chance for Hispanic males and 2.5% chance for White males.⁹ In the arena of criminal policies, African-Americans are also negatively affected at a higher rate than any other group as cited by the organization Drug Policy in their 1999 “Race and the Drug War” article: “Although African Americans comprise only 12.2 percent of the population and 13 percent of drug users, they make up 38 percent of those arrested for drug offenses and 59 percent of those convicted of drug offenses.”¹⁰ Due to the heavy influence of racial discrimination, African-Americans’ experiences and limitations on their agency are unique and although my definition of agency can be applied to all, the purpose of this thesis is to find a solution to the phenomenon of the overrepresentation of African-Americans within the criminal justice system. By offering a standard for assigning criminal responsibility, which involves legal actors examining external impediments to defendants’ agency such as racial discrimination, my definition of agency will serve as a solution to this phenomenon.

I further explore in my second chapter the racial influence of African-Americans’ criminalization through a historical analysis of three court cases in order to demonstrate the significance of race over time in terms of defining agency and assigning criminal responsibility in the American criminal justice system. I analyze cases from the antebellum period (*State v. Caesar (1840)*), the Jim Crow Era (*State v. Johnson (1913)*), and post-1960’s (*McCleskey v. Kemp (1987)*). These time periods encompass major focal points in African-American history: slavery, segregation, and post-modern civil rights era. I chose all of these cases because they involve African-American defendants on trial for criminal actions while also demonstrating the variance in the role race plays in determining criminal agency for African-Americans.

⁹ Bureau of Justice Statistics: www.ojp.usdoj.gov/bjs/

¹⁰ Drug Policy: <http://www.drugpolicy.org/communities/race/>

After the historical analysis, my thesis then transitions into my application chapter. This chapter involves an analysis of a current court case that highlights my definition of agency. The major question my thesis serves to answer is, “Are current legal interpretations of agency sufficient for evaluating criminal responsibility for African-Americans? And if not, is a new interpretation of agency that involves the concepts of race and crime necessary?” I analyze the case of *Washington v. Poole* (2007) in order to determine if the legal interpretation of Washington’s agency was sufficient for assigning him criminal responsibility.¹¹ I apply my definition of agency to this case in order to test its practicality and sufficiency for assigning criminal responsibility for African-Americans.

When I apply my definition of agency to the *Washington v. Poole* (2007) case, I will highlight two components of my definition of agency (*highly-valued options* and coercion).¹² Washington is a repeated felon convicted of theft and through speculation I will show how it is possible that his environment lacked highly-valued options and the restrictions placed on him by felon policies may have limited his criminal agency. Felon policies play the role of coercion in my definition and the act of committing theft is shown as a result of a lack of highly-valued options in one’s environment. I will also show how this restriction of agency may be further limited when coupled with racial discrimination. Therefore, *Washington v. Poole* (2007) shows the necessary connection of race, crime, and agency.

My thesis then concludes with proposed policy changes within the criminal justice system. I propose that the criminal justice system honor my interpretation of agency as a preferred method for use when considering mitigating factors in assigning criminal responsibility

¹¹ The race of the defendant is unknown due to limitations in the record so I speculated the effects of race on agency through the use of statistical evidence of the racial influence on felon laws and environmental status.

¹² Reasoning is not a focus here because in *Washington v. Poole* (2007) his level of reasoning was not shown to be an issue and so it is suggested that Washington exercised sufficient reasoning.

and punishment for African-Americans. Although there currently exist mitigating factors when considering criminal responsibility and punishment for defendants, they are not consistent. Often-times legal actors have sole discretion in their judgments, creating a variance in considered mitigating factors. The system would be more efficient if mitigating factors were consistent across courts instead of having one person convicted of a crime and another excused from this same crime due to a consideration of a mitigating factor that one judge recognized while another did not. My definition of agency will allow for this consistency. If implemented, environmental, policy, and racial factors will be considered by all courts when examining the criminal agency of defendants. I predict that the recognition of these new mitigating factors as a standard for determining criminal responsibility will drastically reduce the overrepresentation of African-Americans within the criminal justice system. This would allow for the consistency of America's most prized values of fairness, freedom, and equality.

I also propose policy changes within institutions that are indirectly affected by the criminal justice system, such as the public educational system and city employment. The educational system has an inverse relationship to the criminal justice system. Statistics have shown that more funding for education will reduce the number of drop outs and therefore the number of criminals: "between 1985 and 2000, the increase in state spending on corrections was nearly double that of the increase to higher education (\$20 billion versus \$10.7 billion), and the total increase in spending on higher education by states was 24% compared with 166% for corrections."¹³ These statistics show that more funds are spent incarcerating an individual who in many cases is a child, than on educating that child. An increase in educational funding will also provide the *highly-valued option* of education within many impoverished urban areas, thus expanding the agency of many African-Americans. This expansion of agency due to an increase

¹³ Quoted in Stop the War on Drugs: <http://stopthedrugwar.org/chronicle-old/252/jpistudy.shtml>

in highly-valued options is also seen with economic opportunities such as employment. The presence of sufficient employment in one's environment allows for self-preservation, which will be shown to be effective at preventing crime. Therefore, I propose that the criminal justice system acknowledge my unique definition of agency in order to ensure justice, and that states redistribute funds from prisons to schools. This would not only be economically viable for states and their citizens, but also an act towards better humanity as the overrepresentation of African-Americans within the criminal justice system becomes drastically reduced.

Agency

The connections between agency, race and crime are essential when analyzing the agency of African-Americans. The concept of agency has been debated for many years, yet few have explicitly connected race and crime with agency. This missing connection is unfortunate because as historical analysis and present-day statistics show, race is inextricably linked with crime. Devah Pager, author of *Marked*, has pointed out that “Blacks in this country have long been regarded with suspicion and fear; but unlike progressive trends in other racial attitudes, associations between race and crime have changed little in recent years.”¹⁴ This long-term racial link with crime creates a necessary connection between race and agency when examining the criminal actions of African-Americans. Therefore, it is only logical that I present a definition of agency that involves this necessary connection. My interpretation of agency measures African-Americans' agency in three contexts: environment, policy, and reason.

The first measure of this unique definition of agency involves an examination of one's environment in terms of the availability of *highly-valued options*. Highly-valued options rely on the objective American principles of self-preservation, self-sufficiency, freedom, and

¹⁴ Pager, Devah, Marked: Race, Crime, and Finding Work in an Era of Mass Incarceration (The University of Chicago Press 2007) 3.

opportunity. As a means of achieving sufficient agency, the measurement of *highly-valued options* requires that one's environment consist of options that ensure long-term self-preservation, the opportunity for self-sufficiency, and the freedom to acquire these values without threats. These American principles are assigned to the American values of education, employment, and safety. An environment that consists of *highly-valued options* is one that includes both sufficient employment and educational opportunities. Sufficient employment and educational opportunities allow for self-sufficiency and long-term self-preservation through the maintaining of one's well-being. An environment with highly-valued options has little to no criminal opportunity. Little to no crime creates a safe environment, which means that there is greater assurance of self-preservation. This inverse relationship between crime in an area and the assurance of self-preservation is expressed in a 2008 TIME Magazine article which explains that "anyone who looks over their shoulder walking home late at night in a big city, the idea that America has won its war on violent crime might seem absurd."¹⁵ Here, crime is expressed as a threat to self-preservation as described by looking over one's shoulder. Thus, urban areas with high crime rates pose a threat to self-preservation. This shows that urban areas, at least those with high crime rates, limit the agency of those residing within by prohibiting the option for long-term self-preservation.

I chose the American values of employment, education, and safety to represent highly-valued options because these are factors that all Americans value in their search for a place of residence. For instance, these are factors, more or less, that drove the Great Migration of African-Americans from the South to the North for a better life filled with opportunities:

"African American migration was affected by the "push and pull" factors...An important natural

¹⁵ Ferkenhoff, Eric. "How Low Can the Crime Rate Go?" Time Magazine 18 Jan 2008. 7 Dec. 2010. < <http://www.time.com/time/nation/article/0,8599,1705342,00.html>>

force was the destruction of the cotton crop by the Boll Weevil forcing farmers, sharecroppers and tenants off the land...The pull in the North came from the labor needs of expanding industries stimulated by World War I.¹⁶ African-Americans' agency was limited in the South due to a lack of highly-valued options in their southern environment. This included a lack of sufficient employment that would allow for long-term self-preservation and self-sufficiency as well as a lack of safety that would do the same: "A crucial unnatural force was the rise of the Ku Klux Klan gangs, which terrorized and intimidated African Americans."¹⁷ Thus, a great influx (one quarter)¹⁸ of African-Americans migrated from the South to the North in search of these highly-valued options of employment, education, and safety. An environment without these highly-valued options limits the agency of those within because they are *coerced* to choose from alternatives that they would otherwise not choose in order to satisfy the principles of self-preservation, self-sufficiency, freedom, and opportunity.

An example of an environment that lacks these highly-valued options for African-Americans is the impoverished, urban areas of America. African-Americans are overwhelmingly represented in urban areas or big cities due to the Great Migration: "there has been an enormous movement from rural areas to the cities by all Americans but this is especially true of African Americans... During this period [The Great Migration (1910-1930)], large racially homogeneous areas of African Americans developed in places such as Harlem in New York and the Southside of Chicago... Today the vast majority of African Americans live in the urban areas."¹⁹ African-Americans migrated from the rural South to the industrial North in hopes of obtaining highly-valued options. Unfortunately, the urban areas in which African-Americans currently reside are

¹⁶ African Americans and Urban America: <<http://www.africawithin.com/jeffries/aapart33.htm>>

¹⁷ African Americans and Urban America:< <http://www.africawithin.com/jeffries/aapart33.htm>>

¹⁸ African Americans and Urban America: <<http://www.africawithin.com/jeffries/aapart33.htm>>

¹⁹ African Americans and Urban America:< <http://www.africawithin.com/jeffries/aapart33.htm>>

missing these highly-valued options. The World Bank characterizes impoverished, urban areas as an environment with “limited access to employment opportunities and income... violent and unhealthy environments... [and] limited access to adequate health and education opportunities.”²⁰ The World Bank defines impoverished, urban areas as one that restricts the agency of those residing within due to the “limited access” to educational and employment opportunities versus the expansive opportunities for violent and unhealthy activities such as crime. Due to factors such as the Great Migration, African-Americans are overwhelmingly affected by these agency limiting areas.

One may argue that some people who also live in impoverished, urban environments do not choose crime as an option. Although this is true, this does not counter the fact that these impoverished environments restrict people from exercising sufficient agency, including those who do not commit crime. For instance, when faced with the following options: poor school, insufficient employment, and drug-trafficking, one may choose to attend the poor school while another chooses the insufficient employment that provides little income and security and another chooses the option of drug-selling. Each option is different, but results in the same outcome: ultimately, a lack of self-sufficiency and long-term self-preservation. A poor school is less likely to lead to sufficient employment, which would lead to self-sufficiency and self-preservation. An insufficient employment is not enough for one to sustain oneself, thus making self-sufficiency and long-term self-preservation virtually impossible. Engaging in criminal activities such as drug-trafficking initially seems attractive to some due to the possibility of a high economic return in the short-term, but nonetheless fails to satisfy long-term self-sufficiency and self-preservation due to the high possibility of incarceration or worse, death. In other words, the cost of crime

²⁰ World Bank:

<<http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTURBANDEVELOPMENT/EXTURBANPOVERTY/0,,contentMDK:20227679~menuPK:473804~pagePK:148956~piPK:216618~theSitePK:341325,00.html>>

outweighs the benefits. Therefore, regardless of which options one chooses within an impoverished, urban environment, one's agency is limited due to the lack of long-term self-preservation and self-sufficiency. Another criterion that creates a limitation on one's agency is that of coercion from criminal policies. Coercion within my interpretation of agency is measured by the institutional and policy forces on African-Americans' agency. Although various criminal policies have this coercive effect on African-Americans, I focus on the current felon disenfranchisement laws because they best highlight this restriction.

According to the Sentencing Project, felon disenfranchisement laws are “obstacles to participation in democratic life.”²¹ Current felon disenfranchisement laws restrict opportunities to voting, employment, and education for inmates and ex-offenders, including those on parole and probation as well as those who have completed their sentences. In thirty-five states, felon restrictions are imposed upon those on parole and in thirty states upon those who are on probation, while ten states restrict voting from those who have fully completed their sentences (neither on parole nor probation).²² Felon disenfranchisement laws have a disproportionate effect on African-Americans: “nearly two million African-Americans-or 8.25 percent of the African-American population-are disenfranchised, a rate three times the national average.”²³ This disproportionate status is even more overwhelming among African-American males: “1.4 million African-American men, or 13% of black men, are disenfranchised, a rate seven times the national average.”²⁴ These high rates of a disenfranchised African-American minority suggest a racial motivation behind felon disenfranchisement laws.

²¹ The Sentencing Project: <<http://www.sentencingproject.org/template/page.cfm?id=133>>

²² Quoted in *Requests for Hearing* in Sentencing Project:
<http://www.sentencingproject.org/doc/publications/fd_IACHRHearingRequest.pdf>

²³ See “Requests for a Thematic Hearing” in Sentencing Project:
<http://www.sentencingproject.org/doc/publications/fd_IACHRHearingRequest.pdf>

²⁴ See “Felon Disenfranchisement Laws in the United States” in Sentencing Project:
<http://www.sentencingproject.org/doc/publications/fd_bs_fdlawsinusMarch2010.pdf>

This racial motivation is even more apparent after examining the historical origins of felon disenfranchisement laws. For instance, “after Reconstruction, many states expanded their restriction on the felon population, which began to contain large proportions of African-Americans for the first time.”²⁵ Following the Civil War and the emancipation of African-American slaves, Blacks were given new freedoms, such as the right to vote, during the Reconstruction era (1864-1877). One can assume that the threat of African-Americans gaining political power during the Reconstruction era motivated states to find new ways to restrict the agency of the former slaves. The expansion of felon disenfranchisement laws included restricting the vote from individuals convicted of certain crimes. As a result, African-Americans were negatively affected by this restriction on voting for certain crimes because these crimes were those that “almost exclusively applied against African-Americans.”²⁶ This expansion of felon disenfranchisement laws by states in response to large proportions of the African-American population is also seen with current laws: “When African-Americans make up a larger proportion of a state’s prison population, that state is significantly more likely to adopt or extend felon disenfranchisement laws.”²⁷ Maine and Vermont are the only two states without felon disenfranchisement laws, but they also do not have any Black prisoners. Therefore, it seems that felon disenfranchisement laws are racially designed to target African-Americans.

Due to their disproportionate effect of felon disenfranchisement laws, an overwhelming number of African-Americans are prevented from attaining sufficient employment, quality education, and safety, which leaves open an array of criminal opportunities. These restrictions

²⁵ Manza, Jeff and Christopher Uggen, *Locked Out: Felon Disenfranchisement and American Democracy* 55 (Oxford University Press 2006)

²⁶ Manza, Jeff and Christopher Uggen, *Locked Out: Felon Disenfranchisement and American Democracy* (Oxford University Press 2006) 42.

²⁷ Manza, Jeff and Christopher Uggen, *Locked Out: Felon Disenfranchisement and American Democracy* (Oxford University Press 2006) 67.

include “legal restrictions on employment” and “ineligibility of educational benefits” and they cause difficulty for ex-offenders to find jobs and a safe place live.²⁸ Ineligibility of educational benefits prevents equal educational opportunity for felons, thus preventing self-sufficiency and long-term self-preservation. Restrictions on employment prevent equal employment opportunities, which also prevent long-term self-preservation and self-sufficiency. Difficulty in finding a safe place to live shows the lack of safety felons face as well as the abundance of criminal options available to them. This array of available criminal opportunities in combination with a lack of sufficient employment and education coerces felons to commit further crime. Therefore, a repeated felon’s criminal responsibility should be diminished due to his or her limited agency caused by felon restrictions and because these laws have a disproportionate effect on African-Americans, this limited agency and diminished criminal responsibility are more apparent for this group.

Felon disenfranchisement laws further prevent *highly-valued options* for African-Americans through the restrictions on voting. Voting allows for the decision on factors that affect one’s life, thus expanding agency. Voting is an avenue of satisfying the American principles of self-preservation, self-sufficiency, freedom, and opportunity. Voters are allowed to vote for representatives and policies that would best serve these interests. Therefore, restriction on voting causes a prevention of obtaining *highly-valued options* for felons and even more so for African-American felons. This denial of voting is described in Jeff Manza and Christopher Uggen’s book *Locked Out: Felon Disenfranchisement and American Democracy* when a felon described it as throwing salt on an open-wound: “But it’s like it’s still open enough so that you

²⁸ Manza, Jeff and Christopher Uggen, Locked Out: Felon Disenfranchisement and American Democracy (Oxford University Press 2006) 9.

telling me that I'm still really bad because I can't [vote] is like making it sting again."²⁹ The denial of voting, a basic right as a citizen, informs the felon that he or she is a criminal and unfit to perform citizen duties or exercise sufficient agency when determining the options in his or her life. It seems then, that as a felon, one can be coerced into further criminal activity due to the denial of sufficient options. Therefore, when determining African-Americans' criminal responsibility, legal actors should consider felon restrictions on agency as well as their disproportionate effect on African-Americans.

Historical Analysis

This chapter shows the role race has played in interpreting the agency of African-Americans as well as in assigning criminal responsibility and punishment throughout the history of the U.S. courts. I will present three cases from three different time periods: Antebellum (1600-1865) Jim Crow (1865-1965), and Post 1960's. These time periods capture the variance of racial influences on court decisions for African-American defendants. The analysis begins during American slavery because this era sparks the beginnings of legal actors interpreting the agency of Blacks in America s shown by *State v. Caesar* (1849). The Jim Crow era shows the transition of the role of race in determining the agency of African-Americans as slaves to newly free-person as exhibited by *Johnson v. State* (1910). Post-1960's represents a time when African-Americans' criminal status increased greatly due to racialized legislation and discriminatory court sentencing such the "War on Drugs" and mandatory sentencing: "The increased rate of black imprisonment is a direct and foreseeable consequence of harsher sentencing policies, particularly for violent crimes, and of the national 'war on drugs.'³⁰ Harsher sentencing practices for African-Americans during the Post 1960's era show the importance of the *McCleskey v.*

²⁹ Manza, Jeff and Christopher Uggen, Locked Out: Felon Disenfranchisement and American Democracy (Oxford University Press 2006) 4.

³⁰ See in The Sentencing Project: <<http://www.hrw.org/reports98/vote/usvot98o-02.htm>>

Kemp (1987) case. The overarching question this chapter serves to answer is “How has African-Americans’ criminal agency been interpreted throughout history?” Through these cases, I will show how the interpretation of African-Americans’ agency has changed throughout history, which is important for determining the necessity of redefining African-Americans’ agency today.

State v. Caesar (1849)

Race was a driving force behind American slavery. As explained by the Reverend Morgan Godwyn in 1680, “these two words, Negro and Slave, had by custom grown Homogeneous and convertible”³¹ [and] “no one claimed that Southern slavery lacked a ‘profound racial dimension.’”³² Thus, in determining who would serve as slaves for the New World, the consensus held that Black Africans would serve this role: ““this inquiry into the physical, mental, and moral development of the negro race, seems to point them clearly, as peculiarly fitted for a laborious class”...[and] “attempts to have servile work done by biological equals, namely whites, was a prescription for class conflict and revolution.”³³ This biological attempt to differentiate Blacks from Whites resulted in the belief that Blacks were natural slaves and incapable of exhibiting human qualities of conflict and revolution as Whites were. As a result, the consideration of Blacks as sub-human and property arose.

This consideration of Blacks as sub-human and property was exacerbated when assigning criminal punishment to Blacks. A 1669 Virginia slave law, stated that

Whereas the only law in force for the punishment of refractory servants resisting their master...cannot be inflicted on negroes...if any slave resist his master...and by the extremity of the correction should chance to die...the master be acquit

³¹ Morris, Thomas D., *Southern Slavery and the Law, 1619-1860* (The University of North Carolina Press 1996) 17.

³² Morris, Thomas D., *Southern Slavery and the Law, 1619-1860* (The University of North Carolina Press 1996) 18.

³³ Morris, Thomas D., *Southern Slavery and the Law, 1619-1860* (The University of North Carolina Press 1996) 18.

from molestation, since it cannot be presumed that malice should induce any man to destroy his own estate.”³⁴

The 1669 Virginia slave legislation reinforced the sub-human, property status of Blacks by considering them ineligible for legal punishment when other non-Black “refractory servants” were subjected to this legal punishment. This was due to Blacks’ perpetual slave status, a societal position no other servants experienced because of racial discrimination geared towards Blacks. Thus, it did not make any sense for Blacks to be legally punished—such as with the imposition of more prison or slave time—because they already served the maximum sentence of forever enslaved. Preventing Blacks from legal punishment implied that Blacks were not considered as rational acting, human agents capable of legal sanctions. Instead, Blacks were only allowed to be punished by their masters. Therefore, at least to legal actors, the agency of Blacks was insufficient. In assigning punishment for an act, there is a tacit agreement that agency was performed in the act or else holding someone responsible for the act would be futile. In assigning criminal agency for Blacks, Virginia on the one hand, refused the sufficiency in their agency and deemed them unfit for legal punishment, and on the other, implied that Blacks exercised sufficient agency because their masters were allowed to punish them. Therefore, during the antebellum period, Virginia was contradictory in its interpretation of Blacks’ agency. This 1669 Virginia statute leads this chapter into the influence of race on legal actors creating contradictory interpretations of Blacks’ agency during the antebellum period.

*State v. Caesar (1849)*³⁵ represents this contradiction when interpreting Blacks’ agency during the antebellum period by demonstrating how the state appointed jury subjected Caesar (the Black defendant) to human qualities for the purpose of assigning criminal responsibility,

³⁴ Quoted in Higginbotham, Leon A., *Shades of Freedom*, (Oxford University Press 1996) 50.

³⁵ Supreme Court of North Carolina, Raleigh: 31 N.C. 391

while also rejecting these human qualities when determining punishment for him. Caesar was a Black slave from North Carolina owned by John Latham and Thomas Latham. Caesar was convicted of murdering a White man named Kenneth Mizell after hitting him on the head with a fence rail. The jury argued that Caesar “not having the fear of God before his eyes, but being moved and seduced by the instigation of the devil...feloniously, willfully and of his malice aforethought, did make an assault.”³⁶ Accusing Caesar of “not having the fear of God before his eyes” shows that the State believed that Caesar, although someone’s property and sub-human, was capable of human worship and religious principles—but merely neglected to follow them. One would not consider a farm animal, which is the property of a farmer, capable of worship and religious principles because these are human qualities done with rational thought. Therefore, in this instance, the jury considered Caesar a rational acting human agent who exercised sufficient agency in his criminal act. In considering Caesar to be “moved and seduced by the instigation of the devil” one could argue that the jury, rather than considering Caesar to be acting with sufficient agency, believed his agency was restricted due to the external force of the devil. Instead, I argue that by suggesting that Caesar’s actions were done “willfully and of malice and aforethought,” the jury actually considered Caesar to be exercising full agency—without any restriction—through deliberation and intent to harm. As a result, the jury held Caesar fully responsible for his actions and convicted him of murder.

This conviction of murder was problematic because the juror’s reason for it was in direct contradiction to their reason for holding him criminally responsible. The incident began when Caesar and his friend Dick, who was also a slave, were lying on the ground in front of a store. Mizell (the deceased) and his friend Brickhouse, a White man, walked up to the two slaves (Caesar and Dick) and told them that they were patrollers. Brickhouse, with a piece of board,

³⁶ Supreme Court of North Carolina, Raleigh: 31 N.C. 391

began to give the two slaves “two or three slight blows”³⁷ with the board. Brickhouse then began a conversation with Caesar and Dick, during which another slave by the name of Charles appeared. Brickhouse seized Charles and ordered Dick to retrieve a whip for him so that he (Brickhouse) could whip Charles. Dick refused. Due to this refusal, Brickhouse seized Dick. Mizell held Dick down while Brickhouse struck him repeatedly in his head and side with his fists. While witnessing this beating, Caesar exclaimed that, he “could not stand it”³⁸ and grabbed a fence rail. With the fence rail, Caesar began to hit the two White men out of passion to protect his friend. Mizell was hit severely and died the next day. The jury translated Caesar’s assault on Mizell as an act of passion. Passion resulted in a conviction of manslaughter (without intent). Although Caesar’s act was judged to be one from passion, the jury convicted him of murder (with intent) instead of manslaughter because of his Black slave status. This punishment resulted in the jury contradicting itself because the punishment of murder meant that Caesar acted intentionally, but it was already ruled that he acted out of passion and not willfully. Therefore, the jury should have convicted him of manslaughter instead of murder. It was the jury’s consideration of Caesar’s race that determined the unfair punishment of the death sentence.

The jury’s assigned punishment of the death sentence for Caesar due to his supposed inability to exhibit the human quality of passion was in direct contradiction to their assumption of Caesar as a rational acting, human agent when they assigned his criminal responsibility. The jury argued that Caesar, unlike a White man, was incapable of acting out of passion because as a slave he was used to humiliation. The State argued that:

From the nature of the institution of slavery, a provocation, which, given by one white man to another, would excite the passions, and dethrone reason for a time,

³⁷ Supreme Court of North Carolina, Raleigh: 31 N.C. 391

³⁸ Supreme Court of North Carolina, Raleigh: 31 N.C. 391

will not and ought not to produce this effect, when given by a white man to a slave. Hence, although, if a white man, receiving a slight blow, kills with a deadly weapon, it is but manslaughter; if a slave, for such a blow, should kill a white man, it is murder; for, accustomed as he is to constant humiliation, it is not calculated to excite to such a degree as to dethrone reason, and must be ascribed to a wicked heart, regardless of social duty³⁹

In arguing that Caesar was unaccustomed to humiliation and unable to excite passion due to his Black slave status, shows that the jury considered Caesar's repulsion towards witnessing his friend being beaten as out of the norm for a slave. Here, the jury disregarded Caesar's humanness by arguing that he should not have been moved by any passion to kill because he was subhuman and as property, he was used to degradation. According to the jury, Caesar should have known about this degradation status of his and disregarded any passion that may have arisen within him. This shows that if Caesar was a White man, it would have been expected of him to act out of passion after witnessing his friend being beaten because a White man is considered human. Due to this natural human emotion of passion, the White man's criminal act would have been "extenuated from murder to manslaughter."⁴⁰ The jury thought that Caesar, a Black slave, could not have acted out of this natural human emotion because he was accustomed to humiliation and the only way he could have acted was out of "a wicked heart."⁴¹ This thought is contradictory in itself. The jury initially applied the human qualities of worship and religious principles to Caesar when assessing his agency and assigning him criminal responsibility, but in assigning his punishment, the jury disregarded the possibility of him ever having the human quality of passion and argued that his act was intentional. Due to Caesar's Black slave status, the jury's

³⁹ Supreme Court of North Carolina, Raleigh: 31 N.C. 391

⁴⁰ Supreme Court of North Carolina, Raleigh: 31 N.C. 391

⁴¹ Supreme Court of North Carolina, Raleigh: 31 N.C. 391

interpretation of his agency was contradictory. On the one hand, Caesar was considered exercising sufficient agency in the criminal act and held fully responsible, and on the other, Caesar's agency was restricted by the jury's belief of him not being able to exert the human quality of passion and punished him as if he intended to kill. Nonetheless, the jury punished him to the greatest extent. *State v. Caesar (1849)* exemplified the common tendency of legal actors in the antebellum era to be influenced by racial discrimination that resulted in a contradiction in their interpretation of Blacks' agency, criminal responsibility, and punishment.

Johnson v. State (1910)

As in the antebellum period, race in the Jim Crow era played an explicit role when determining the criminal agency and responsibility of African-Americans. The influence of race provided prosecutors with the ability to disregard facts of a case and rely solely on racist assumptions of African-Americans' when determining their agency and criminal responsibility in a crime. According to A. Leon Higginbotham, "counsel have [sic] attacked the credibility of African-American defendants and witness [sic] by appealing to stereotypical notions of African-Americans as either fools or liars."⁴² These stereotypes proved to be highly influential in legal actors' decisions as shown in *Johnson v. State (1910)*.

*Johnson v. State (1910)*⁴³ involves an African-American male by the name of Alex Johnson who was initially convicted of unlawfully carrying a pistol and for his punishment was fined \$100. Johnson later appealed on the account that the prosecutor made explicit racist comments about his character, which he believed influenced the jury's decision. The prosecutor explicitly mentioned racial stereotypes in order to persuade the jury to convict Johnson:

⁴² Higginbotham, Leon A., *Shades of Freedom*, (Oxford University Press 1996) 140.

⁴³ *Court of Criminal Appeals of Texas*: 59 Tex. Crim. 11; 127

The negro race is all alike and about the same the world over--they are untruthful and unreliable--they are, as a rule, a set of reprobates and liars, and you can rely upon it that when one gets into trouble, as this one has, and you let them sleep over night, they always get together and help each other out, and you need not be afraid of doing wrong to convict this defendant, for you can look at him and see that he is as guilty as sin.⁴⁴

In assessing Johnson's innocence or guilt, the prosecutor did not base his accounts on possible factual information, such as his carrying a pistol unlawfully. Instead, the prosecutor only focused on Johnson's race and used this as the sole reason for his conviction.

Derrick Bell attributes the effectiveness of stereotypes in court rooms as segregation-related paranoia. This term is essential when examining the Jim Crow Era in which Blacks and Whites were segregated based on race. Bell's explains this process as when "each individual learns to segregate out of public social interactions...each individual looking at the [perceived separate characteristics], with a sense of reality, an association between the segregated group [with] dirty, smelly, destructive, and sexual sensations."⁴⁵ When individuals are separated they become strangers to one another and learn to describe the other to negative characteristics in order to fully differentiate oneself from the other. Thus, it seems that the negative stereotypes of Blacks as portrayed by the prosecutor were convincing to the jury because the jurors were under an apartheid state in which the true nature of Blacks were foreign to them and it was easy to perceive Johnson as a "liar" as proclaimed by the prosecutor because Blacks were presumed to be inferior as reinforced by the segregated society of Jim Crow. *Johnson v. State* (1910) exemplifies the tendency of legal actors during the Jim Crow era to use racial stereotypes when

⁴⁴ *Court of Criminal Appeals of Texas*: 59 Tex. Crim. 11; 127

⁴⁵ Bell, Derrick A., Race, Racism, and American Law (Little Brown and Company 1973) 91.

defining the agency and criminal responsibility of African-Americans as well as the tendency of the jury to accept these stereotypes as proof for conviction.

Derrick Bell categorizes racism into two definitions. The first definition of racism is considered overt racism, which is “the use of color per se (or other visible characteristics related to color) as a subordinating factor.”⁴⁶ The second definition of racism is indirect institutional subordination because of color, which “is place keeping or keeping of persons in a position or status of inferiority by means of attitude, actions, or institutional structures which do not use color itself as the subordinating mechanism, but instead use other mechanisms indirectly to color.”⁴⁷ Overt racism would involve one resorting to someone’s skin color as evidence of their inferiority or guilt. Institutional subordination because of color involves larger institutional means of subjugating a race based on their color such as through stereotypes used in legal courts. These two definitions of racism allow for a better understanding of the role of race in assigning criminal agency and responsibility for African-Americans during the Jim Crow era.

Both Institutional subordination because of color and overt racism can be thought of as influential mechanisms in the prosecutor’s defining of Johnson’s agency and criminal responsibility. The prosecutor engaged in *Institutional Subordination because of Color* in determining Johnson’s agency and criminal responsibility because he mentioned negative stereotypes of Blacks as being a “liar” and “unreliable.” It can be interpreted that Johnson’s agency was determined by the prosecutor as sufficient and intentional because in suggesting that Johnson was a liar, the prosecutor automatically assumed that Johnson actually committed the act even without actual evidence adhering to this assumption. In complying with the prosecutor’s stereotypical argument, the jury also engaged in *Institutional Subordination because of Color*.

⁴⁶ Bell, Derrick A., Race, Racism, and American Law (Little Brown and Company 1973) 89.

⁴⁷ Bell, Derrick A., Race, Racism, and American Law (Little Brown and Company 1973) 89.

The prosecutor and jury relied on Johnson's race to determine his criminal responsibility instead of the actual facts of the case.

The prosecutor's use of race when interpreting Johnson's agency and criminal responsibility can also be interpreted as overt racism. When arguing that the jury "need not be afraid of doing wrong to convict this defendant, for you can look at him and see that he is as guilty as sin," the prosecutor relied on Johnson's skin color as evidence of his guilt and so did the jury since Jim Crow's segregation reinforced these stereotypes. Therefore, whether the role of race was *overt racism* or *Institutional Subordination because of Color*, the decision of Johnson's criminal agency and responsibility shows the influence of his race as an African-American.

McClesky v. Kemp (1987)

Unlike the Antebellum or Jim Crow era, the role of race during the Post-1960's era in determining Blacks' agency and criminal responsibility was implicit rather than explicit while its impact on African-Americans' punishment was highly apparent.⁴⁸ The Post-1960's era represented a high increase in incarceration⁴⁹ and a greater favor to the death penalty by the public.⁵⁰ Out of this culture of high incarceration rates and greater interest in the death penalty bore the landmark case *McCleskey v. Kemp (1987)*. Warren McCleskey was an African-American man convicted of murder and issued a punishment of the death penalty by the Superior Court of Fulton County, Georgia. The Georgia law at the time allowed the jury to impose the death penalty for murder if at least one of the statutory aggravating circumstances existed beyond a reasonable doubt. The jury found that two out of the total ten aggravating circumstances had

⁴⁸ Due to the implicit role of race in determining agency and criminal responsibility for African-Americans during the Post-1960's era, I will use speculation and supporting external evidence when analyzing the effects of race.

⁴⁹ Manza, Jeff and Christopher Uggen, *Locked Out: Felon Disenfranchisement and American Democracy* (Oxford University Press 2006) 97.

⁵⁰ Friedman, Lawrence M., *Crime and Punishment in American History* (Harper Collins Publishers 1993) 318.

existed beyond a reasonable doubt in McCleskey's act of murder. This included committing murder during the course of an armed robbery and committing an offense against a police officer "engaged in the performance of his duties".⁵¹ The jury found no mitigating factors and took these aggravating circumstances into account in deciding the death penalty for McCleskey. It seems then that due to McCleskey's violation of the relevant aggravating circumstances, the jury's account of his agency was that it was enough to assign him sufficient responsibility and as a result, he was given the death penalty. On the surface, race seemed to not have any influencing role on the jury's interpretation of McCleskey's agency, but a closer examination will reveal that this is not the case.

The jury's perception of McCleskey's blackness influenced their decision not to consider any mitigating factors that would have shown a limitation of his agency, thus limiting his criminal responsibility and punishment. In his book, *Race, Racism, and American Law* Derrick Bell argues that "it would require a miracle to effectively screen from the jury room all of the beliefs based on racial myths and fears that social scientists have found permeate society...[and that] racial considerations do influence jury decisions"⁵² In arguing that eliminating racism from courtrooms would require a "miracle," suggests that the influence of race on juror's decisions are still active today due to the historical effects of racism that has been ingrained in the American psyche. One study called "The American Jury at 341," which was conducted in the mid-1950's and included 225 jurors, involved heavy racial influences on juror's perception of Blacks' agency and ultimately their decision to punish Blacks more harshly. For instance, one juror reported: "Niggers have to be taught how to behave. I feel that if he hadn't done that, he'd done something else probably even worse and that he should be put out of the way for a good long

⁵¹ *McCleskey v. Kemp* (1987): 481 U.S. 279

⁵² Bell, Derrick A., *Race, Racism, and American Law* (Little Brown and Company 1973) 949.

while.”⁵³ In referring to Blacks as “niggers,” and admitting that “if he [the Black defendant] hadn’t done that, he’d done something else probably even worse” shows that this juror based his decision on race, which included a possible hatred towards Blacks as well as the belief that Blacks are inherently violent and deserving of harsh or cruel and unusual punishment. Although this study was conducted in the mid-1950’s racism has permeated through American society and is often reinforced. Derrick Bell explains that the perception of racism persists and is reinforced when one “selectively focuses upon content which supports one’s own beliefs and by selectively ignoring content which undermines them.”⁵⁴ The selection of what one chooses to believe and ignore highlights the racial intent of jury’s decision of Blacks’ agency, criminal responsibility, and punishment. Therefore, in regards to McCleskey, I argue that the persistence of American racism had most likely influenced the jury’s interpretation history of American racism influenced the jury’s interpretation of McCleskey’s agency in order to reinforce the racial belief Blacks being inherently violent while disregarding any mitigating factors that could contradict this belief. As a result, the role of race in interpreting the agency of McCleskey was probably done with a subtle intent by the jury to satisfy their long-held racial beliefs of Blacks.

Furthermore, the evidence of the disparate racial impact of the death penalty as presented by the 1970’s Baldus study⁵⁵ shows that the role of race in assigning criminal responsibility and punishment for McCleskey created explicit disparate effects. This disparate racial impact has been shown in other instances such as with employment bars on individuals with criminal records where in some states, the courts have ruled against them arguing these bars have a “disparate impact on African-Americans” as shown in *Green v. Missouri Pacific Railroad*

⁵³ Quoted in Bell, Derrick A., Race, Racism, and American Law (Little Brown and Company 1973) 949.

⁵⁴ Bell, Derrick A., Race, Racism, and American Law (Little Brown and Company 1973) 90.

⁵⁵ Baldus Study quoted in *McCleskey v. Kemp* (1987): 481 U.S. 279

Company (1975).⁵⁶ The 1970's Baldus study demonstrated a disparity between Whites and African-Americans in the imposition of the death sentence in Georgia. The study showed that 11% of the defendants charged with killing a White person received the death penalty and only 1% of defendants charged with killing African-Americans received the death penalty. The study also revealed that in Georgia, 22% of the death penalty cases involved African-American defendants and White victims versus 3% of the cases involving White defendants and African-American victims. Furthermore, 8% of the cases involved White defendants and White victims while 1% of the cases involved African-American defendants and African-American victims.⁵⁷ This racial discrimination in this study suggests that White lives are more valuable than Blacks' lives and therefore the assigning of Blacks the death penalty seems to be racially motivated. McCleskey appealed to the Supreme Court and presented this statistical evidence in order to show that his conviction of the death penalty involved racial influence as shown by the obvious disparate impact of the death penalty between Blacks and Whites in Georgia. The Supreme Court disregarded this study as evidence of any influence of race in deciding McCleskey's criminal responsibility and punishment, thus upholding the original decision.

Justice Powell, as deliverer of the Supreme Court's decision in *McCleskey v. Kemp* (1987), argued that at most the Baldus study indicated "a discrepancy that appears to correlate with race."⁵⁸ The huge disparities that existed such as when the defendant is Black and the victim is White (the Black defendant is charged with the death penalty 22% of the time) or when the defendant is White and the victim is Black (the White defendant is only charged with the death penalty 3% of the time) show more than an *appearance of correlation*. I would argue that

⁵⁶ Pager, Devah, *Marked: Race, Crime, and Finding Work in an Era of Mass Incarceration* (The University of Chicago Press 2007) 34.

⁵⁷ Baldus Study quoted in *McCleskey v. Kemp* (1987): 481 U.S. 279

⁵⁸ Justice Powell's opinion in *McCleskey v. Kemp* (1987): 481 U.S. 279

if race only *appeared to correlate* with the sentencing of the death penalty, then the disproportionate death sentencing for African-Americans would not be so large. These numbers are too stark to be merely a coincidence. Therefore, the Supreme Court should have recognized the disparate impact of Georgia's death penalty on Blacks as enough reason to rule against it as the Court did in *Green v. Missouri Pacific Railroad Company (1975)*.

Based on the Supreme Court's decision to ignore the Baldus study as evidence for race as an influential factor in determining McCleskey's criminal responsibility and punishment, it can be interpreted that the Court thought factors other than race played a more dominant role in assigning criminal responsibility and punishment for McCleskey. The Court argued that it was "unnecessary to seek such a rebuttal, because legitimate and unchallenged explanation for the decision is apparent from the record: McCleskey committed an act for which the United States Constitution and Georgia laws permit imposition of the death penalty".⁵⁹ Here, the Court reaffirmed the decision that race did not have a role in assigning criminal responsibility and punishment for McCleskey. Instead, Justice Powell argued that McCleskey's actions themselves caused his committal to the death penalty. This argument would seem plausible if the jury considered possible mitigating factors for McCleskey and found that there were none, but they never considered any. In *Gregg v. Georgia (1976)* it was announced that "after the defendant was convicted of a capital crime, the judge had to consider any mitigating and aggravating evidence. This case resulted in the requirement of the Supreme Court of Georgia to review all death cases to see whether 'passion or prejudice'...had influenced the sentence or whether the sentence was 'excessive or disproportionate to the penalty in similar cases.'"⁶⁰ *Gregg v. Georgia* set precedence for the requirement of considering mitigating factors in death penalty cases in

⁵⁹ Justice Powell's opinion in *McCleskey v. Kemp* (1987): 481 U.S. 279

⁶⁰ Friedman, Lawrence M., *Crime and Punishment in American History* (Harper Collins Publishers 1993) 318.

Georgia as well as requiring further review by the Georgia Court in order to prevent any negative perceptions or prejudices in influencing the decision of the jury. However, the jury's decision in McCleskey's death sentence violated this rule because it was "disproportionate to the penalty in similar cases" since White men—as seen in the Baldus study—who also committed murder were often not sentenced to death as Black men were. The Superior Court of Fulton County, Georgia made the mistake of agreeing with the jury's opinion without further review of the disparate racial impact that created a discrepancy in who would receive a death sentence. One cannot consider the facts of the Baldus study as race-neutral because the disparities in the death sentencing between Blacks and Whites were so great, thus highly suggesting heavy racial influence in the decisions of assigning criminal responsibility and punishment for McCleskey.

Although there are other considerations in play when assigning the death penalty as seen in the McCleskey case (the murder of a police officer combined with armed robbery), it was the jury's discretion in deciding whether or not to consider mitigating factors that would have lessened the punishment of McCleskey. The history of racism has been ingrained in the minds of Americans since slavery and has had a huge effect on the jury's perception of African-American defendants: "Americans share a historical experience that has resulted in individuals within the culture ubiquitously attaching a significance to race that is irrational and often outside of their awareness."⁶¹ Racial discrimination is often-times conducted without reason or unconsciously. Even if a juror denies any racial influence in his or her decision, the racism in America's history shows that one's race cannot be ignored. The statistical evidence of the racial discrimination in Georgia's death sentencing practices during the 1970's by the Baldus study gave further evidence that a disparate racial impact can be translated into a racial intent to

⁶¹ Quoted in *McCleskey v. Kemp* (1987): 481 U.S. 279

criminalize Blacks more harshly. Therefore, after taking a glance at the historical effects of racial disparities and inequities, it is permissible to acknowledge that race played both a subtle role of intention when determining the agency of Warren McCleskey and an explicit role in assigning his criminal responsibility and punishment.

Through the analysis of three historical cases, which covered very important eras in African-Americans' criminal history, I have shown how the role of race in determining the agency and criminal responsibility for African-Americans has varied throughout time. The influence of race on these decisions went from being explicitly mentioned during the Antebellum and Jim Crow era to implicitly shown through disparate racial impact during the Post-1960's era. This variance in the racial influence on legal interpretations of African-Americans' agency and criminal responsibility shows the changes in how African-American's criminality have been interpreted while at the same time representing a consistency in having a unique interpretation for African-American defendants based on their race. Therefore, it is necessary to acknowledge this consistency when examining current court cases in order to fully analyze the role that race plays for today's African-Americans.

Application

As shown, felon laws are very coercive in their effects on crime probability due to their restrictions on highly-valued options--employment, education, and safety—which are necessary for attaining long-term self-preservation and self-sufficiency. African-Americans are convicted and imprisoned at a higher rate than any other racial group and as a result, African-Americans are disproportionately represented as felons. In fact, felon laws have their roots in racial politics. As discussed in my agency chapter, after the Reconstruction era felon laws were expanded to include former slaves and this led to their rapid imprisonment. This racial intent of felon laws is

currently seen by states' tendencies to expand their felon laws as their Black population increases. Due to their coercive effect on people's ability to commit crime, I argue that felon laws limit the agency of those affected by them. This limitation in agency is shown by the restriction in employment, voting, and educational opportunities. These restrictions also limit the mobility of the felon, leaving him or her trapped in the same environment that lack highly-valued options--thus fueling the criminal cycle. The coupling of race and a felon record for African-Americans makes highly-valued options virtually impossible for this group. Devah Pager describes this "double-jeopardy" effect in his Milwaukee study of race, crime, and employment: "hundreds of thousands of young black men released from prison each year, [are] facing bleak employment prospects as a result of their race and criminal record."⁶² This chapter will further analyze these felony restrictions on African-Americans' agency through an analysis of a recent court case involving a repeated felon offender: *Washington v. Poole* (2007).

I will analyze this case in order to apply my definition of agency. Using my definition of agency, I will offer a normative critique of the case. The record of this case is limited in that the defendant's exact location or race is unknown. Thus, I will use speculation in order to conclude the effects of his criminal status based on these uncertain factors. Unlike the historical analysis of this thesis, the influence of race as a motivating factor behind the conviction of African-American defendants will not be focused. Instead, this chapter will focus on the specific effects of felon laws on the agency of the defendant, who is a three-time repeated felon.

Washington v. Poole (2007)

William Washington was convicted on October 31, 2002 for grand larceny in the fourth degree, a violation of N.Y. Penal Law § 155.30(5), for stealing William Carelis's wallet.

⁶² Pager, Devah, Marked: Race, Crime, and Finding Work in an Era of Mass Incarceration (The University of Chicago Press 2007) vii-viii.

According to the N.Y. Penal Law § 155.30(5), grand larceny in the fourth degree is “the property, regardless of its nature and value, is taken from the person of another.”⁶³ During the time of the incident, Carelis “recalled feeling someone ‘brush against’ the left pocket of his pants as he was walking... discovered that his wallet, which contained \$90, was missing, and he noticed [Washington] in the vicinity.”⁶⁴ According to Carelis, he said to [Washington], “‘stop . . . you have my wallet,’ but [Washington] kept walking [and Carelis] followed the [Washington] down the stairs, but stumbled, and he yelled, ‘Hey, stop that guy, he's got my wallet.’”⁶⁵ It is during this time when witness Abdoulaye Sakho chased after Washington and grabbed him. Washington then threw the wallet towards Carelis, exclaiming that “he ‘found’ the wallet.”⁶⁶ Washington’s defense council argued that there was no evidence that Washington had used physical force and suggested that it was a possibility that the wallet fell out of Carelis’s wallet and all Washington did was merely pick it up. This defense was rejected by the Court because the judge argued that this suggestion was speculation due to a lack of evidence and Washington did not present any witnesses to attest to this. As a result, the Court was convinced that Washington had unlawfully taken Carelis’s wallet and convicted him of grand larceny in the fourth degree.

Grand larceny in the fourth degree normally amounts to a maximum of two to four years in prison, but this was Washington’s third felony offense. This meant that Washington would be sentenced based on New York’s Persistent Felony Offender statute: N.Y. Penal Law § 70.10. This statute states that “a persistent felony offender is a person, other than a persistent violent felony offender as defined in section 70.08, who stands convicted of a felony after having

⁶³ NY CLS Penal § 155.30 (2011)

⁶⁴ United States District Court, S.D. New York: 06 Civ. 2415 (JGK)

⁶⁵ United States District Court, S.D. New York: 06 Civ. 2415 (JGK)

⁶⁶ United States District Court, S.D. New York: 06 Civ. 2415 (JGK)

previously been convicted of two or more felonies.”⁶⁷ This statute gave the Court the liberty to use Washington’s history and character as well as the nature and circumstances of his crime to determine whether or not an “extended incarceration and life-time supervision will best serve the public interest.”⁶⁸ This statute results in a minimum of fifteen to twenty-five years and a maximum of life imprisonment. As a result, Washington was sentenced to twenty years in prison. The court explained that it “relied on the extensive number of his prior convictions, the fact that he repeated the same sorts of theft crimes at the same location, and the court's conclusion that he was beyond rehabilitation and would continue to steal ‘as long as he is physically able.’”⁶⁹ The Court’s decision was based on Washington’s twelve theft related misdemeanor convictions in New York City, three other theft related felony convictions between 1990 and 1999 in New York City, and fifty-seven arrests outside of New York in various states. The Court stated that once Washington is released from “committing one crime, he seems to go right back and commit another crime and is brought back to jail... This is someone who is not going to stop committing crimes.”⁷⁰ It is for these reasons that Washington was sentenced to twenty-years in prison for stealing a wallet with ninety-dollars inside, which otherwise would have led to a maximum of two years.

Washington appealed to the Supreme Court of New York’s Appellate Division arguing that his twenty-year sentence was unconstitutional. He argued that the original court-in having the sole discretion of determining his sentencing based on his history, character, and nature of crime-violated his Sixth Amendment right to a jury. Washington was referencing *Blakely v. Washington (2004)*, which “made it clear that any factor that increases a sentence for an offender

⁶⁷ NY CLS Penal § 70.10 (2011)

⁶⁸ United States District Court, S.D. New York: 06 Civ. 2415 (JGK)

⁶⁹ United States District Court, S.D. New York: 06 Civ. 2415 (JGK)

⁷⁰ United States District Court, S.D. New York: 06 Civ. 2415 (JGK)

past the statutory maximum...must be found by a jury.”⁷¹ The New York Persistent Felony Offender statute was the factor that increased Washington’s grand larceny sentence from a maximum of two to four years to a minimum of fifteen years to life imprisonment; the U.S. Supreme Court ruling in *Blakely v. Washington* (2004) prevented this from happening unless it was by a jury’s decision. In reviewing Washington’s case, the Supreme Court of New York upheld the New York Persistent Felony statute, but modified his sentence from twenty to fifteen years because it was considered excessive. This meant that the Court upheld the judge’s sole discretion in examining Washington’s history and character as well as the nature and circumstances of his theft. The Court argued that the Persistent Felony statute “merely serves to aid the Appellate Division’s judicial review of sentences for undue harshness in the interest of justice.”⁷² In other words, a jury’s ruling was deemed unnecessary. No other facts such as Washington’s environmental history were considered. In its justification, the Court further argued that “Neither this Court nor any other federal tribunal has any authority to place a construction on a state statute different from the one rendered by the highest court of the state.”⁷³ Thus, New York’s highest court rejected the Supreme Court ruling in *Blakely v. Washington* (2004).

Washington further appealed to the U.S. Court of Appeals for the Second Circuit, which argued in his favor. In March 2010, the Second Circuit stated that “we hold that the Sixth Amendment right to a jury trial, applicable to the states as incorporated by the fourteenth amendment, prohibits the type of judicial fact-finding resulting in enhanced sentences under

⁷¹ Legal Aid: <<http://www.legal-aid.org/en/mediaandpublicinformation/inthenews/newyorkspersistentfelonyoffender.aspx>>

⁷² United States District Court, S.D. New York: 06 Civ. 2415 (JGK)

⁷³ United States District Court, S.D. New York: 06 Civ. 2415 (JGK)

New York's Persistent Felony Offender statute.”⁷⁴ The Second Circuit then sent Washington's case back to lower federal courts for “determination of whether state court rulings upholding [Washington's] enhanced sentences were harmless error or whether their release should be ordered.”⁷⁵ If it is found that the sentencing was “harmless error” then Washington's sentence would be approved.⁷⁶ This case is still pending.

In Washington's original conviction, the Court disregarded the lack of highly-valued options in his environment as a possible limitation in his agency and criminal responsibility. The U.S. Court of Appeals for the Second Circuit Court argued that in his original conviction, William Washington's Sixth and Fourteenth Amendment right to a jury was violated, but the violation of these Constitutional Amendments were not the only factors neglected by this court. The New York Persistent Felony statute gives judges the liberty to examine a defendant's history as well as the nature and circumstances of the crime. Although the judge examined Washington's *criminal* history, the judge neglected to examine his environmental history, which includes the availability of employment and educational options as well as the abundance of criminal options or the lack thereof. These factors are necessary when examining one's ability to make desirable choices towards long-term self-preservation and self-sufficiency. As mentioned, the New York Court's decision in Washington's original conviction was based on the “fact that he repeated the same sort of theft crimes at the same location.” This repeat at the same location may demonstrate not a simple desire to be a criminal, but the lack of highly-valued options in Washington's environment. It seems that after his incarceration, Washington was placed in the same restrictive

⁷⁴ Legal Aid: <<http://www.legal-aid.org/en/mediaandpublicinformation/inthenews/newyorkspersistentfelonyoffender.aspx>>

⁷⁵ Legal Aid: <<http://www.legal-aid.org/en/mediaandpublicinformation/inthenews/newyorkspersistentfelonyoffender.aspx>>

⁷⁶ Glaberson, William. “N.Y. Repeat Felon is Found Unconstitutional.” New York Times March 31, 2010: <http://www.nytimes.com/2010/04/01/nyregion/01offender.html?_r=1>

environment that caused him to commit theft in the first place. This restrictive environment suggests that criminal opportunity was readily available and rehabilitation assistance—such as education and employment—were not.

As President George W. Bush stated in his 2004 State of the Union address, “we know from long experience that if they [ex-cons] can’t find work, or a home, or help, they are much more likely to commit crime and return to prison.”⁷⁷ President Bush’s message exemplifies the necessity of rehabilitation programs in an ex-offender’s environment in order to prevent a repeat in criminal activity. An example of this positive rehabilitation effect on reducing crime is shown by Newark’s Nicholson Foundation, which has a program that helps parolees receive basic necessities such as food, housing, and mental health counseling. Without this assistance, Newark’s ex-prisoners would not have access to these basic necessities. This access would help to prevent them from being coerced to commit further crime in order to fulfill these basic necessities. It becomes even more important to provide rehabilitation services in areas such as Newark because “more than 95 percent of those incarcerated [are] eventually released.”⁷⁸ This huge number of released ex-offenders makes the necessity for sufficient rehabilitation services in ex-offenders’ environments even more pressing. As Newark’s deputy mayor for economic development Stefan Pryor stated, “The last thing a returning ex-offender needs is to have to chase down a dozen different services to remedy their problems.”⁷⁹ In other words, without the presence of rehabilitation services in an ex-offender’s environment that could provide long-term self-preservation and self-sufficiency, the outcome could be problematic and the act of

⁷⁷ Pager, Devah, Marked: Race, Crime, and Finding Work in an Era of Mass Incarceration (The University of Chicago Press 2007) 10.

⁷⁸ Pager, Devah, Marked: Race, Crime, and Finding Work in an Era of Mass Incarceration (The University of Chicago Press 2007) 2.

⁷⁹ Jacobs, Andrew. “Seeking the Key to Employment for Ex-Cons.” New York Times April 27, 2008: <http://www.nytimes.com/2008/04/27/nyregion/27excons.html?_r=1&scp=1&sq=seeking%20the%20key%20to%20employment%20for%20ex-cons&st=cse>

committing crime would continue. Newark also has a mechanics training school specifically for ex-offenders with felony records and “90 percent of the graduates find jobs and stay out of jail.”⁸⁰ Newark has shown that rehabilitation services for ex-offenders serve as highly-valued options for them. As shown by the 90% graduation rate, these services are highly-valued by participating ex-offenders. Thus, when an ex-offender’s environment is revamped to include highly-valued options that were once restricted to him or her, crime then becomes the undesirable option that s/he refrains from. Therefore, I argue that Washington’s repeat of the same crime at the same location may have been due to a lack of rehabilitation services in his environment. These services, if available, could have prevented Washington from committing further theft crimes.

Some may argue that rehabilitation services are not enough to prevent one from committing further crime. This was the case in Newark, New Jersey with Ronald O’Reily, a forty-one year old ex-convict who spent most of his life in prison for burglary, drug sales and weapons possession. He was offered a furnished apartment to live in as well as a job to help build and renovate apartments. According to the 2008 New York Times Article “Seeking the Key to Employment for Ex-Cons,” within five months, O’Reilly “had rekindled his love affair with crack cocaine...He stopped coming to work, ceased paying his \$500 monthly rent, and by the time he was evicted, had not only sold off the contents of the apartment, but also the items in an adjacent storage space that belonged to his erstwhile patron... He was arrested soon after and charged with sexual assault.”⁸¹ The case of O’Reily shows how rehabilitation services such as

⁸⁰ Jacobs, Andrew. “Seeking the Key to Employment for Ex-Cons.” New York Times April 27, 2008: <http://www.nytimes.com/2008/04/27/nyregion/27excons.html?_r=1&scp=1&sq=seeking%20the%20key%20to%20employment%20for%20ex-cons&st=cse>

⁸¹ Jacobs, Andrew. “Seeking the Key to Employment for Ex-Cons.” New York Times April 27, 2008: <http://www.nytimes.com/2008/04/27/nyregion/27excons.html?_r=1&scp=1&sq=seeking%20the%20key%20to%20employment%20for%20ex-cons&st=cse>

employment and housing are sometimes unable to prevent an ex-con from committing further crime. This may have been the case with Washington as well. In this case, one could argue that Washington's agency was not limited because rehabilitation services may have been available to him. Although this could be true, this argument fails to consider other agency limiting factors that can cause Washington to commit further in the face of highly-valued options such as rehabilitation services. These factors include a lack of rehabilitation while in prison, a development of a habit, and old age.

The prison system is seen as more of a punitive solution to crime rather than as a means for rehabilitation. This lack of rehabilitation has been shown to be ineffective and destructive. As a 1967 report published by the President's Commission on Law Enforcement and Administration of Justice stated, "the conditions in which [prisoners] live are the poorest possible preparation for their successful reentry to society, and often reinforces in them a pattern of manipulation or destructiveness."⁸² This study recognized that without successful rehabilitation inside of prisons, the prisoner would leave with either the same criminal tendencies as before or worse. In other words, the penal system is ineffective and contributes to the re-arrests seen among many ex-cons. This fact was noted in a 1973 report by the National Advisory Commission on Criminal Justice Standards and Goals: "institutions create crime rather than prevent it."⁸³ The claim that institutions create crime is a strong accusation of America's penal system, which highlights both this system's inability to prevent crime and its role as a crime incubator. This fact could be attributed to Washington's case who was not a stranger to this system as a three-time repeated felon with an "extensive number of prior convictions." As it has been shown, when a prisoner is

⁸² As quoted in Pager, Devah, Marked: Race, Crime, and Finding Work in an Era of Mass Incarceration, (The University of Chicago Press 2007) 1.

⁸³ As quoted in Pager, Devah, Marked: Race, Crime, and Finding Work in an Era of Mass Incarceration, (The University of Chicago Press 2007) 5.

incarcerated, he or she is not given assistance such as counseling, education or job training that would serve to prevent further crime. Instead, one receives retribution. The focus on retribution rather than rehabilitation means that Washington's time in prison lacked highly-valued options, which he could have used as a proper means for reintegration into the broader society. Therefore, even if Washington's environment outside of prison consisted of rehabilitation services, the failure to provide these services while he was in prison may have conditioned him to be a permanent criminal incapable of being rehabilitated by services outside of prison. This results in a restriction of his criminal agency in further committed crimes.

Habit could also explain a repeat of crime even in the midst of available rehabilitation services in his environment. In Washington's original conviction, the judge recognized that Washington is "someone who is not going to stop committing crimes." It seems then that as someone who constantly repeats the same crime, has made it out of a habit. Instead of viewing this habit of thieving as an inherent criminality that deserves long-term imprisonment, one should consider other possible origins of this habit. As I argued previously, Washington's repeat of the same crime at the same location could represent a lack of highly valued options in his environment. It could have been that each time Washington was convicted of theft, he was sent back to his same restricted environment with the opportunity to commit it again. This restricted environment, coupled with the penal system's lack of rehabilitation services and its tendency to foster crime, most likely limited Washington's agency in choosing a life without crime. After being used to the same restrictive environments for so long, Washington may have become used to stealing goods in order to fulfill the necessity of long-term self-preservation. Getting used to crime or creating a habit out of it could result in one's inability to be rehabilitated. The judge seems aware of this possibility when s/he concludes that Washington was "beyond rehabilitation

and would continue to steal as long as he is physically able.” Instead of viewing this habit as a reason for further punishment, the judge should have recognized that Washington’s possible history of restricted environments—both in and outside of prison—may have coerced Washington into a life of crime and he could not have fathomed life without it. In other words, a habit in committing crime represents a restriction in one’s agency, and one’s disregard for available rehabilitation services shows the magnitude of this habit.

In addition, Washington’s age could explain his repeat in crime even when there may have been rehabilitation services within his environment. Washington was sixty-three years old⁸⁴ when the Second Circuit Court of Appeals ruled that his conviction under the New York Persistent Felony statute was unconstitutional. This fact would have made Washington sixty-years old during his original conviction in 2007. Washington’s age is very significant in analyzing his possible agency during the time of the crime. As someone who is approaching retirement age,⁸⁵ Washington’s job prospects are slim, especially for a senior felon. Pager recognizes the difficulty in senior felons refraining from further crime due to limited employment opportunities: “weakened ties to family and work associated with long spells of incarceration may themselves stimulate continued offending.”⁸⁶ Washington’s ability to obtain sufficient employment may have been extremely limited due to his old age and long-time prison history. As a result, his ability to refrain from constant theft would have been extremely limited as well. Washington would not have been able to hold steady employment nor would he have been able to obtain necessary employable skills. Therefore, Washington’s old age is a possible

⁸⁴ Ginsberg, Alex and Bruce Golding. “3 Strikes and You’re Back Out” New York Post April 1, 2010: <http://www.nypost.com/p/news/local/strikes_you_re_back_out_EWfPrcutHMwDgHWPuH2OIM>

⁸⁵ Kwoh, Leslie. “New Jersey Seniors Working Past Retirement Age.” NJ.com March 6, 2011: <http://www.nj.com/business/index.ssf/2011/03/more_seniors_working_past_reti.html>

⁸⁶ Pager, Devah, Marked: Race, Crime, and Finding Work in an Era of Mass Incarceration (The University of Chicago Press 2007) 13.

factor in his repeat of theft even when rehabilitation services may have been available to him.

The Court should have considered Washington's age as a limiting agency factor in his constant repeat of theft when determining his criminal responsibility.

As shown, rehabilitation services in an ex-offender's environment are not always able to prevent him or her from committing further crime, but for the most part these services have been shown to greatly reduce crime; a fact that becomes obsolete for many African-Americans due to the location variance of these services. Rehabilitation services vary depending on location, which causes a discrepancy in the services received between minorities and White ex-offenders. The organization Drug Policy found that "White first offenders received rehabilitative placements in the community at twice the rate of blacks or Latinos."⁸⁷ This discrepancy leaves African-American ex-offenders more vulnerable to recidivism. In other words, African-Americans' environments are less likely to include highly-valued options that would minimize criminal opportunity. Although Washington was not a first-time offender at the time of his original conviction and his race is unknown, the fact that there is a racial discrepancy in available rehabilitation services, shows that if he were African-American, his chances at receiving rehabilitation services after incarceration are very limited. This could also explain Washington's repeat of the same theft crime at the same location; without the presence of rehabilitation services, Washington's chances at obtaining highly-valued options were restricted. This may have led to a restriction in Washington's agency and should have therefore, been considered as such when the judge assigned his criminal responsibility and punishment.

In his book, *Marked*, Devah Pager describes this coercive effect of committing further crimes by an ex-prisoner due to a lack of highly-valued options: "scholarly literature in criminology indicates that ex-offenders who are unable to find legal work face increasing

⁸⁷ Drug Policy: <<http://www.drugpolicy.org/library/schiraldi2.cfm>>

incentives to return to crime...a criminal record may itself reduce opportunities for finding legitimate work.”⁸⁸ Ex-offenders often find difficulty in gaining employment due to their criminal record and without the highly-valued option of employment, he or she find incentives to return to crime. The article “Seeking the Key to Employment for Ex-Cons” also vividly explains this dire situation in which ex-prisoners struggle at obtaining highly-valued options as they exit prison and becomes re-integrated into the same restrictive environment they derived from:

Parolees with drug convictions do not qualify for federal tuition grants and outstanding traffic fines prevent many from obtaining driver’s license [sic] that would give them access to jobs beyond the city’s public transit system and because child support payments and court fees accrue while they are behind bars, the pay-checks of newly employed offenders are sometimes heavily garnished⁸⁹

This article shows that in Newark, New Jersey, highly-valued options such as quality education, sufficient employment, and minimal criminal opportunity are almost non-existent for ex-prisoners. There exist many barriers to achieving highly-valued options for felons, including transportation, education, and employment barriers. According to Devah Pager’s Milwaukee study of felons and employment, ex-offenders have a higher chance at being employed in the suburbs than the city,⁹⁰ but when one is prevented from this locale with higher availability of employment due to transportation barriers, their freedom to obtain such employment is restricted.

When an ex-offender is faced with barriers to education, s/he is limited in his or her job

⁸⁸ Pager, Devah, Marked: Race, Crime, and Finding Work in an Era of Mass Incarceration (The University of Chicago Press 2007) ix.

⁸⁹ Jacobs, Andrew. “Seeking the Key to Employment for Ex-Cons.” New York Times April 27, 2008: <http://www.nytimes.com/2008/04/27/nyregion/27excons.html?_r=1&scp=1&sq=seeking%20the%20key%20to%20employment%20for%20ex-cons&st=cse>

⁹⁰ Pager, Devah, Marked: Race, Crime, and Finding Work in an Era of Mass Incarceration (The University of Chicago Press 2007) 110-111.

prospects and often-times ends up with an insufficient employment that garner's his or her entire paycheck due to built up fines that were out of one's control while incarcerated. Even if these barriers are not enough for one to commit further crime, the transportation barrier to employment will certainly leave one without the means to stay employed. According to the article "Seeking the Key to Employment for Ex-Cons," Newark's unemployment rate is twice that of the state average with 16% of adults possessing a criminal record and as the article describes: "The situation epitomizes the way Newark's two leading problems, crime and unemployment, are intertwined with the huge number of ex-convicts in the city."⁹¹ There is a positive correlation between unemployment and crime rates. Without highly-valued options such as sufficient employment, crime initially becomes an attractive means for survival and later becomes an overwhelming option for those residing within this environment. As Pager noted, "incarceration is associated with limited future employment opportunities and earnings potential, which themselves are among the strongest predictors of desistance from crime."⁹² It seems then that in order to achieve long-term self-preservation and self-sufficiency, Washington may have been coerced into committing the same crime due to his felon status, which restricted employment opportunities and as a result crime served as an alternative to this missing highly-valued option.

The lack of highly-valued options is the reason behind many re-arrests. This relationship between highly-valued options and re-arrests is highly apparent in Newark, New Jersey where there exists a high unemployment rate with re-arrests rates up to 65% within five years out of

⁹¹ Jacobs, Andrew. "Seeking the Key to Employment for Ex-Cons." New York Times April 27, 2008: <http://www.nytimes.com/2008/04/27/nyregion/27excons.html?_r=1&scp=1&sq=seeking%20the%20key%20to%20employment%20for%20ex-cons&st=cse>

⁹² Pager, Devah, Marked: Race, Crime, and Finding Work in an Era of Mass Incarceration (The University of Chicago Press 2007) 3.

prison.⁹³ Many times ex-offenders are rearrested for the same crimes as demonstrated in a 1985 article from the U.S. Department of Justice titled “Probation and Felony Offenders”: “With the exception of drug offenders, [California’s] probationers were most often arrested and convicted of the same crimes they had been originally been convicted of.”⁹⁴ This particular study shows that re-arrest rates are even more apparent with felony offenders as seen in William Washington’s case who, as a felon, was convicted of “seventy similar thefts.”⁹⁵ When the Court examined the nature and circumstances of Washington’s theft, they should have considered the possible the circumstance of his environment lacking sufficient employment as well as the possibility of the nature of his theft being a viable means for self-preservation. In other words, the nature and circumstances of Washington’s crime may have limited his criminal agency and as a result, limited his criminal responsibility. Washington’s conviction should have acknowledged this notion.

Washington’s repeat of the same crime at the same location not only shows a possible lack of highly-valued options, but also the restrictions placed on felons. In many cases, the option to travel outside a restrictive environment (one that lacks highly-valued options) is virtually impossible for ex-offenders. This was seen in Newark, New Jersey where felons who were prevented from obtaining a driver’s license could not travel to available employment because it existed outside of the city and public transportation to these areas was unavailable. Felons are often-times “stuck” in environments that lack sufficient employment due to transportation barriers. Furthermore, educational attainment is virtually impossible for drug

⁹³ Jacobs, Andrew. “Seeking the Key to Employment for Ex-Cons.” New York Times April 27, 2008: <http://www.nytimes.com/2008/04/27/nyregion/27excons.html?_r=1&scp=1&sq=seeking%20the%20key%20to%20employment%20for%20ex-cons&st=cse>

⁹⁴ “Probation and Felony Offenders.” U.S. Dept. of Justice 1985

⁹⁵ Glaberson, William. “N.Y. Repeat Felon is Found Unconstitutional.” New York Times March 31, 2010: <http://www.nytimes.com/2010/04/01/nyregion/01offender.html?_r=1>

offenders since they are restricted from financial aid and other educational privileges. These restrictions can coerce a felon to commit further crime in order to attain the necessary values of long-term self-preservation and self-sufficiency. This coercion creates a limitation of one's agency. Washington's could have environment restricted his agency, but the mere fact that he was a felon highlights this restriction even more. Even if Washington's environment consisted of these highly-valued options, he was barred from these available options because of his felon status.

The effects of a felon status on one's agency also vary by race such that African-Americans' agency becomes more restricted than their White counterparts. In his book *Marked*, Devah Pager describes a negative credential as an "official marker that restricts access and opportunity rather than enabling them."⁹⁶ He argues that a criminal record is the "archetypal" negative credential as a "wide range of social, economic, and political privileges become off-limits."⁹⁷ Thus, a felony's negative credential restricts the agency of felons because it restricts opportunities and access to goods necessary for self-preservation. Felons are restricted from having access to necessary goods such voting, higher-education, and even from some of the most basic low-wage occupations such as barber, plumber, and billiard room employee.⁹⁸ Many of these restricted employments are those that African-Americans heavily occupy: the public sector and low-wage medical jobs.⁹⁹ Therefore, if Washington is an African-American, he is restricted from achieving self-preservation in its most basic form. As a result, crime may have resulted in being the next viable option.

⁹⁶ Pager, Devah, *Marked: Race, Crime, and Finding Work in an Era of Mass Incarceration* (The University of Chicago Press 2007) 32.

⁹⁷ Pager, Devah, *Marked: Race, Crime, and Finding Work in an Era of Mass Incarceration* (The University of Chicago Press 2007) 35.

⁹⁸ Pager, Devah, *Marked: Race, Crime, and Finding Work in an Era of Mass Incarceration* (The University of Chicago Press 2007) 33.

⁹⁹ Pager, Devah, *Marked: Race, Crime, and Finding Work in an Era of Mass Incarceration* (The University of Chicago Press 2007) 33.

In examining the racial influence on a felon's job prospects, Pager found a "strong aversion to both blacks and ex-offenders, and an even stronger aversion towards applicants bearing both characteristics...the combination of minority status and criminal record results in almost total exclusion from this labor market."¹⁰⁰ If this fact is factored into Washington's case, it becomes evident that as an African-American, Washington's ability to refrain from crime may have been heavily curtailed and therefore his determine criminal responsibility by the Court should have reflected this. This could explain his extensive criminal history of "seventy similar thefts" since theft is a way to provide self-preservation through economic gain. Pager's study involved an examination of both Black and White felons with the same credentials: criminal record, employment competency, and educational level. In other words, the participants were identical except for a difference in race. Even with these similarities, Pager explains that a White felon has a higher percentage of gaining employment than a Black felon-especially when there was personal contact involved: White felons without personal contact received callbacks from employers 9% of the time versus 4% for Blacks, and White felons who did have personal contact with employers received callbacks 42% of the time versus 6% callbacks for Black felons with this same personal contact.¹⁰¹ A personal contact allows the employer to get to know the employee beyond what is written on the application. Here, the felon has some opportunity to persuade the employer to hire him or her even with a criminal record. As this study reveals, African-Americans are at an extreme disadvantage when attempting to convince employers to hire them as shown by the small percentage difference between personal contacts and none at all for this group. Therefore, race heavily influence how one could exercise his or her agency.

¹⁰⁰ Pager, Devah, Marked: Race, Crime, and Finding Work in an Era of Mass Incarceration (The University of Chicago Press 2007) 101.

¹⁰¹ Pager, Devah, Marked: Race, Crime, and Finding Work in an Era of Mass Incarceration (The University of Chicago Press 2007) 104-105.

Pager also describes a difference in employment for Black and White felons depending on location such as in the suburbs versus the inner-city. White felons had a 7% callback rate in the inner-city versus 6% for Blacks, and White felons within the suburbs had a 22% callback rate versus 3% for Blacks.¹⁰² This study shows that Black felons fare worse in obtaining employment in the suburbs than in the city and in comparison to Whites, their employment prospects were even more insignificant. This inner-city versus suburb comparison is important because as seen previously with felons in Newark, much of the available employment is outside of the inner-city. In this Milwaukee study, Pager shows that “more than 90 percent of recent job growth was in the outlying areas, compared to only 4 percent of new jobs in the central city of Milwaukee.”¹⁰³ African-Americans are disproportionately represented in inner-cities and are therefore disproportionately affected by unemployment. This low percentage in the suburban employment rate for African-Americans can also be attributed to transportation barriers as witnessed in the Newark case study. Even when African-Americans were hired in employment outside the inner-city, they were often-times prevented from staying employed due to heavy traffic fines that prevented them from driving a car as well as an unreliable or non-existent public transportation systems.¹⁰⁴ Considering the fact that Washington was convicted of “twelve theft related misdemeanors in New York City... [and] three other theft related felony convictions in New York City” shows that employment which would have been sufficient for Washington to stop committing theft may have been unavailable to him since New York City is an inner-city

¹⁰² Pager, Devah, Marked: Race, Crime, and Finding Work in an Era of Mass Incarceration (The University of Chicago Press 2007) 110-111.

¹⁰³ Pager, Devah, Marked: Race, Crime, and Finding Work in an Era of Mass Incarceration (The University of Chicago Press 2007) 107.

¹⁰⁴ Note: the results of Devah Pager’s Milwaukee study show “a best case scenario in portraying the views of employers in other metropolitan areas (*Marked*, 120). Milwaukee was actually considered more tolerant and open in its hiring of ex-offenders than employers in cities such as Chicago, Cleveland, and Los Angeles. In other words, for African-American felons in other cities’ the chances at getting employed are even more lower than they are in Milwaukee.

and as shown, there is a higher chance for one to receive employment outside of the inner-city. Instead of examining Washington's perpetual theft crimes as an inherent tendency to be a criminal, the Court should have examined his criminal history in light of his potential restricted environmental history as a Black, inner-city felon. Washington's environmental history—which included possible racial discrimination and a lack of highly-valued options—could have translated into a limitation of both his agency and criminal responsibility. Therefore, Washington's punishment should have reflected this restriction.

Conclusion

The American criminal justice system has expanded since the 1970s. The prison population was 100 inmates per 100,000 residents for most of the twentieth century until it doubled between 1972 and 1984, and then increased to 486 per 100,000 residents in 2004.¹⁰⁵ Currently seven million people are under criminal justice supervision and “tough on crime” policies are responsible for this rapid expansion.¹⁰⁶ Before these policies emerged during the 1950's and 1960's, the criminal justice system focused more on rehabilitation than retribution: “it was widely believed that counseling, education, and job training were central to criminal desistance and that active intervention could have lasting effects.”¹⁰⁷ Counseling, education, and job training are important rehabilitative methods for ensuring a smooth transition into the broader society. These methods equip an ex-offender with essential skills needed to gain competency in areas such as the work force. As shown previously in William Washington's case, the lack of sufficient employment is the major cause for re-arrests among ex-offenders. Although

¹⁰⁵ Pager, Devah, Marked: Race, Crime, and Finding Work in an Era of Mass Incarceration (The University of Chicago Press 2007) 11.

¹⁰⁶ Pager, Devah, Marked: Race, Crime, and Finding Work in an Era of Mass Incarceration (The University of Chicago Press 2007) 11.

¹⁰⁷ Pager, Devah, Marked: Race, Crime, and Finding Work in an Era of Mass Incarceration (The University of Chicago Press 2007) 15.

it has been shown that rehabilitation services have been proven to be effective at preventing further crime, the current American criminal justice system ignores this fact and instead engages in retribution: “instead of helping prisoners locate or maintain a job, find a residence, or locate needed drug treatment services, the new parole system is bent on surveillance and detection.”¹⁰⁸ With retribution as a focus, crime policy has transitioned into “harsher sentences for a broader range of offenses.” This broader range of offenses began to include non-violent crimes, such as drug offenses.¹⁰⁹ As a result of retribution, the prison population among varied groups has expanded, but this has especially been the case for African-Americans.

Racial discrimination has resulted in African-Americans being uniquely affected by the criminal justice system as seen by their disproportionate criminal status in comparison to their overall U.S. population. The concentration on retribution has not only increased the number of prisoners, but it has also increased the number of felons. The U.S. is beyond comparison in its “scope and impact of [its] disenfranchisement laws,” which affect 5.3 million people.¹¹⁰ As described in my introduction, African-Americans are incarcerated at a much higher rate than any other group and as a result are disproportionately affected by felon laws. In addition African-Americans are also uniquely restricted under these laws. For instance, much of the employment that is barred under felon laws includes jobs that are African-Americans highly occupy. In addition to this racialized barring of employment, the impact of a felon record on African-Americans’ chances of being hired for a non-barred job are even more dire than for their White counterparts. Job growth is also more concentrated in suburbs than in inner-cities and as seen

¹⁰⁸ Pager, Devah, Marked: Race, Crime, and Finding Work in an Era of Mass Incarceration (The University of Chicago Press 2007) 24.

¹⁰⁹ Pager, Devah, Marked: Race, Crime, and Finding Work in an Era of Mass Incarceration (The University of Chicago Press 2007) 11.

¹¹⁰ *Requests for Hearing* in Sentencing Project:

<http://www.sentencingproject.org/doc/publications/fd_IACHRHearingRequest.pdf>

previously in my agency chapter, African-Americans are highly concentrated in these low job growth inner-cities due to racial segregation. As a result, African-Americans are marginalized from much of the available employment. Therefore, due to racial discrimination, African-Americans' criminal agency is uniquely restricted, thus requiring a new method for analyzing agency that would recognize this restriction.

As seen in the history chapter, the influence of racial discrimination has for a very long time, been a major influence for determining African-Americans' agency, criminal responsibility, and punishment within courts. Due to this racial influence, I saw that there was a need to establish a new definition of agency that would acknowledge this fact. This is why I focused on African-Americans in my research. The racial discrimination that this group faces within the criminal justice system is unparalleled. My definition of agency shows how racial discrimination causes a train of effects that limit the agency of African-Americans, including environmental restrictions. The idea of agency has been debated for many years and in developing my own definition of this long debated topic, it was necessary for me to build on these other established definitions of agency. Unlike these other definitions, I included the effects of racism. Using my definition of agency, I want to pursue real policy changes within the criminal justice system as well as among other institutions that the criminal justice system indirectly affects such as public education and employment.

William Washington's case shows the dire need for policy changes within the criminal justice system as well as within the institutions that it affects. Although the record of Washington's case is limited in terms of the identification of his race and exact environment, I was able to speculate as to what his situation may have looked like if his race and environment were known. This speculation showed that African-American felons are more disadvantaged

than their White counterparts. It also showed that African-Americans are disproportionately affected by impoverished, urban areas that lack highly-valued options including necessary rehabilitation services for ex-offenders. As a result of racial discrimination, most particularly discrimination of Blacks, African-Americans' criminal agency is limited more so than any other group. If one is denied employment due to one's race, it makes it hard for that person to exercise his or her agency as s/he desires. The denial of employment due to a felon record creates this same difficulty, but when coupled with racial discrimination, one's agency is further limited and often leads to the choice of crime as an alternative. I speculated this double jeopardy effect of race and a felon record with William Washington. I showed when one's environment fosters crime rather than sufficient employment, this restrictive environment becomes an influential factor on one's criminal actions. These three barriers—racial discrimination, a felon record, and a restrictive environment—create a unique restriction on African-Americans' agency. It then seems that the overrepresentation of African-Americans within the criminal justice system is due to a lack of acknowledgement of this unique restriction on their agency. If the criminal justice system views many of the criminal actions of African-Americans as a potency to be criminals--as they did with William Washington--rather than a restriction in agency, then the disproportionate criminal status of this group becomes justified. However, this conclusion is problematic. Even if race is removed from being an influential factor within the criminal justice system—which often times results in harsher sentencing for African-Americans, it is still apparent that race plays a major part in determining the life choices for many African-Americans well before they even enter a courtroom as shown by the lack of highly-valued options in their environments. This fact was also noted in my introduction by scholar Bruce Western from his book *Punishment and Inequality in America* in which he argued that poverty is one of the major causes for African-

Americans' mass incarceration. Due to this finding, it becomes important to push for policy changes that would recognize this unique agency of African-Americans in order to stop the injustice of their alarming overrepresentation within the criminal justice system.

Some may argue that creating a new policy that would cater to African-Americans' unique agency is problematic since it echoes a "separate, but equal" rhetoric. In order to avoid a "separate, but equal" system for African-Americans, my definition of agency is flexible enough to be applied to all. Essentially, my definition of agency argues for a policy change in how legal actors interpret sufficient agency. Through the recognition of previously unexplored factors that inhibit agency and coerces criminal activity—such as one's environmental history and the restrictive impact of felon laws—this can be done. For instance, if William Washington is a White man whose environment lacked sufficient highly-valued options that limited his ability to refrain from criminal activities, then his agency would be restricted just as any other who has been subjected to such an environment and the same goes for felony restrictions on agency. The only difference is that the mark of Black skin further limits one's agency when this race is discriminated against in areas such as employment and felon laws. This was discovered by Devah Pager in his Milwaukee study when he found that African-American felons were at a greater disadvantage than their White counterparts. The effect of racial discrimination also affects one's environment and the availability of highly-valued options as seen in Pager's study of the high job-growth rate in suburban areas rather than inner-cities in which the majority of African-Americans reside. I propose policy changes within the criminal justice system that would require legal actors to recognize these various limits on agency, including racial discrimination, in their decisions of criminal responsibility. A person's whole history and not just their criminal history should be considered. Therefore, when assigning criminal responsibility

through the analysis of the “history, nature and circumstances” of the offender and his or her criminal action, these limiting factors should be taken into account.

Another policy change that I propose involves changes in felon laws. As shown, felon laws have unequal restrictions on ex-offenders that highlight the influence of racial discrimination. I argue that felon laws should have equal effects on all felons, which would require lifting restrictions on the most basic forms of employment and educational opportunities that disproportionately affect African-Americans. In other words, this new policy would lift the barring on the barber and plumber trades as well as on federal financial aid, which specifically target drug-offenders. I also propose that the requirement for felons to include their criminal history on job applications be a voluntary decision instead. As seen in Devah Pager’s Milwaukee study, a felon record puts felons at an extreme disadvantage when applying for employment—regardless of their skills or educational history. In the arena of voting, I propose that felon restrictions are lifted in order to allow the felon sufficient agency in their life circumstances. Felon laws should not coerce further criminal activity, but instead help felons reintegrate into the broader society and this can only be done if the insurmountable restrictions that it place on ex-offenders are removed.

I also propose policy changes regarding rehabilitation services. Often-times ex-offenders are thrust back into restrictive environments without a sense of security, and crime becomes a means for obtaining that security out of desperation. As Newark’s mechanics training school founder Rich Liebler stated: “It takes at least a year to ‘deprogram’ the felons. Most have never owned an alarm clock — months can pass before they show up for class on time — and few can name a family member with a regular job.’ ‘We treat them as if they were in a cult,’ he said. ‘We

have to reverse the thought process they've grown up into.”¹¹¹ Liebler pointed out the importance of rehabilitation services in changing the habit of criminal activity among ex-offenders who have grown accustomed to restrictive environments that foster crime. I speculated this habitual effect by perpetual crime with William Washington. Rehabilitation services are needed to help end this habit. In order for this proposal to be effective, I argue that rehabilitation services should be proportion to population and crime rates. For instance, if an area has a high crime rate and a high ex-offender population, then there should be sufficient rehabilitation services to fulfill the high need within that community. Currently, what is seen is an unequal distribution of rehabilitation services between African-American and White communities. Requiring equal proportions of rehabilitation services will offset this inequality. Crime heavily rests within impoverished, urban areas and therefore, these areas should receive more rehabilitation services in order to offset a repeat in crimes. As stated before, these areas are where African-Americans are overrepresented, and providing sufficient rehabilitation services within these areas may also decrease African-Americans' overrepresentation within the criminal justice system.

I also argue that sufficient rehabilitation services should be available not only when these ex-offenders are released from prisons, but also while they are in prison in order to ensure an effective re-integration. As mentioned, since the early 1970's rehabilitation services within prisons are almost obsolete as the focus has transitioned from rehabilitation to retribution. I argue for required rehabilitation services within prisons including specialized counseling, job training, education, and drug rehabilitation. Rehabilitation services within prisons would also make it

¹¹¹ As quoted in: Jacobs, Andrew. “Seeking the Key to Employment for Ex-Cons.” New York Times April 27, 2008:
<http://www.nytimes.com/2008/04/27/nyregion/27excons.html?_r=1&scp=1&sq=seeking%20the%20key%20to%20employment%20for%20ex-cons&st=cse>

easier for ex-offenders to be susceptible to rehabilitation outside of prison. Rehabilitation services within and outside of prisons have shown to be very effective at preventing further crimes. This too may diminish the overrepresentation of African-Americans within the criminal justice system.

Some may question how these rehabilitation services will be funded. My final proposal argues for a redistribution of state funding from penal systems to public school systems in order to fund these necessary rehabilitation services. In my introduction, I showed how states' public education funding suffers at the expense of increases in the funding of prisons. This fact is disturbing considering there have been studies that have shown that increases in educational funding actually prevent future crime. Schools with insufficient funding birth high-school dropouts and high-school drop-outs often lead a life of crime. It seems then that a vicious cycle occurs; while public schools are defunded, much of their student population drop-out and as a result, the criminal justice system is funded to accommodate these high-school drop-outs. The reversal of states' funding from their prisons to the public schools will provide the highly-valued option of education in disadvantaged communities—thus increasing the agency of those that reside within those areas.

In accordance with the increased spending of prisons at the expense of public schools is the global mechanism called the prison industrial complex, which takes funding away from impoverished, urban areas where sufficient employment is greatly needed. At the 2007 Women's Resource Center conference on the prison industrial complex, scholar and activist Angela Davis called this complex a "massive apparatus with global dimensions that profits from the incarceration of human beings...[which] goes beyond the notion that punishment stems from

crime.”¹¹² Davis explains how prisoners are used as cheap labor for the benefit of corporations and how this economic benefit creates an incentive for the state to create crime. This creating of crime involves characterizing some actions as criminal acts that were previously not thought of as crime in earlier decades. In other words, the imprisonment of individuals is not just about crime, but about maximizing profits for corporations and states. She explains how there are “other forces on the punishment process...especially racism...especially sexism...[these concepts] have deployed the concept of a prison industrial complex.”¹¹³ Davis recognizes that factors such as racism have a huge influence on the incrimination of individuals. This idea is reminiscent of my own argument of racial discrimination as a hindrance on one’s criminal agency. Davis agrees with Pager in arguing that this massive incarceration since the 1970s was due to the inclusion of non-violent crimes in the criminal justice system such as drug use.¹¹⁴ Due to this inclusion of crimes previously not considered as crime and its disparate effect on African-Americans, it is no wonder why Davis believes these new policies were racially motivated.

An example of this prison industrial complex is that of the Los Angeles based factory U.S. Technologies, which closed its plant to the general public and moved it to the nearby correctional facility. An article from the news of Worcester Polytechnic Institute titled “Prison Labor Cheats Society” explains how “prisons in impoverished areas often end up with inmates from the local area who had previously worked in the community.”¹¹⁵ This article shows how prisons are funded at the expense of much needed employment. In fact, this increase in prison funding is encouraged. According to the Worcester Polytechnic Institute, state corrections agencies advertise prison labor and specifically in California, “inmates who work for the private

¹¹² As quoted in Archives.org: <http://www.archive.org/details/Angela_Davis_-_Prison_Industrial_Complex>

¹¹³ As quoted in Archives.org: <http://www.archive.org/details/Angela_Davis_-_Prison_Industrial_Complex>

¹¹⁴ As quoted in Archives.org: <http://www.archive.org/details/Angela_Davis_-_Prison_Industrial_Complex>

¹¹⁵ Worcester Polytechnic Institute News: <<http://www.wpi.edu/News/TechNews/010327/prisonlabor.shtml>>

corrections called the Prison Industrial Authority, earn wages between 30 and 95 cents per hour before required deductions for restitutions and fines.”¹¹⁶ This low wage shows the incentives of corporations and states to exploit prison labor instead of employing citizens from the general population, which would allow for an economic growth in impoverished, urban areas that lack highly-valued options. Thus, this privatization and the use of cheap prison labor often lead to more crime as highly-valued options are stripped from these vulnerable environments. According to Angela Davis and Devah Pager, crime is often created in order to satisfy the interest of the state and participating corporations. In order to fund my policy initiative, I argue for the end of exploiting prison labor and for corporations that participate in the prison industrial complex be required to provide employment in disadvantaged neighborhoods where most of these prisoners often derive. This would provide much needed highly-valued options such as rehabilitation services in the area and greatly reduce crime.

Some may argue that the use of cheap prison labor and its privatization is beneficial. According to Robert D. Atkinson from the Progressive Policy Institute, prison labor reduces recidivism and supports the overall economy¹¹⁷ and Stephen McFarland, Chris McGowen, and Tom O’Toole from Cornell University argue that the privatization of corrections leads to improving the quality of the services provided without increasing the costs or decreasing the quality of services.¹¹⁸ According to Atkinson, prison labor provides job training to inmates, which helps to reduce recidivism because the ex-offender will have skills necessary to maintain

¹¹⁶ Worcester Polytechnic Institute News: <<http://www.wpi.edu/News/TechNews/010327/prisonlabor.shtml>>

¹¹⁷ Atkinson, Robert D.. “Prison Labor: Its More Than Breaking Rocks.” May 2002: 3:
<http://www.ppionline.org/documents/prison_labor_502.pdf>

¹¹⁸ McFarland, Stephen, Chris McGowen, Tom O’Toole. “Prisons, Privatization, and Public Values.” Cornell University, Restructuring Local Governments:
<http://government.cce.cornell.edu/doc/html/PrisonsPrivatization.htm#_Introduction>

employment,¹¹⁹ and according to Atkinson, this output by the inmate benefits the nation's economy. I argue that while the nation's GDP benefits from prison labor, the inmate or ex-offender and his or her specific community does not. As I have shown, the environments from which many of these inmates derive birthed their criminal activity. In other words, the economic benefit that the nation as a whole is supposedly enjoying does not reach the impoverished, urban environments that forever lack highly-valued options. These areas are marginalized from this so-called increase in GDP and without providing actual economic benefits such as sufficient employment within these impoverished environments, the inmate may find him or herself back in a life of crime, which leads to further exploitation of their labor once they return to prison. As a result, the only players that are winning in the increasing of GDP are the prisons, corporations, and the wealthy—not the prisoners or their communities. In regards to the prisoner gaining employment skills while participating in prison labor, I argue that these skills go to waste once these prisoners are placed in the same restrictive environments as before. Without sufficient employment on the outside, the ex-offender cannot exercise his or her newfound skills. According to McFarland, et. al, the privatization of labor increases the efficiency of the corporations' services and products. The increasing of the efficiency of these products and services only benefits the corporations and not the prisoners or their communities. This privatized prison labor does not put money into much needed communities nor does it help the prisoner since a large majority of their wages is taken for restitution.

As a part of my policy initiative, I argue for the end of the exploitation of prisoners and a push for corporate responsibility in surrounding communities. I propose that instead of using prisoners for their own selfish economic gain, corporations and states should provide sufficient

¹¹⁹ Atkinson, Roberts. "Prison Labor: Its More Than Breaking Rocks." May 2002: 3: <http://www.ppionline.org/documents/prison_labor_502.pdf>

employment in areas that they often neglect, which are many times impoverished, urban areas as shown by the large suburban job-growth. Instead of funding and creating new prisons, there should be a push for better schools, sufficient employment, and other rehabilitation services in areas that need these goods the most. In adopting my policy initiatives, I predict that the mass incarceration of all groups will be drastically reduced and therefore resulting in the decrease of African-Americans' disproportionate criminal status.

There is much change needed within the current American criminal justice system in order to reverse the overrepresentation of African-Americans within this system. The cause of this phenomenon is numerous and the concept of agency is very complex. I understand that my definition of agency is easier established as a theory, but that does not mean it is impracticable. As I have shown in the William Washington's case, my definition of agency can be applied to affect the turnout of a defendant's criminal responsibility. Although there are many factors that contribute to the overrepresentation of African-Americans within the criminal justice system, the concept of race and its limiting effects should be among those factors. I have shown that these factors contribute to a reduction in one's agency. My definition of agency can be applied to any case involving environmental restrictions and limitations from coercive criminal factors such as felon laws. I show the effects of race on these limitations in order to argue for a specific re-evaluation of African-Americans' agency in hopes of overturning their grossly overrepresentation within the criminal justice system. Due to race, African-Americans are uniquely affected by these limitations and this should be acknowledged when examining African-American defendants' full history and the nature and circumstances of the crime. This is important for ensuring equal justice and a reversal of the 40% African-American population within the criminal justice system versus their overall 12% population in the U.S. Therefore, in

answering my overarching question of whether or not current legal interpretations are sufficient for analyzing the agency and criminal responsibility of African-Americans, I argue that they are not and will continue to be insufficient as long as these legal actors neglect to recognize the limitations of agency by racial discrimination and its effects on factors such as the availability of highly-valued options in one's environment. As Fred Davie of a non-profit group based in Philadelphia states: "Up until now, the focus has been putting ex-offenders back in jail... We need a national approach to what has become a national crisis."¹²⁰ Approaching African-Americans' agency in light of various restrictions is necessary for understanding the complexity of criminal decision-making and for stopping the current national crisis of Black over-criminalization.

¹²⁰ As quoted in: Jacobs, Andrew. "Seeking the Key to Employment for Ex-Cons." New York Times April 27, 2008:
<http://www.nytimes.com/2008/04/27/nyregion/27excons.html?_r=1&scp=1&sq=seeking%20the%20key%20to%20employment%20for%20ex-cons&st=cse>

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