What's Wrong with Differential Punishment?

BENJAMIN S. YOST
Providence College

Half of the drug offenders incarcerated in the United States are black, even though whites and blacks use and sell drugs at the same rate, and blacks make up only 13 per cent of the population. Non-comparativists about retributive justice see nothing wrong with this picture; for them, an offender's desert is insensitive to facts about other offenders. By contrast, comparativists about retributive justice assert that facts about others can partially determine an offender's desert. Not surprisingly, comparativists, especially comparative egalitarians, contend that differential punishment is retributively unjust. I agree with this assessment, but take issue with the reasons egalitarians cite in its favour. In this article, I argue that differential punishment violates retributive justice because it contributes to structural racial oppression. Over the course of developing and defending this claim, I identify the shortcomings of both comparative egalitarianism and respectarianism, which is the most popular and plausible brand of non-comparativism.

I. INTRODUCTION

Although the sentencing disparities between black and white drug offenders in the United States are having their day in the media, the statistics remain shocking. Roughly half of those incarcerated for drug offences at the state level, and close to half of those in the federal system, are black.[1] This disparity exists even though blacks make up 13 per cent of the population, and whites and blacks use and sell drugs at roughly the same rate.[2] Intuitively speaking, what is wrong here seems to be that blacks are subject to unequal treatment, in violation of the imperative to treat like cases alike. But these intuitions are not universally shared. Some philosophers contend that offenders are wronged only when their punishment exceeds their individual desert. By their lights, there is no injustice in a black drug offender being arrested and sentenced to a proportionate punishment, despite the fact that blacks suffer punishment for drug offences more frequently than whites.

This relative indifference to inequality flows from a non-comparative conception of retributive justice.[3] Non-comparativists see nothing

[1] Marc Mauer, 'The Changing Racial Dynamics of the War on Drugs', *The Sentencing Project*, <http://sentencingproject.org/doc/dp_raceanddrugs.pdf> (2009).

[2] Nazgol Ghandnoosh, 'Race and Punishment: Racial Perceptions of Crime and Support for Punitive Policies' (Washington, DC: The Sentencing Project, 2014), p. 21. The situation is much the same for Latinos, though I will keep to a narrow path.

[3] This article will be concerned with positive retributivism, which is the view that offenders deserve to be punished, and that their desert furnishes a sufficient reason to

Utilitas Vol. 00, No. 0, 2016
doi:10.1017/S095382081600039X

amiss with inequality as such; for them, retributive justice is violated only when an offender is punished disproportionately to her desert, individually construed.[4] The most popular flavour of non-comparativism, respectarianism, supplements the view with the claim that legal officials' disrespectful treatment of offenders also offends retributive justice.[5] By contrast, those who hold a comparative conception of retributive justice, like egalitarians, assert that an offender's just deserts are partially determined by how other offenders are treated.[6]

If non-comparativists and respectarians are correct, there is nothing wrong with the fact that blacks in the United States are more likely to be punished for drug crimes, so long as none are punished too

punish. Positive retributivists also believe that an offender's desert constitutes a strong (but defeasible) reason to punish him. Negative retributivism is the more modest view that punishment may be imposed only on those who have committed a crime; it does not insist on punishing them. Negative retributivists sometimes use consequentialist considerations to guide determinations about whether and how much to punish, though they maintain that punishment must be at least roughly proportionate to an offender's desert.

Not all philosophers of punishment believe desert to be a conceptual component of retributive justice; see e.g. Matt Matravers, 'Is Twenty-First Century Punishment Post-Desert?', *Retributivism Has a Past, Has It a Future?* ed. Michael Tonry (Oxford, 2011), pp. 30–45. My argument is compatible with some of these alternative brands of retributivism, most notably the communicative theory of R. A. Duff (*Punishment, Communication, and Community*, Studies in Crime and Public Policy (New York, 2001)), but I must refrain from discussing these matters. I will also set aside consequentialist theories of punishment, which raise an entirely different set of issues.

[4] Although Ernst van den Haag is the best-known advocate for this view, which I later dub non-comparative rigourism, there are a few others. See van den Haag, 'The Ultimate Punishment: A Defense', *Harvard Law Review* 99.7 (1986), pp. 1662–9; Christopher Meyers, 'Racial Bias, the Death Penalty, and Desert', *The Philosophical Forum* 22.2 (1990), pp. 139–48. Kant is often thought to fit this mould, though I harbour serious doubts about this interpretation.

[5] Respectarians include Ronen Avraham and Daniel Statman, 'More on the Comparative Nature of Desert: Can a Deserved Punishment Be Unjust?', *Utilitas* 25.3 (2013), pp. 316–33; Mitchell N. Berman, 'Punishment and Justification', *Ethics* 118.2 (2008), pp. 258–90; Harry Frankfurt, *Necessity, Volition, and Love* (Cambridge, 1999); Louis Pojman, 'Does Equality Trump Desert?', *What Do We Deserve?* ed. Louis Pojman and Owen McLeod (Oxford, 1999), pp. 283–97.

[6] Comparativists include Michael Cholbi, 'Race, Capital Punishment, and the Cost of Murder', *Philosophical Studies* 127 (2006), pp. 255–82; Roberto Gargarella, 'Penal Coercion in Contexts of Social Injustice', *Criminal Law and Philosophy* 5 (2011), pp. 21–38; Thomas Hurka, 'Desert: Individualistic and Holistic', *Desert and Justice*, ed. Serena Olsaretti (Oxford, 2003), pp. 45–68; Erin Kelly, 'Desert and Fairness in Criminal Justice', *Philosophical Topics* 40. 1 (2012), pp. 63–77; Karl Lippert-Rasmussen, 'Punishment and Discrimination', *Punishment and Ethics: New Perspectives*, ed. Jesper Ryberg and J. Angelo Cortlett (New York, 2010), pp. 169–88; Owen McLeod, 'On the Comparative Element of Justice', *Desert and Justice*, ed. Olsaretti , pp. 123–44; David Miller, 'Comparative and Noncomparative Desert', *Desert and Justice*,(Oxford, 2003), pp. 25–44; John Pittman, 'Punishment and Race', *Utilitas* 9.1 (1997), pp. 115–30; Tommie Shelby, 'Justice, Deviance and the Dark Ghetto', *Philosophy & Public Affairs* 35.2 (2007), pp. 126–60.

harshly. (Non-comparativists would nevertheless take issue with the leniency afforded to white offenders.) If comparative egalitarians are correct, then the intuitions of those troubled by racial disparities in punishment look to be vindicated. To see the difference as clearly as possible, imagine a jurisdiction in which 1,000 white drug offenders go unmolested while ten black drug offenders are arrested, convicted and incarcerated. Non-comparativists contend that the black offenders are not treated unjustly, so long as they are not punished in excess of their desert. Comparativists reply that the black offenders *are* treated unjustly, in virtue of their unequal treatment. I agree with egalitarians that the differential treatment of blacks is a breach of retributive justice, but I think that they misunderstand why this is so. In what follows, I defend a different comparativist position, arguing that the violation of retributive justice lies not in the bare fact of unequal treatment, as egalitarians insist, but in the racially oppressive nature of differential punishment. My goal is twofold. First, I want to establish that retributivists who remain unconcerned about differential punishment ought to be concerned – that retributivists, qua retributivists, are committed to alleviating racially oppressive punishment. Second, I want to show that many retributivists who do denounce differential punishment do so for the wrong reasons. But before describing my programme in more detail, I want to prepare the way by briefly discussing differential punishment and situating the problem within the intricate desert literature.

I.1. Differential punishment

Differential punishment occurs when different punishments are repeatedly imposed on different groups for the same crime. (I prefer 'differential punishment' to the orthodox 'discriminatory punishment',[7] for reasons that will soon be clear.) Crimes are sufficiently similar when they feature the same *actus reus*, the same *mens rea*, and similarly weighted aggravating and mitigating factors. So differential punishment for crime c exists when it is not the case that there is a 1:1 ratio between group G's crime rate for c, expressed as per cent of the total commissions of c, and G's punishment rate for c, expressed as a per cent of the total punishment[8] of all groups for c.[9] 'Differential punishment' is thus distinct from 'overpunishment', which I will use

[7] See, for example, Lippert-Rasmussen, 'Punishment and Discrimination'.

[8] For our purposes, total punishment is the product of two factors, the number of people punished and the severity of their punishment.

[9] Of course, it must be a salient group; see Lippert-Rasmussen, 'Punishment and Discrimination', p. 170. A salient group is one that structures social interactions across a variety of contexts, e.g. women, LGBTQ, deaf – rather than Camry owners, people born on the 4 July, and so on.

to refer to punishments the severity of which exceeds a malefactor's desert. My article is concerned not with differential punishment *simpliciter*, but with the differential punishment constituted by the more frequent punishment of marginalized social group G for a given crime *c*, and that is how the notion should be understood throughout.

Establishing the fact of differential punishment is somewhat difficult, given the notorious difficulty of assembling an accurate picture of crime rates. To track changes in crime rates over time and differences among jurisdictions, social scientists usually work with arrest rates. But this shortcut sheds little light on the number of crimes actually committed, and it tells us nothing about the racial make-up of the wrongdoers who avoid arrest. So if we are interested in uncovering whether and to what extent differential punishment exists, we cannot begin with such an inaccurate proxy. Some progress can be made by comparing two government measurements, the National Crime Victimization Survey and the Uniform Crime Reports. The NCVS collects self-reports of crime victimization, and the UCR gathers arrest data from local and state police departments. Juxtaposing the two provides some insight into the correlations between arrest rates and crime rates. Although the NCVS and the UCR categorize crimes in slightly different ways, two direct comparisons are possible. In 2006, the last year the NCVS tracked the race of offenders, blacks were arrested for 56 per cent of robberies committed (per the UCR), yet only 37 per cent of robbery victims said they were robbed by a black person (per the NCVS).[10] In the same year, blacks were arrested for 34 per cent of aggravated assaults, yet only 24 per cent of victims reported a black assailant. These comparisons suggest that blacks are differentially punished for robbery and aggravated assault. Researchers have amassed better data for drug crimes. As I noted above, blacks are disproportionately incarcerated for drug offences: roughly half of those incarcerated for drug offences at the state level, and close to half of those at the federal level, are black,[11] yet whites and blacks use and sell drugs at roughly the same rate.[12] If there is any significant difference in offending, it is that whites are *more* likely to deal drugs than people of colour.[13] In these domains, at least,

[10] NCVS 2006, Table 40, <http://www.bjs.gov/content/pub/pdf/cvus0602.pdf> (2006); UCR 2006 Table 43 <http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2006> (2006). It should be noted that the UCR counts Hispanic offenders as white, and the NCVS counts some Hispanics as white, some as 'other'.

[11] Mauer, 'The Changing Racial Dynamics of the War on Drugs'.

[12] Ghandnoosh, 'Race and Punishment', p. 21.

[13] Michelle Alexander, *The New Jim Crow: Mass Incarceration in an Age of Colorblindness* (New York, 2010), p. 97. In Ferguson, Missouri police officers stop, search and arrest black drivers more frequently than white drivers, even though contraband

differential punishment is a reality, though I will suggest in section III that there is reason to believe that blacks are differentially punished across the board.

I.2. Comparativism and non-comparativism

To clarify the differences between my account of the wrongness of differential punishment and those of respectarians and egalitarians, I need to unpack the distinction between comparative and non-comparative conceptions of retributive justice. Helpful here is Joel Feinberg's classic tripartite analysis of desert: person P deserves treatment T by virtue of desert basis DB. The difference between comparativism and non-comparativism in general, and not just in relation to retributive justice, can be cashed out in terms of their contrasting conceptions of that which constitutes desert bases and deserved treatment. In a nutshell, the disagreement hinges on the nature of the facts pertinent to desert.

Non-comparativism about desert
- P's desert basis is constituted merely by facts about P[14]
- P's deserved treatment is determined merely by facts about P

Comparativism about desert
- P's desert basis may include facts about how P stands in a relevant relation to Q, R, or S ... with respect to some x[15]
- P's deserved treatment is determined in part by how Q, R, S ... are treated

If, for example, you grade papers on a curve, you are a comparativist about *desert bases*, at least with respect to grading. By contrast, a non-comparativist would feel comfortable immediately assigning a final grade to the top paper on the stack without having read any others, so long as she is not troubled by any epistemic concerns (e.g. a lack of confidence born of inexperience). Imagine you grade on a curve, discover you have given P a higher grade than she deserves, and have already handed P's final grade to the registrar. If you are a comparativist

hit rates are higher for white drivers; see Nazgol Ghandnoosh, 'Black Lives Matter: Eliminating Racial Inequality in the Criminal Justice System' (Washington, DC: The Sentencing Project, 2015), pp. 6–7.

[14] Owen McLeod correctly observes that it is hard to get a handle on exactly what it means for a fact to be 'about' a person ('On the Comparative Element of Justice'). But this difficulty need not detain us any more than it has detained anyone else in the last forty-odd years.

[15] Some facts about other people are irrelevant to P's desert. For example, the fact that an assistant professor's friends desperately want her to be tenured has no bearing on whether she deserves tenure.

about *treatment*, you will raise Q's grade by the same increment that P enjoyed. If you are a non-comparativist about treatment, you will not raise Q's grade.[16] (For our purposes, to say that P deserves treatment T is to say that there is a relation of fit between P's actions or omissions and the treatment bestowed on P as a consequence thereof.) Comparativists of both sorts believe in the existence of what we might call 'comparative wrongs' and 'comparative injustice'. Comparative injustice occurs when someone is not accorded what she deserves, comparatively construed. Different accounts of comparative injustice go hand in hand with different types of comparativism, as discussed in section I.3.

Although the distinction between comparativism and non-comparativism is old hat in desert theory, it is something of a newcomer to the retributivist literature. Nevertheless, the translation is quite seamless. Non-comparativists about retributive justice assert that offender P's desert bases or deserved treatment are constituted solely by facts about P, along with facts about the effects of P's criminal act on P's victims that establish the crime's severity. Comparativists insist that P's desert bases or deserved punishment are partly constituted by facts about other offenders. Because retributivism has been so frequently construed in terms consonant with non-comparativism, some readers might suspect that comparative retributivism is not retributivism at all, but a distributive wolf in retributivist clothing. However, many contemporary retributivists, as well as desert theorists, believe that retributive justice contains comparative aspects, and this more permissive conception of retributivism is garnering many contemporary adherents (see n. 6 above).[17] To my mind, what motivates

[16] One can be a comparativist or non-comparativist about either DB or T, where the disjunction is inclusive. So we have the following set of views: (4) is self-explanatory; it represents orthodox non-comparativism. There is a slight but noticeable difference between (2) and (3). Imagine four friends help you move on a sweltering August day, and you want to reward them with beer. While each friend has worked hard enough to deserve four beers, you have only two six-packs in your refrigerator, and the stores are closed. A proponent of (2) will say that this creates an unavoidable injustice, given the non-comparative nature of desert bases. No matter how you divide the beers, someone will get less than their DB requires, even though an equal distribution is just qua distribution. By contrast, advocates of (3) can say that so long as everyone receives three beers, everyone gets the treatment they deserve, and justice prevails. It is important to note that the comparative egalitarianism discussed earlier is a version of (2), in so far as it asserts a non-comparative conception of desert bases.

The difference between (1) and (3) can be seen in the grading example. Those favouring (1) and (3) would both grade on a curve. But those favouring (3) would not raise Q's grade to match P's, while friends of (1) would.

[17] Initially, the contrast between comparative and non-comparative justice was invoked in debates about the role of desert in distributive justice. In this literature, retributive justice is often held up as a paradigm case of noncomparative justice, and retributive and distributive justice are said to be asymmetrical. See Samuel Scheffler, 'Justice and

comparativists are considerations like those invoked in the introduction section I: it seems implausible to say that there is nothing retributively wrong with the punishment of ten black drug offenders, when one thousand white drug offenders have walked free. Although a full-throated defence of comparative retributivism would occupy a paper by itself, if readers find themselves moved by my conclusions, my article will have functioned as an additional argument for comparativism.

Unfortunately, the comparative-non-comparative binary is not sufficient to accurately categorize the various positions in the complex retributivist literature. For that, I have to introduce an additional distinction, which cuts across the comparative–non-comparative divide, but is especially salient in the non-comparative context. Retributivism comes in both *rigourist* and *non-rigourist* flavours. Rigourism holds that retributive justice is served only when there is a precise fit between an offender's desert bases and the punishment she receives. By contrast, non-rigourism touts a more generous conception of retributive justice, identifying considerations other than the fit between T and DB as normatively salient. Van den Haag's non-comparativism is rigouristic. Non-rigourist non-comparativists like Ronen Avraham and Daniel Statman claim that even a (non-comparatively) fitting punishment is unjust when immoral motives such as disrespect figure into the causal explanation of the punishment imposed.[18]

The primary significance of the distinction between rigourism and non-rigourism is dialectical, although it also introduces a bit of analytic clarity. Non-comparative non-rigourism is a radical position mainly associated with van den Haag;[19] few others sign on to his claim that a proportionate sentence motivated by racial hatred is unimpeachable from the standpoint of justice. Non-comparative non-rigourism is far more plausible, and not surprisingly enjoys a number of adherents (though 'non-rigourism' is my term of art).[20] But because van den Haag's non-comparative rigourism is often advertised as

Desert in Liberal Theory', *California Law Review* 88.3 (2000), pp. 965–90. My suspicion is that these debates utilized a cramped notion of retributive justice because they were preoccupied with arguing for the comparative elements of distributive justice. The non-comparative characterization of retributive justice responded to the need for an intuitive contrast, and expressed no deep philosophical commitment; on this point, see Jeffrey Moriarty, 'Smilansky, Arneson, and the Asymmetry of Desert', *Philosophical Studies* 162 (2013), pp. 537–45.

[18] A comparativist of type (3) could be a rigourist. A pluralist comparativist who also endorsed, *mutatis mutandis*, respectarianism would count as a comparative non-rigourist, as would a comparative egalitarian of type (2), in so far as she believes that treatment of P can be just even when it is not completely congruent with P's desert basis. I have elected not to represent these nuances in my chart above.

[19] See also Meyers, 'Racial Bias, the Death Penalty, and Desert'.

[20] Avraham and Statman, 'More on the Comparative Nature of Desert'; Frankfurt, *Necessity, Volition, and Love*, p. 150; Pojman, 'Does Equality Trump Desert?', p. 291;

non-comparativism *par excellence*, non-comparativism is liable to be dismissed more hastily than is warranted, unless we bear the difference between rigourism and non-rigourism in mind.

I.3. What's wrong with differential punishment: the options

I can now organize the extant approaches to the wrongfulness of differential punishment in light of the conceptual distinctions just discussed.

> Differential punishment is wrong when it:
> *Non-comparative rigourism*
> Punishes an offender disproportionately to her non-comparative desert
>
> *Non-comparative non-rigourism*
> Punishes an offender disproportionately to her non-comparative desert, or violates her dignity
>
> *Comparativism*
> A. Fails to give some offenders what they comparatively deserve, with respect to their treatment
> B. Fails to give some offenders what they comparatively deserve, with respect to their desert basis
> C. Undermines the legitimacy of punishment as an institution

Although this schematization captures what I see to be prevailing trends in the literature, other positions – at least within non-comparative non-rigourism and comparativism – are surely possible, and my own is one of these.[21] But before developing my contribution, I will canvass the aforementioned views.

Non-comparativists of both rigourist and non-rigourist flavours believe that there is nothing wrong with differential punishment *as such*, i.e. with the fact that offenders are treated differently for the same offence. This is a straightforward implication of their scepticism about comparative wrongs. For rigourists, differential punishment is wrong only when, and in so far as, it treats an individual offender in a way disproportionate to her desert. (To be sure, non-comparative rigourists allow that differential punishment is wrong qua non-comparative wrong. They hold that it is wrong to let white drug offenders walk while

Mark D. White, '*Pro Tanto* Retributivism: Judgment and the Balance of Principles in Criminal Justice', *Retributivism: Essays on Theory and Policy*, ed. Mark D. White (New York, 2011), pp. 129–45.

[21] For example, Russ Schafer-Landau argues that while retributivism requires an accurate assessment of an offender's non-comparative and comparative desert, there is no right answer to the question 'what does P deserve?'. Retributivism, he concludes, is an incoherent justification of punishment ('Retributivism and Desert', *Pacific Philosophical Quarterly* 81.2 (2000), pp. 189–214).

black drug offenders are thrown behind bars. But what is wrong here is not that offenders are treated differently, it is that white offenders are treated too leniently – and/or that black offenders are treated more severely than merited by their desert basis.) For most non-rigourists, differential punishment is also wrong when it infringes on an offender's dignity. Here non-rigourists trade on the intuitive notion that it is wrong to base the treatment of P on irrelevant features of P,[22] or, more specifically, features irrelevant to proper assessments of P's deserved treatment or desert bases. Accordingly, differential punishment is wrong when it fails to treat offenders with the concern they deserve as human beings, or when it treats an offender as less worthy than he is. In Avraham and Statman's formulation, differential punishment is wrong when it disrespects an offender.[23]

Although comparativism about treatment (A, above) is not reducible to egalitarianism, most comparativists are egalitarians about treatment in some form or another. This should be expected, given that the most popular explanation of the wrongness of differential punishment is that it treats offenders unequally. The kernel of what I, following Avraham and Statman, call 'comparative egalitarianism' is a version of the like cases principle: when Q, R, and S are punished in a certain way, their treatment furnishes a reason to punish everyone else with the same desert basis in the same way.[24] Accordingly, differentially punished offenders are victims of a comparative wrong, namely, the denial of the equal protection of the laws. Many comparative egalitarians are also sensitive to non-comparative desert, and endorse a non-comparative conception of desert bases (section II, above). Thomas Hurka holds that differential punishments can be unjust both because they treat offenders unequally, and because they fail to treat offenders in accordance with their desert basis, non-comparatively construed.[25] On his view, when a member of a differentially punished group is over-punished, she is wronged by her unequal treatment and by her disproportionate punishment.[26] (Although comparative egalitarians do not explicitly address this point, in so far as they are non-comparativists

[22] Frankfurt, *Necessity, Volition, and Love*, p. 150; Pojman, 'Does Equality Trump Desert?', p. 291.

[23] Avraham and Statman, 'More on the Comparative Nature of Desert', p. 326.

[24] Egalitarian considerations, broadly speaking, also figure in criticisms of differential punishment that are grounded on political or distributive values. But positions like Elizabeth Anderson's do not portray egalitarianism as a matter of retributive justice ('What Is the Point of Equality?', *Ethics* 109.2 (19990, pp. 287–337, at 288, 312). Since I am interested in a retributivist approach, I will set these brands of egalitarianism aside.

[25] Hurka, 'Desert: Individualistic and Holistic', pp. 52–7.

[26] see also McLeod, 'On the Comparative Element of Justice', pp. 129–30; Miller, 'Comparative and Noncomparative Desert', pp. 34–7.

about desert bases, they should allow that if a member of a favoured group is punished more leniently than she deserves, an injustice is done, though the offender is not wronged.)

One can also be a comparativist about desert bases (B). Both Erin Kelly and Tommie Shelby argue that in jurisdictions riven by social inequality, members of marginalized social groups are less blameworthy for some types of criminal offences (both cite drug dealing) than members of privileged social groups who commit the same offence.[27] Here, the facts that constitute an offender's desert basis include facts about his relative social standing. For this type of comparativist, what would otherwise seem to be fair punishment of a member of a disadvantaged social group – i.e. sanctions equivalent to those imposed on members of a dominant social group – is in fact unjust, because it treats him more harshly than his desert basis warrants.

A more radical brand of comparativism (C) alleges that when differential punishment is prevalent within a jurisdiction, the very practice of punishment loses its legitimacy, rendering *all* punishments unjust. For example, Roberto Gargarella argues that differential punishment reflects the outsize influence of the majority on matters of social policy that bear on fundamental rights, compromising the legitimacy of punishment by violating the democratic norms that render it an exercise of authority rather than naked coercion.[28]

There is no reason to think that these explanations are mutually exclusive, or that only one is correct. But the list suffers from a serious lacuna: one of the problems with differential punishment, at least in the United States, cannot be explained in terms of the concepts of equality or dignity that undergird comparative egalitarianism and respectarianism. The injustice of differential punishment cannot be reduced to brute inequality, as the comparative egalitarian asserts, or disrespect or disproportionate treatment, as the non-comparativist insists. In what follows, I show that differential punishment reinforces structural racial oppression, and, for this reason, violates both non-comparative and comparative retributive justice. My account is of type A, identifying racial oppression as the relevant comparative injustice. I forgo discussion of more radical comparativist views (types B and C) in their entirety, not because I find them implausible, but because I

[27] Kelly, 'Desert and Fairness in Criminal Justice', p. 71; Shelby, 'Justice, Deviance and the Dark Ghetto', p. 152.

[28] Gargarella, 'Penal Coercion in Contexts of Social Injustice', pp. 24–6; see also Elizabeth Anderson, 'Outlaws', *The Good Society* 23.1 (2014), pp. 103–13; Duff, *Punishment, Communication, and Community*; Kelly, 'Desert and Fairness in Criminal Justice', p. 68; Daniel McDermott, 'A Retributivist Argument against Capital Punishment', *Journal of Social Philosophy* 32 (2001), pp. 317–33; Pittman, 'Punishment and Race'.

am convinced that the wrongfulness of differential punishment can be established on less controversial grounds.[29]

I begin by presenting respectarianism's analysis of the wrongfulness of differential punishment. I then argue that the existence of implicit racial bias raises a problem for this account that is independent of the point about structural oppression: the prevalence of implicit bias, combined with the immense discretion afforded to legal actors, results in non-comparative injustices that cannot be accounted for in a respectarian framework. Respectarianism thus turns out to be a deficient explanation of the wrongfulness of differential punishment, even in the non-comparative terms with which it is so comfortable. The next section carries out two related tasks. First, after discussing the nature of structural racial oppression, I argue that differential punishment violates *comparative* retributive justice in so far as it reinforces structural racial oppression. Second, I show that the wrongfulness of differential punishment cannot be adequately explained by either comparative egalitarianism or respectarianism. Respectarianism, as a resolutely non-comparativist theory, cannot acknowledge the existence of comparative wrongs like oppression. Although comparative egalitarianism enjoys the benefits of a comparative theory, its normative assessment of differential punishment, and just as important, the solutions it offers, fail to track the significant moral differences between the differential punishment of favoured and disfavoured social groups. My critique of comparative egalitarianism extends into the article's conclusion, which explores ways to mitigate differential punishment, and finds comparative egalitarian solutions wanting.

II. RESPECTARIANISM

The most comprehensive defence of respectarianism can be found in a recent paper by Avraham and Statman.[30] Avraham and Statman contend that differential punishment can run afoul of retributive justice in two ways. It may fail to give offenders what they non-comparatively deserve, and it may be disrespectful. These two

[29] Since my goal is to convince retributivists that differential punishment is a problem, and a problem of a different sort than is sometimes imagined, I make use of some relatively conservative presuppositions. I assume that punishment is legitimate, and that retributivism offers a reasonably satisfactory general justification of punishment. These are contestable assumptions, of course, and adopting them risks obscuring the extent to which the administration of the American criminal justice system is a system of racialized social control. However, they are required by my dialectical aims. Furthermore, I find it interesting to see how differential punishment violates retributive norms, even if retributive institutions might be unjust in their application.

[30] Avraham and Statman, 'More on the Comparative Nature of Desert'.

explanations are aligned with what Avraham and Statman see as the fundamental conditions of legitimate punishment: punishment must fit the crime and must be imposed in light of permissible motives.[31] When punishments are based on officials' disrespectful attitudes, they are unjust even when they are appropriate to an offender's desert, compromised by immoral motives.[32] This approach is decidedly non-rigourist: what makes differential treatment wrong is not its excessive severity, but the fact that an official's immoral attitudes about an offender motivate his action, causing his treatment of that offender.[33]

According to Avraham and Statman, P disrespects Q when P treats Q as 'less worthy than other human beings, as not fully human'.[34] Disrespect is wrong because, plausibly enough, treating people as less than human is wrong. They develop this point into a counterfactual conception of disrespect: P disrespects Q when P treats Q worse than he would treat R in the same situation, and does so because P wrongly believes that Q possesses some attribute that renders her inferior to R.[35] (The account allows for these beliefs to be conscious or unconscious.)

Avraham and Statman clarify the difference between respectarianism and comparative egalitarianism by appealing to the distinction between strict equality principles, which decree that all Ps should be treated as some Ps are treated in respect of x, and anti-discrimination principles, which prohibit treating people on certain grounds (race, gender, religion, class, etc.). If I give students who deserve a B on their exam a C because consuming too many Manhattans has made me careless, I violate strict equality principles, but not anti-discrimination ones. If I give students who deserve a B a C because I detest their political views, I violate both strict equality and anti-discrimination principles. In the context of punishment, if P is punished more harshly than Q for crime c, and if no forbidden grounds influence P's treatment, P is not thereby wronged, so long as his punishment fits his individual desert. In short, Avraham and Statman deny the existence of comparative wrongs.[36]

[31] Avraham and Statman, 'More on the Comparative Nature of Desert', p. 328.
[32] Avraham and Statman, 'More on the Comparative Nature of Desert', p. 323.
[33] Avraham and Statman, 'More on the Comparative Nature of Desert', p. 326.
[34] Avraham and Statman, 'More on the Comparative Nature of Desert', p. 323.
[35] Avraham and Statman, 'More on the Comparative Nature of Desert', p. 323.
[36] xsAvraham and Statman, 'More on the Comparative Nature of Desert', p. 319. Avraham and Statman label themselves comparativists to register their belief that a comparative review of sentencing data can help reveal when sentences are a product of disrespect. But if this epistemic conviction is all there is to comparativism, the concept is so loose as to be meaningless. Even non-comparative rigourists like van den Haag count as comparativists in this sense.

Most will readily agree that there is something noxious about a punishment that results from conscious or unconscious hostility towards an offender's race, religion, sexual preference or economic status. But, as we shall soon see, the concept of disrespect is too narrow to capture everything that is wrong – both comparatively and non-comparatively – with differential punishment. To foreshadow, I want to introduce a scenario I call *Stop and Frisk:*

> During what is known as a 'Terry stop', police officers detain someone they 'reasonably suspect' is involved in criminal activity. (There are virtually no Constitutional constraints on what counts as reasonable suspicion.) Officers making such stops may briefly pat down the detainee to search for weapons. If drug contraband is discovered, police may seize it and arrest the detainee. The New York City Police Department makes generous use of Terry stops, in accordance with their Stop, Question, and Frisk policy. This policy is executed primarily in black neighbourhoods, the justification being that these neighbourhoods experience more crime.[37] Research suggests that black neighbourhoods are disproportionately targeted, even when controlling for crime rates.[38]
>
> Stephen, a young black man residing in Bushwick, Brooklyn, is walking down a neighbourhood sidewalk, clad in a hoodie and minding his own business, when he is stopped by a police officer. The police officer, suspicious of Stephen, frisks him. Running his fingers over what seems to be a joint, he asks Stephen to empty his pockets. Stephen complies, and since the joint is now in 'public view', he is arrested. A judge later convicts him of misdemeanour possession.

If I stipulate that the police officer in *Stop and Frisk* is black, and harbours neither racist attitudes nor (implicit or explicit) ill-will toward Stephen, the respectarian will find nothing unjust in Stephen's arrest and punishment. On the plausible supposition that my stipulation obtains in many actual stop and frisk cases, the respectarian will see nothing retributively unjust with the arrest and punishment of *thousands* of people of colour, even when whites are not subject to the same level of enforcement. (To reiterate, the respectarian will object if guilty whites are going unpunished, because it means that many offenders are not getting their just deserts. But the respectarian will not inveigh against the treatment of the black offenders.) The only time

[37] <http://www.washingtonpost.com/blogs/wonkblog/wp/2013/08/13/heres-what-you-need-to-know-about-stop-and-frisk-and-why-the-courts-shut-it-down/>. The title of this article is inaccurate, as the decision was overturned on appeal.

[38] See the expert report of Jeffrey Fagan, available at <http://ccrjustice.org/files/Expert_Report_JeffreyFagan.pdf>.

a respectarian will protest is when a representative of the criminal justice system acts disrespectfully towards an offender, or when the punishment is disproportionate to the crime.

Stop and Frisk reveals two defects in the respectarian analysis of the wrongness of differential punishment. The first has to do with the fact that the implicit or explicit association of blackness with criminality displayed by the officer is not necessarily disrespectful. For example, the officer might insist that his beliefs about this association are warranted by higher black crime rates. Even though the officer is mistaken, the respectarian will not find Stephen's arrest problematic, since no disrespect is involved. But, I will argue presently, the false beliefs about black suspects generated by implicit bias are also *non-comparatively* impermissible grounds for penal intervention. Respectarianism is insufficient in that it is inhospitable to this normative conclusion. Second, *Stop and Frisk* is emblematic of a society in which blacks are oppressed by the practice of punishment. In section IV, I will argue that differential punishment constitutes a comparative wrong in so far as it reinforces racial hierarchy. Since wrongful treatment cannot be deserved, differential punishment compromises retributive ideals. And because oppression is a structural phenomenon, the individualistic analysis offered by respectarianism cannot acknowledge it.

III. IMPLICIT BIAS

Implicit bias is a type of social cognition that comprises implicit stereotypes and attitudes. In psychological terminology, a stereotype is a cognitive association between a trait and a concept, while an attitude is an affective or evaluative response to a concept. Stereotypes and attitudes are implicit when their possessors are unaware of them, and for this reason, their existence cannot be established through self-report.[39] Cognitive and social psychologists study implicit racial biases using experimental measures called Implicit Association Tests (IATs), which task participants with rapidly sorting pictures and words associated with various racial schema. One example of an IAT, available online, has participants quickly match pictures of blacks with negative words, and pictures of whites with positive words. One is then asked to quickly match picture of blacks with positive words, and pictures

[39] Some argue that implicit cognitions are beliefs, others that they are aliefs (Michael Brownstein, 'Implicit Bias', *Stanford Encyclopedia of Philosophy*, <http://plato.stanford.edu/entries/implicit-bias> (2015)). Neither this nor related controversies have any bearing on my argument.

of whites with negative words.[40] Shorter response times in the first exercise are taken as indications of an association between blacks and negative attitudes, on the premise that stronger associations between pictures and words facilitate their grouping.

Implicit bias research indicates that implicit racial bias is nigh ubiquitous, even among those who espouse egalitarian ideals. Research also shows implicit bias to be predictive of certain kinds of behaviour.[41] This is especially worrisome given the massive amounts of discretion built into the criminal justice system. Police officers choose which cars to pull over for faulty tail lights, which pedestrians to frisk, which neighbourhoods to subject to broken windows policing, and so on. (In New York City, where Eric Garner was suffocated to death during an arrest for illegally selling cigarettes, 55 per cent of those stopped and frisked are black, although blacks make up 25 per cent of the population.[42] This broken windows approach leads to a higher rate of misdemeanour arrests for blacks, who suffer 48 per cent of the consequent arrests. Whites are on the receiving end of 13 per cent of these arrests, though they make up 36 per cent of the population.[43]) Prosecutors decide whether to bring charges, and which charges to bring. Judges have leeway in setting bail, jury selection, trial procedure, post-conviction sentencing and post-conviction appeals; in non-jury trials, they decide whether to convict. Juries have discretion in determining levels of culpability and overall guilt or innocence. There is a regrettable paucity of research on implicit bias in these contexts, but the evidence that exists paints a troubling picture:

> *Police on the streets*: Research shows that police offers judge black youth to be more culpable for their wrongdoings than white youth of the same age.[44] (This result is also supported by tests of explicit cognition.) Several studies show that, independent of explicit bias, police officers are more likely to misidentify a harmless object as a gun when that object is preceded by a picture of a black person.[45] 'Weapon bias' can have serious consequences. One study of Denver-

[40] <https://implicit.harvard.edu/implicit/selectatest.html>. For a detailed discussion of IATs, see Jerry Kang et al., 'Implicit Bias in the Courtroom', *UCLA Law Review* 59 (2012), pp. 1124–86; Daniel Kelly and Erica Roedder, 'Racial Cognition and the Ethics of Implicit Bias', *Philosophy Compass* 3.3 (2008), pp. 522–40, at 524–5.

[41] Kang et al., 'Implicit Bias in the Courtroom', pp. 1129–31; Brownstein, 'Implicit Bias', p. 7.

[42] <http://www.nyclu.org/content/stop-and-frisk-data>.

[43] Ghandnoosh, 'Black Lives Matter', p. 9.

[44] Phillip Goff et al., 'The End of Innocence: Consequences of Dehumanizing Black Children', *Journal of Personality and Social Psychology* 106.4 (2014), pp. 526–45.

[45] Kang et al., 'Implicit Bias in the Courtroom', pp. 1136–9; Kelly and Roedder, 'Racial Cognition and the Ethics of Implicit Bias', p. 526.

based police officers revealed that officers, mostly white, were more likely to shoot armed black suspects than armed white ones.[46] *The courtroom*: IAT tests show that a majority of white judges and a minority of black judges display biases favouring whites and disfavouring blacks. And mock jurors are more likely to view ambiguous evidence as inculpatory when it is associated with darker-skinned suspects.[47]

Neither the prevalence nor the general character of implicit bias should be terribly surprising, given the sordid history of public discourses attributing criminality to blacks. In the late 1800s, allegations of blacks' criminal tendencies proliferated not only in the Jim Crow south, but also in nascent social scientific efforts to understand crime.[48] Both politicians and academics used these scientific discourses to buttress calls to oppose anti-lynching legislation, deny blacks public education and exclude them from the democratic process.[49] The racist legacy of the connection between blackness and criminality can perhaps be seen most readily in the fact that ethnic Irish and Italian lawbreaking was credited to their impoverished social upbringing, while black crime was construed as a matter of racial inferiority.[50] Despite some progress, today blacks and whites still associate blacks with criminality and dangerousness.[51] A national survey of explicit beliefs shows that whites overestimate the rate of burglaries, illegal drug sales and juvenile crimes committed by blacks by 20 to 30 per cent.[52])

This discussion illuminates respectarianism's cramped scope of concern. If convictions and sentences based on disrespectful beliefs are unjust, as respectarians aver, then so are cases in which false

[46] Ghandnoosh, 'Race and Punishment', p. 16.

[47] Ghandnoosh, 'Race and Punishment', pp. 14–16.

[48] Khalil Muhammad, *The Condemnation of Blackness: Race, Crime, and the Making of Urban America* (Cambridge, 2010), p. 7.

[49] Khalil Muhammad details how the 1890 Census inaugurated the use of statistics to link blackness and criminality. Not surprisingly, the data were dramatically flawed (*The Condemnation of Blackness*, pp. 2–5, et passim). For example, statistical reports failed to mention that blacks were liable for far more criminal offences than whites. Black intellectuals like W. E. B. Du Bois were some of the first to identify these problems.

[50] Muhammad, *The Condemnation of Blackness*, pp. 41, 76, 103, 273.

[51] Joshua Correll et al., 'The Influence of Stereotypes on Decisions to Shoot', *European Journal of Social Psychology* 37 (2007), pp. 1102–17, at 1103. Blacks commit some crimes more frequently than whites, but whites also commit some crimes more frequently than blacks. Drunk driving, which is linked to the deaths of an estimated 10,000 people a year, is committed far more frequently by whites, who make up roughly 85 per cent of drunk driving arrests. It is quite telling that whiteness is not linked to the notion of 'vehicular criminality'.

[52] Ghandnoosh, 'Race and Punishment', p. 13.

beliefs about racial characteristics play a causal role in conviction or sentencing. Take the implicit bias towards seeing black youth as more culpable for their crimes than white youth.[53] No disrespect is present here; if anything, such implicit beliefs disrespect white youth. The respectarian's silence on this matter is damning, as these false beliefs constitute illicit reasons for sentencing. The impermissibility in question is not of a straightforwardly moral stripe. Rather, a legal official who uses unjustifiable premises in arrest, sentencing or conviction violates an *epistemic* norm of practical reasoning, namely, that an agent may use only known premises in her deliberation.[54] And while this norm is of an epistemic variety, criminal justice authorities can be reasonably held blameworthy for violating it (at least so long as they are aware of their vulnerability to false beliefs), because such violations abrogate one of their crucial role responsibilities: in a legitimate legal system, legal authorities must uphold the standards of due process. In sum, if respectarianism stands for the view that impermissible motives taint proportionate punishments, it should allow that sentencing based on false beliefs originating in implicit bias is impermissible and hence unjust. But respectarianism's exclusive concern with disrespectful beliefs precludes it from doing as it should.

IV. DIFFERENTIAL PUNISHMENT AND RACIAL OPPRESSION

Now I want to put the issue of non-comparative injustice to bed and move to the heart of the article, which argues that differential punishment imposes *comparative* wrongs on the differentially punished. More specifically, my contention is that differential punishment is comparatively wrong in so far as it reinforces racial oppression.

Oppression is frequently associated with tyranny, and it was not so long ago that lynch mobs and Jim Crow legislators tyrannized blacks. Although this straightforward agent oppression persists in different contemporary manifestations, racial oppression is often *structural*. In Sally Haslanger's terminology, structural oppression exists when the oppression is a function of social arrangements and institutions, not individual legal or extra-legal actors, and it characteristically occurs when oppressive effects are unintended.[55] Structural oppression refers

[53] Goff et al., 'The End of Innocence'.

[54] See, for example, John Hawthorne and Jason Stanley, 'Knowledge and Action', *Journal of Philosophy* 105 (2008), pp. 571–90. I want to thank Geoff Pynn for helpful discussion of these issues.

[55] Sally Haslanger, 'Oppressions: Racial and Other', *Racism in Mind*, ed. Michael P. Levine and Thomas Pataki (Ithaca, 2004), pp. 97–123, at 100–7.

to the way social arrangements and institutions create and maintain unjust social hierarchies. To simplify matters, I'll stipulate that groups G and H are in an unjust hierarchical relationship when they occupy the same jurisdiction and G has, for no good reason, less access than H to the basic conditions of individual flourishing and social advancement (liberty, wealth, employment, education, esteem, etc.). The precise explanation of the wrongfulness of structural oppression will hang on one's preferred conception of justice, but since most liberal, democratic conceptions of justice censure unjust social hierarchies,[56] this point need not be pursued in more detail. For my purposes, an especially significant feature of structural oppression is that it involves essentially comparative wrongs: in the case of furthering illicit hierarchy, the wrongfulness of group G's treatment is determined to a large degree by how groups H, I and J are treated. G's oppression is constituted not by the fact that G's access to basic social goods falls below some specific level, but by the fact that G is afforded less access to these goods than H, I and J.

Racial structural oppression is the structural oppression of a race.[57] What does it mean to oppress a race? First, let's tackle the concept of race. It is now a commonplace among scientists, social theorists, and social and political philosophers that race is socially constructed. I will follow Ron Mallon in defining racial constructivism as the view that races are not biological natural kinds in any informative sense, but possess reality nonetheless.[58] Charles Mills locates this reality in the existence of facts about race, especially facts about the racial categorization of a person.[59] In this respect, there are objective criteria of racial ascription, although this epistemic objectivity is constituted by intersubjective agreements, or better, social, cultural and legal practices.

But race is real in another sense. In most societies, races are organized hierarchically, and this hierarchy of racial classifications is reinforced, however implicitly, by legal and political institutions and cultural norms. As a result, the racial categorization of P has a predictable influence on P's ability to pursue the ends she sets for

[56] See, for example Anderson, 'What Is the Point of Equality?' and Samuel Scheffler, 'What Is Egalitarianism?', *Philosophy & Public Affairs* 31.1 (2003), pp. 5–39.

[57] Racial hierarchy is complex. A race can be lower on the hierarchy in some domains of social life, but not others. And social position is strongly affected by the intersection of race, class and gender; see Kimberlé Crenshaw, 'Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color', *Stanford Law Review* 43.6 (1991), pp. 1241–99.

[58] Ron Mallon, 'Passing, Traveling and Reality: Social Constructionism and the Metaphysics of Race', *Noûs* 38.4 (2004), pp. 644–73, at 644.

[59] Charles Mills, *Blackness Visible: Essays on Philosophy and Race* (Ithaca, NY, 1998), p. 47.

herself. Being a member of a disfavoured racial group subjects P to a significant narrowing of P's opportunities.

Continuing in this vein, a race is *oppressed* when being a member of the race is strongly correlated with being subject to racial hierarchy and subordination. This type of correlation is most visible when the oppressed group is explicitly disadvantaged by a policy, practice or institution, like the Three-Fifths Clause of the US Constitution. Today it is harder to find many instances of explicit racial oppression, mainly because it is no longer acceptable to flaunt racist views (unless you're Donald Trump or on social media). The correlations constitutive of structural racial oppression are harder to identify, just because they are caused by practices or policies that do not explicitly target race. So how do we know if they exist? Here I will borrow once more from Haslanger. A correlation counts as strong, or non-accidental, when it supports a certain kind of counterfactual:[60] were P of a different race, P would not be unjustly treated in the way P is treated. If the counterfactual is secure, we can conclude that race plays a causal role in the way P is unjustly treated.

Although it is not always easy to establish this counterfactual, in many instances of differential punishment, it is. Let's revisit the War on Drugs. We have already seen that blacks and whites use drugs at similar rates, but punishment falls far more heavily on blacks. It is also clear that police choose to wage the 'war' primarily in black neighbourhoods, instead of college fraternities or suburban cul-de-sacs.[61] To take just one example, in Seattle, a majority of drug dealers are white, yet 64 per cent of arrestees are black. A recent study could not find any 'racially neutral' explanation for the disparate arrests.[62] So I think we can say with a high level of confidence that many black drug offenders would not have been punished but for their being black.[63]

[60] Haslanger, 'Oppressions: Racial and Other', p. 114.

[61] Matthew Fogg, a former US marshal and DEA agent, reports that DEA agents intentionally avoid wealthier neighbourhoods. See <http://thefreethoughtproject.com/dea-agent-drug-laws-intentionally-rich-communities/>. Former New York Police Chief Lee Brown casts the choice of enforcement targets in similarly repugnant terms: 'it's easier for police to make an arrest when you have people selling drugs on the street corner than those who are [selling or buying drugs] in the suburbs or in office buildings. The end result is that more blacks are arrested than whites'; Jamie Fellner, 'Race, Drugs, and Law Enforcement in the United States', *Stanford Law and Policy Review* 20.2 (2009), pp. 257–92, at 271.

[62] Fellner, 'Race, Drugs, and Law Enforcement in the United States', p. 261.

[63] Of course, class also plays a role; see Jeffrey Reiman and Paul Leighton, *The Rich Get Richer and the Poor Get Prison: Ideology, Class, and Criminal Justice* (Boston, 2010). Overall, the types of crimes poor people commit are more likely to be punished with incarceration than those committed by the rich. And blacks tend to be less well-off than whites. But class alone cannot explain drug sentencing disparities; there are almost twice as many whites as blacks living under the poverty line.

That blacks are differentially punished should come as no surprise, given the prevalence of implicit racial bias coupled with a historical pattern of illicit attributions of criminality and dangerousness to blacks. Police officers, jurors and judges have no more ability to overcome their implicit biases than anyone else, so they, too, will be disposed to believe in an overly robust relation between blackness and criminality. Possessing such beliefs is clearly congenial to the differential punishment of blacks. Jerry Kang's recent overview of the literature contends that implicit bias has at least a small effect on all stages of the criminal process.[64] He emphasizes the picture of the deleterious consequences for racial minorities painted by a recent simulation using data compiled from a meta-analysis of IAT studies. The simulation measures the aggregate effect of implicit bias from arrest to sentencing, and it suggests that for a crime with a mean sentence of 5 years in prison, black offenders are likely receive a sentence of 2.4 years, versus 1.4 years for whites.[65] As Kang points out, the high number of criminal prosecutions in the United States means that this level of variance has serious carceral consequences.[66]

At this point, it is worth specifying how it is that differential punishment contributes to racial hierarchy. The most obvious mechanism – blindingly obvious, in fact – is differential incarceration. Differential incarceration restricts blacks' negative freedom to a degree that it does not restrict whites'. Because negative freedom is one of the most basic ingredients of a flourishing life, privileging one race over another in the distribution of this freedom creates, or reinforces, racial hierarchy.

If, as seems likely, blacks are subject to disproportionate as well as differential punishment, these non-comparative injustices will multiply the oppressive effects of differential incarceration.[67] We cannot, of course, simply squeeze the conclusion that blacks are over-punished out of the fact that they are differentially punished. To support this conclusion, we need some sense of the (dis)proportionality of current sentencing schemes. Only if these schemes are too harsh will there be a non-comparative injustice factor augmenting the oppressive effects of differential punishment. If our sentencing schemes are appropriate, then differential punishment does not cause an increase in excessive punishment; if our sentencing schemes are too lenient, then

[64] Kang et al., 'Implicit Bias in the Courtroom', p. 1151.

[65] Kang et al., 'Implicit Bias in the Courtroom', p. 1151.

[66] The combined federal and state criminal caseload hovered around 21 million annually from 2001–2010 <http://www.courtstatistics.org/~/media/Microsites/Files/CSP/DATApercent20PDF/CSP_DEC.ashx>.

[67] I want to thank a reviewer for urging me to clarify this point.

both whites and differentially punished blacks are under-punished. I would be foolish to level a general assessment of the proportionality of all federal and state sentencing schemes, but even two minutes spent perusing the ACLU's recent report on the prevalence of life without parole for non-violent offences should persuade all but the most bloodthirsty that the American criminal justice system is excessively severe in at least some significant aspects.[68] Some examples of drug offences that earned life without parole include possession of a crack pipe, acting as a go-between in the sale of $10 of marijuana to an undercover officer, and sharing several grams of LSD with Grateful Dead concertgoers. Examples of property offences include possession of stolen wrenches, siphoning petrol from a truck and shoplifting three department store belts.[69] In these respects, there is good reason to think that the oppression of blacks constituted by differential punishment is multiplied by non-comparative injustice.[70] To drive this point home, I would note that 69 per cent of those serving life without parole for non-violent drug or property offences are black.[71])

Differential incarceration reinforces oppression in a second way. Felony convictions, even for minor drug offences, have serious post-sentence collateral consequences. Felons are often denied the franchise, public housing and food stamps, and they are ineligible for federal educational assistance.[72] In many states, felons cannot hold certain professional licences – like barbering, even though barbering is a focus of job training programmes in many prison systems – and employers are allowed to query potential employees on their felony status.[73] (Constitutionally speaking, courts have held these post-sentence penalties to be civil in nature, rather than criminal, and have declined to characterize them as part and parcel of an offender's

[68] 'A Living Death: Life without Parole for Nonviolent Offences', American Civil Liberties Union, <https://www.aclu.org/criminal-law-reform/living-death-life-without-parole-nonviolent-offenses-0> (2013).

[69] 'A Living Death'.

[70] Although this is a bit of armchair philosophizing, I would venture that non-comparative injustice flows from the fact that implicit stereotypes and attitudes are not practically inert and therefore influence how black Americans are arrested, charged and sentenced: the imagined gun generated by weapon bias turns a misdemeanour assault into felony aggravated assault; and the improperly high ascription of culpability renders black children more liable to be tried as adults. In both cases, black offenders are punished disproportionately to their non-comparative desert.

[71] 'A Living Death'.

[72] Alexander, *The New Jim Crow*.

[73] The 'Ban the Box' campaign has been making strides in this area. See <http://www.nelp.org/campaign/ensuring-fair-chance-to-work/>. For a philosophical treatment of collateral consequences, consult Hugh Lafollette, 'Collateral Consequences of Punishment: Civil Penalties Accompanying Formal Punishment', *Journal of Applied Ethics* 22.3 (2005), pp. 241–61.

punishment. In so far as retributivists are engaged in a normative analysis, they should reject this bifurcation. The penalties in question are statutorily prescribed, so they are both legislatively foreseen and intended, and to deny that they are 'punishment' is to invoke a specious 'definitional stop'.[74]) Furthermore, failure to pay court costs or fees for room and board during incarceration – fees that are skyrocketing on account of their expanding role in balancing state and municipal budgets – can count as a parole violation and often result in jail time.[75] These burdens seriously undermine offenders' ability to live a flourishing life and impede their opportunities for social advancement.[76] Differentially allocating these burdens between blacks and whites thereby reinforces racial hierarchy.

Finally, differential punishment augments hierarchy in an indirect fashion, fuelling the self-perpetuation of a hierarchical political and legal climate. To explain, I will borrow John Pittman's concept of 'racialment'. Racialment, he writes, 'is an institution which dispenses knowledge as well as exercise[s] control over a population of subjects, [and it] does not merely shape a pre-existing social reality in conformity with specific intentions, but also defines the reality in conformity with its operations and procedures'.[77] Pittman puts racialment to a number of different uses, but the point I want to emphasize is that penal practices generate knowledge about crime rates. Racialment qua differential punishment makes it a fact that blacks are punished at a higher rate than whites for the same crimes. The consequences that flow from differential punishment – blacks punished more frequently for the same crimes as whites – support the associations of blackness with attributes like 'dangerous' and 'criminal' that justify differential punishment. In other words, differential punishment maintains a feedback loop that creates the higher black crime rates that it purportedly reflects.[78] It is thus plausible to think that differential punishment sediments implicit biases. It is beyond question that differential punishment is used to justify cognitively explicit

[74] H. L. A. Hart, *Punishment and Responsibility: Essays in Legal Philosophy* (Oxford, 1968), pp. 5–6.

[75] <http://www.npr.org/2014/05/19/312158516/increasing-court-fees-punish-the-poor>.

[76] In principle, whites suffer the same consequences. But the background fact that whites generally enjoy more wealth and economic opportunity ensures that the consequences are usually not as severe.

[77] Pittman, 'Punishment and Race', p. 118, see also 29.

[78] Susanna Siegel describes a feedback loop that operates at the individual level, whereby the 'cognitive penetration' of perceptual experience by pre-existing beliefs illicitly reinforces those beliefs ('Cognitive Penetrability and Perceptual Justification', *Noûs* 46.2 (2012), pp. 201–22, at 202). In the situation I am discussing, cognitive penetration leads to arrest data that illicitly reinforce the original beliefs about blackness and criminality.

judgements: pundits and politicians often brush off concerns about the aggressive policing of black neighbourhoods by emphasizing black 'criminality'. Rudy Giuliani, who popularized broken windows policing as mayor of New York City, recently opined that black crime rates are 'the reason for the heavy police presence in the black community'.[79] On this line of reasoning, the 'fact' of higher black crime rates renders differential punishment both licit and necessary.

The foregoing shows that the differential punishment of blacks imposes comparative wrongs, even when it is non-comparatively unimpeachable. Comparative injustice occurs when someone is not given her just deserts, comparatively considered. When a black offender in the United States is differentially punished, she is, by means of that punishment, oppressed and subordinated. Since oppressive treatment is a comparative wrong, her oppressive treatment (punishment) cannot be deserved. That is, she does not deserve the treatment she would deserve, were her desert constituted solely by her non-comparatively considered desert basis. If she *is* punished, her punishment exceeds her desert and violates comparative retributive justice.

IV.1. The argument

1. Wrongful treatment cannot be deserved.
2. P does not deserve treatment T, even when T is recommended by P's DB, if T constitutes a comparative wrong.
3. Racial oppression is a comparative wrong.
4. Some differential punishment is racially oppressive.
5. Some differential punishment is comparatively wrong, because it is racially oppressive (from 3 and 4).
6. Members of oppressed races do not deserve the treatment constituted by oppressive forms of differential punishment, even when that treatment is warranted by their desert basis (from 2 and 5).
7. When an offender receives punishment she does not deserve, she is retributively wronged.
8. When members of oppressed races are differentially punished, they are retributively wronged (from 6 and 7).

In a nutshell, differential punishment racially oppresses blacks, and so wrongs them. Because wrongful treatment cannot be deserved, the differential punishment of blacks violates retributive justice.

[79] <http://www.chicagotribune.com/news/opinion/chapman/ct-garner-brown-ferguson-police-brutality-crime-blacks-perspec-1207-jm-20141205-column.html>. For a philosophical version of this response, see David Boonin, *Should Race Matter? Unusual Answers to Unusual Questions* (Cambridge, 2011), p. 346.

My argument might suggest that in so far as differential punishment contributes to oppression, it wrongs *all* blacks. While this would be a legitimate inference from the standpoint of an anti-oppressive political theory, i.e. a theory that holds that distributive anti-oppression principles trump non-comparative justice, I do not think it is one that retributivists can draw.[80] To be sure, the reality of differential punishment undeniably and illegitimately confronts black Americans with a set of serious risks, and since all blacks are exposed to these risks, they are, as a matter of political morality, wronged by them.[81] But despite the fuzziness of the boundary between retributive and distributive justice, it seems to me that this type of political wrong will be illegible to the retributivist. Consider a related case: differential punishment imposes not just a risk, but a serious diminution of the prospects of black offenders' children. If this is wrong, it is wrong in a political or distributive sense, not a retributive one. Retributive justice is concerned with the imposition of harsh treatment on those who violate the law, not the distribution of benefits and burdens more generally.

Who, then, *is* retributively wronged by differential punishment? All offenders who are (a) members of an oppressed race, and (b) subject to differential punishment. A black offender who is differentially sentenced in accordance with his non-comparative desert is retributively wronged by his punishment because his punishment is comparatively unjust, and he therefore does not deserve it. A black offender who is differentially sentenced and sentenced too harshly is doubly wronged: he is comparatively wronged, due to the oppressive nature of his punishment, and non-comparatively wronged, due to his disproportionately severe sentence.[82] (Black offenders who are punished for a crime that is *not* differentially punished, and hence not oppressive, are not comparatively wronged, even though they are, by virtue of their racial ascription, liable to oppressive punishments. Such offenders stand in the same position relative to oppressive punishment as non-offenders.) In sum, differential punishment retributively

[80] This admission highlights, rather than diminishes, the significance of the argument on offer, which establishes the responsiveness of *retributivism* to racial oppression, and steers clear of controversies regarding the priority of distributive or retributive justice.

[81] Michael Cholbi develops an interesting argument along these lines regarding disparities in capital sentencing ('Race, Capital Punishment, and the Cost of Murder').

[82] By my lights, when a white offender is sentenced too leniently, there is a comparative and non-comparative injustice, but the offender is not wronged. But those who subscribe to the view that offenders have a right to be punished will maintain that such offenders *are* retributively wronged, because they do not receive the punishment they deserve. A well-known proponent of this view is Herbert Morris, 'Persons and Punishment', *The Monist* 52 (1968), pp. 475–501.

wrongs, in a comparative sense, those offenders who are members of an oppressed race and whose crime is punished differentially.

As this argument depends on claims specific to comparative retributivism, it is not one to which respectarians can help themselves. But what about comparative egalitarianism? Comparative egalitarianism is (quite obviously) comparative, and so does not fall prey to the same difficulty as respectarianism. Furthermore, comparative egalitarianism purports to explain why the differential punishment of *any* group is wrong: it holds that differential punishment is wrong because it treats differently people who should be treated the same. At first glance, the egalitarian account might, due to its generous explanatory scope, seem superior to the present proposal.

But the parsimonious explanatory machinery that secures egalitarianism's expansive reach fails to capture what is morally distinctive about the differential punishment of blacks. Although racial hierarchy surely entails inequality, and can be constituted solely by a multitude of inequalities, the comparative injustice involved cannot be glossed exclusively in terms of the comparative egalitarian principle 'all Ps should be treated as some Ps are treated in respect of *x*'. To illustrate, imagine a nearby possible world that is the same as ours, with one exception: in that world, punishments for fraud fall more frequently and/or more heavily on whites than blacks. By comparative egalitarian lights, the injustice involved is of exactly the same kind as the differential punishment of blacks; in both cases, different classes of offenders are treated differently for the same offence. But given background conditions of racial hierarchy and systematic inequality the two types of injustice are not equivalent. Put simply, the practice of arresting and punishing whites more frequently for fraud does not contribute to the racial oppression of whites; it *cannot*, because whites are not racially oppressed. (Of course, whites may be oppressed economically, or on account of their gender.) So if I am right that differential punishment makes a significant contribution to racial hierarchy, and that significantly contributing to racial hierarchy is wrong, then the comparative egalitarianism principle is, as it stands, incapable of accounting for what is wrong with the differential punishment of blacks.[83]

This insufficiency extends to the comparative egalitarian response to the problem of differential punishment. If the problem is construed in light of inequality and inequality alone, equality will be the solution.

[83] To repeat, egalitarianism is a very large family of views, not all of which are committed to the spartan apparatus of comparative egalitarianism. My view could be labelled egalitarian in the broad sense; see, e.g., Anderson, 'What Is the Point of Equality?'. John Pittman helpfully pushed me to precisify my criticism of egalitarianism.

Because inequality is objectionable as such, no specific inequality can insist on special attention or concern. So on the egalitarian view, legal institutions in the possible world of white fraudsters might reasonably devote their resources to eliminating arrest and sentencing disparities related to fraud rather than drug possession. But if the problem is, or includes, racial oppression, then the solution is to alleviate racial oppression, which, *pace* egalitarianism, requires prioritizing the disadvantages suffered by blacks.

The egalitarian's inability to adequately respond to differential punishment has a second facet. The comparative egalitarian principle is indifferent to whether legal institutions level down or up.[84] But legal institutions concerned about racial oppression should prefer levelling down the punishment of blacks to the levelling up of the punishment of whites, because levelling down better alleviates oppression, at least along one dimension. The background conditions of racial hierarchy, namely, the comparatively low economic, social and educational opportunities afforded to blacks, render a given punishment more severe for black offenders than (many) white ones. That is, as I argued above, differential punishment undermines the condition of black flourishing. Because comparative egalitarianism cannot privilege levelling down, it cannot mandate the appropriate solution to this problem.

V. A NOTE ON A REMEDY

It is presumptuous to think that differential punishment, with its deep political, historical and cultural roots, can be completely eradicated. Nevertheless, I want to comment briefly on some ways of tackling the problem. It might seem obvious that efforts should be made to rid criminal justice officials of implicit bias. While there has been a lot of excitement about implicit bias training for police officers and

[84] Hurka asserts that comparative injustice should be ameliorated by levelling down ('Desert: Individualistic and Holistic', pp. 54–6), but his argument for this view is not terribly persuasive.

There is a more general problem here. The comparative egalitarian principle can demand treating P too harshly just because Q has been treated too harshly, heaping wrong on top of wrong. Some egalitarians try to get around this unwelcome conclusion by grounding the like cases principle on the claim that individuals deserve equal treatment by virtue of their equal moral standing; see, e.g., Carl Knight, 'Describing Equality', *Law and Philosophy* 29 (2009), pp. 327–65, at 338ff.; William E. O'Brian Jr, 'Equality in Law and Philosophy', *Inquiry* 53.3 (2010), pp. 257–84, at 261. This more robust view enables egalitarians to deny that legal institutions must replicate disproportionately harsh treatment, but it also squeezes a healthy dose of respectarianism into egalitarianism. It requires egalitarians to endorse the claim that the problem with differential punishment lies in treating an offender as less worthy than he is. The result is a hybrid egalitarianism that inherits the deficiencies of respectarianism.

court officials,[85] the effectiveness of what is often called 'de-biasing' has not been firmly established; in fact, some argue that such training can exacerbate the problem.[86] Other means of reducing bias, such as encouraging police officers to have 'positive contact' with people of colour in their personal lives[87] and setting up peer review systems for judges,[88] have been suggested. But even if significant progress can be made on this front, changes must be made to state and local laws, policing practices and sentencing schemes, in so far as differential punishment is at least as much a product of structural and institutional forces as it is of implicit bias.

To that end, Nazgol Ghandnoosh offers a survey of best practices aimed at eliminating disparities in punishment. Several municipalities have amended policing policies (usually after litigation) that disparately impact blacks, implementing efforts to reduce school arrests and pre-booking diversion programmes that funnel drug offenders to social services. In addition, some states have revised laws that result in differential punishment, decriminalizing small amounts of marijuana and relaxing drug-free school zone sentencing laws.[89]

However, most retributivists will not want to endorse equality-enhancing measures that are unresponsive to the demands of non-comparative justice. (This clarification should not be read as suggesting that the strategies just mentioned do in fact ignore non-comparative desert.) To draw this article to a close, I offer the following principle, which is meant to guide retributivist efforts to ameliorate differential punishment in a fashion sensitive to non-comparative desert: federal, state and municipal legal institutions must punish races identically for crime *c* when there is no good data on *c* or when there is data showing that blacks are differentially punished for *c*.[90] (Identical punishment obtains when there is a 1:1 ratio

[85] See, for example, the curriculum at www.fairimpartialpolicing.com, which has been adopted by several police departments. The National Center for State Courts has promoted a variety of strategies for mitigating implicit bias and its effects (Pamela M. Casey et al., 'Helping Courts Address Implicit Bias: Resources for Education', [National Association for State Courts, 2012], Appendix G).

[86] Destiny Peery, 'Implicit Bias Training for Police May Help, but It's Not Enough', <http://www.huffingtonpost.com/destiny-peery/implicit-bias-training-fo_b_9464564.html> (2016).

[87] B. Michell Peruche and E. Ashby Plant, 'The Correlates of Law Enforcement Officers' Automatic and Controlled Race-Based Responses to Criminal Suspects', *Basic and Applied Social Psychology* 28.2 (2006), pp. 193–99.

[88] Casey et al., 'Helping Courts Address Implicit Bias'.

[89] Ghandnoosh, 'Black Lives Matter', pp. 19–20.

[90] I am attracted to a slightly stronger position, namely, that the argument developed above furnishes what Joseph Raz calls a 'protected reason' for equalizing punishment (*Practical Reason and Norms*, 2nd edn. (Oxford, 1999)). A protected reason is a first-order reason for action that is accompanied by a second-order exclusionary reason for not

between a racial group's percentage of the population and its rate of punishment.) Both disjuncts follow directly from the retributive injustice of differential punishment, and the concomitant imperatives to mitigate its oppressive effects and to dissolve the illegitimate associations between blackness and criminality that contribute to its perpetuation (as well as the associated non-comparative injustices). The first condition depends on the addition of a presumption that (a) unless demonstrated otherwise, blacks and whites commit crimes at a similar rate, or (b) differential punishment infects most aspects of the criminal justice system. Note that for reasons discussed in section IV, the principle loses its force when data establishes that blacks commit crime *c* more than whites. That is, if blacks commit *c* at a higher rate than whites, the (proportionate) punishment of blacks at a higher rate than whites will not be oppressive, and will not constitute a comparative wrong that begs for remedy. It is for this reason that the mooted principle is consonant with non-comparative justice.

Although my principle appears to spring straight out of the comparative egalitarian playbook, it does not, as we can see by highlighting a crucial qualification: efforts to equalize sentencing should limit themselves to levelling down and reducing the total punishment of *black* offenders. This qualification is a corollary of my claim that the wrongness of differential punishment lies in its racially oppressive effects. But as I noted at the end of section IV, the comparative egalitarian principle is indifferent to whether legal institutions level down the sanctions on blacks or level up the sanctions on whites. Even worse, it looks like comparative egalitarianism has to countenance an unpalatable 'solution' to the problem of differential punishment. On comparative egalitarianism, the remedy for differential punishment could involve *increasing* black arrest rates for crimes for which (a) there is no good data on crime rates by race, and (b) black arrest rates are lower than white arrest rates.[91] Given the reality of racial oppression, increasing equality by

acting on (a specified range of) competing first-order reasons. More specifically, the claim that tempts me is this: when we are uncertain about crime rates, differential punishment provides a first-order reason for equalizing punishment rates, and a second-order reason that prohibits the development of policies based on crime data.

That said, I am sympathetic to comparativism regarding desert bases, and so my own view is that the retributive principle in question may be overly restrictive.

[91] As I noted above, whites are much more likely to be arrested for driving under the influence. According to the National Highway Traffic Safety Administration's self-report survey, whites are responsible for 84 per cent of drink-driving trips; offence rates thus seem to closely track arrest rates. See <http://www.nhtsa.gov/About+NHTSA/Traffic+Techs/current/Racial+And+Ethnic+Differences+In+Drinking+And+Driving+Attitudes+And+Behaviors>. Whether self-report surveys regarding criminal activity constitute good evidence is not a matter that can be discussed here.

903 punishing blacks more frequently is a hard pill to swallow. But if my
904 view is correct, we need not make the effort. I take it that this stands
905 as a decisive point in my favour.[92]

906 byost1@providence.edu

[92] I want to thank Anthony Reeves and John Pittman for their insightful comments and suggestions. The article also benefited from discussion with Geoff Pynn and others at the Bowling Green State University Workshop on the Ethics of Policing and Prisons, as well as from *Utilitas* reviewers' constructive criticisms.