For the same criminal behavior, the poor are more likely to be arrested; if arrested, they are more likely to be charged; if charged, more likely to be convicted; if convicted, more likely to be sentenced to prison; and if sentenced, more likely to be given longer prison terms than members of the middle and upper classes. In other words, the image of the criminal population one sees in our nation’s jails and prisons is distorted by the shape of the criminal justice system itself. It is the face of evil reflected in a carnival mirror, but it is no laughing matter.

The face in the criminal justice carnival mirror is also … very frequently black face. Although blacks do not make up the majority of the inmates in our jails and prisons, they make up a proportion that far outstrips their proportion in the population. Here, too, the image we see is distorted by the processes of the criminal justice system itself. Edwin Sutherland and Donald Cressey write in their widely used textbook *Criminology* that numerous studies have shown that African-Americans are more likely to be arrested, indicted, convicted, and committed to an institution than are whites who commit the same offenses, and many other studies have shown that blacks have a poorer chance than whites to receive probation, a suspended sentence, parole, commutation of a death sentence, or pardon.

Curiously enough, statistics on differential treatment of races are available in greater abundance than are statistics on differential treatment of economic classes. For instance, although the FBI tabulates arrest rates by race (as well as by sex, age, and geographical area), it omits class or income. Similarly, both the President’s Crime Commission Report and Sutherland and Cressey’s *Criminology* have index entries for race or racial discrimination but none for class or income of offenders. It would seem that both independent and government data gatherers are more willing to own up to America’s racism than to its class bias. Nevertheless, it does not pay to look at these as two independent forms of bias. It is my view that, at least as far as criminal justice is concerned, racism is simply one powerful form of economic bias. I use evidence on differential treatment of blacks as evidence of differential treatment of members of the lower classes. There are five reasons:

1. First and foremost, black Americans are disproportionately poor. In 1995, while one out of every eight white Americans received income below the poverty line, three out of every ten black Americans did. The picture is even worse when we shift from income to wealth (property such as a home, land, stocks): In 1991, black households owned one-tenth the median net worth of white households. Unemployment figures give a similarly dismal picture: In 1995, 4.9 percent of white workers were unemployed and 10.4 percent of blacks were. Among those in the crime-prone ages of 16 to 24, 15.6 percent of white youngsters (with no college) and 34.0 percent of blacks were. Among those in the crime-prone ages of 16 to 24, 15.6 percent of white youngsters (with no college) and 34.0 percent of blacks were. Among those in the crime-prone ages of 16 to 24, 15.6 percent of white youngsters (with no college) and 34.0 percent of blacks were. Among those in the crime-prone ages of 16 to 24, 15.6 percent of white youngsters (with no college) and 34.0 percent of blacks were.

2. The factors most likely to keep one out of trouble with the law and out of prison, such as a suburban living room instead of a tenement alley to gamble in or legal counsel able to devote time to one’s case instead of an overburdened public defender, are the kinds of things that money can buy regardless of one’s race, creed, or national origin. For example, as we shall see, arrests of blacks for illicit drug possession or dealing have sky-
rocketed in recent years, rising way out of proportion to drug arrests for whites—
though research shows no greater drug use among blacks than among whites. However,
drug arrests are most easily made in “disorgan- 
ized inner-city” areas, where drug sales are more likely to take place out of doors,
and dealers are more willing to sell to strangers. Blacks are (proportionately) more likely than whites to live in such inner-city areas and thus more likely than whites to be 
arrested on drug charges.7 But one very
important reason that blacks are more likely than whites to live in disorganized inner-city
areas is that a greater percentage of blacks
than whites are poor and unemployed. What
might at first look like a straightforward racial disparity turns out to reflect economic status.

3. Blacks who travel the full route of the crimi- 
nal justice system and end up in jail or prison
are close in economic condition to whites
who do. In 1978, 53 percent of black jail
inmates had pre-arrest incomes below
$3,000, compared with 44 percent of whites.8
1983, the median pre-arrest income of
black jail inmates was $4,067 and that of
white jail inmates was $6,312. About half of
blacks in jail were unemployed before arrest
and 44 percent of whites were.9 In 1991, 30
percent of whites in the prison population
and 38 percent of blacks reported full- or
part-time employment during the month
before their arrest.10

4. Some studies suggest that race works to
heighten the effects of economic condition on criminal justice outcomes, so that “being
unemployed and black substantially increase[s] the chances of incarceration over those associated with being either unemployed or black.”11 This means that racism will produce a kind of selective economic bias, making a certain segment of the unemployed even more likely to end up behind bars.

5. Finally, it is my belief that the economic
powers that be in America have sufficient
power to end or drastically reduce racist bias in the criminal justice system. To the extent
that they allow it to exist, it is not unreason-
able to assume that it furthers their economic interests.

For all these reasons, racism will be treated here as either a form of economic bias or a tool that achieves the same end.

In the remainder of this [selection], I show how the criminal justice system functions to weed out the wealthy (meaning both middle- and upper-class offenders) at each stage of the process and thus produces a distorted image of the crime problem. Before entering into this discussion, three points are worth noting:

First, it is not my view that the poor are all innocent victims persecuted by the evil rich. The poor do commit crimes, and my own assumption is that the vast majority of the poor who are confined in our prisons are guilty of the crimes for which they were sentenced. In addition, there is good evidence that the poor do commit a greater portion of the crimes against person and property listed in the FBI Index than the middle- and upper-classes do, relative to their numbers in the national population. What I have already tried to prove is that the crimes in the FBI Index are not the only acts that threaten us nor are they the acts that threaten us the most. What I will try to prove in what follows is that the poor are arrested and punished by the criminal justice system much more frequently than their contribution to the crime problem would warrant—thus the criminals who populate our prisons as well as the public’s imagination are disproportionately poor.

Second, the following discussion has been divided into three sections that correspond to the major criminal justice decision points…. As always, such classifications are a bit neater than reality, and so they should not be taken as rigid compartments. Many of the distorting processes operate at all criminal justice decision points. So, for example, while I will primarily discuss the light-handed treatment of white-collar criminals in the section on charging and sentencing, it is also true that white-collar criminals are less likely to be arrested or convicted than are blue-collar criminals. The section in which a given issue is treated is a reflection of the point in the criminal justice process at which the disparities are the most striking. Suffice it to say, however, that the disparities between the treatment of the poor and the nonpoor are to be found at all points of the process.

Third, it must be borne in mind that the movement from arrest to sentencing is a funnelling process, so that discrimination that occurs at any early stage shapes the population that reaches later
stages. Thus, for example, some recent studies find little economic bias in sentence length for people convicted of similar crimes.\textsuperscript{12} When reading such studies, one should remember that the population that reaches the point of sentencing has already been subject to whatever discrimination exists at earlier stages. If, for example, among people with similar offenses and records, poor people are more likely to be charged and more likely to be convicted, then even if the sentencing of convicted criminals is evenhanded, it will reproduce the discrimination that occurred before.

**Arrest and Charging**

The problem with most official records of who commits crime is that they are really statistics on who gets arrested and convicted. If, as I will show, the police are more likely to arrest some people than others, these official statistics may tell us more about police than about criminals. In any event, they give us little reliable data about those who commit crime and do not get caught. Some social scientists, suspicious of the bias built into official records, have tried to devise other methods of determining who has committed a crime. Most often, these methods involve an interview or questionnaire in which the respondent is assured of anonymity and asked to reveal whether he or she has committed any offenses for which he or she could be arrested and convicted. Techniques to check reliability of these self-reports also have been devised however, if their reliability is still in doubt, common sense would dictate that they would underestimate rather than overstate the number of individuals who have committed crimes and never come to official notice. In light of this, the conclusions of these studies are rather astounding. It would seem that crime is the national pastime. The President’s Crime Commission conducted a survey of 10,000 households and discovered that “91 percent of all Americans have violated laws that could have subjected them to a term of imprisonment at one time in their lives.”\textsuperscript{13}

A number of other studies support the conclusion that serious criminal behavior is widespread among middle- and upper-class individuals, although these individuals are rarely, if ever, arrested. Some of the studies show that there are no significant differences between economic classes in the incidence of criminal behavior.\textsuperscript{14} The authors of a recent review of literature on class and delinquency conclude that “Research published since 1978, using both official and self-reported data suggests … that there is no pervasive relationship between SES [socioeconomic status] and delinquency.”\textsuperscript{15} This conclusion is echoed by Jensen and Thompson, who argue that

The safest conclusion concerning class structure and delinquency is the same one that has been proposed for several decades: class, no matter how defined, contributes little to explaining variation of self-reports of common delinquency.\textsuperscript{16}

Others conclude that while lower-class individuals do commit more than their share of crime, arrest records overstate their share and underestimate that of the middle and upper classes.\textsuperscript{17} Still other studies suggest that some forms of serious crime—forms usually associated with lower-class youth—show up more frequently among higher-class persons than among lower.\textsuperscript{18} For instance, Empey and Erikson interviewed 180 white males aged 15 to 17 who were drawn from different economic strata. They found that “virtually all respondents reported having committed not one but a variety of different offenses” Although youngsters from the middle classes constituted 55 percent of the group interviewed, they admitted to 67 percent of the instances of breaking and entering, 70 percent of the instances of property destruction, and an astounding 87 percent of all armed robberies admitted to by the entire sample.\textsuperscript{19} Williams and Gold studied a national sample of 847 males and females between the ages of 13 and 16.\textsuperscript{20} Of these, 88 percent admitted to at least one delinquent offense.

Even those who conclude “that more lower status youngsters commit delinquent acts more frequently than do higher status youngsters”\textsuperscript{21} also recognize that lower class youth are significantly overrepresented in official records. Gold writes that “about five times more lowest than highest status boys appear in the official records; if records were complete and unselective, we estimate that the ratio would be closer to 1.5:1.”\textsuperscript{22} The simple fact is that for the same offense, *a poor person is more likely to be arrested and, if arrested charged, than a middle- or upper-class person.*\textsuperscript{23}

This means, first of all, that poor people are more likely to come to the attention of the police. Furthermore, even when apprehended, the police are more likely to formally charge a poor person and release a higher-class person *for the same offense.* Gold writes that
boys who live in poorer parts of town and are apprehended by police for delinquency are four to five times more likely to appear in some official record than boys from wealthier sections who commit the same kinds of offenses. These same data show that, at each stage in the legal process from charging a boy with an offense to some sort of disposition in court, boys from different socioeconomic backgrounds are treated differently, so that those eventually incarcerated in public institutions, that site of most of the research on delinquency, are selectively poorer boys.  

From a study of self-reported delinquent behavior, Gold finds that when individuals were apprehended, “if the offender came from a higher status family, police were more likely to handle the matter themselves without referring it to the court.”

Terence Thornberry reached a similar conclusion in his study of 3,475 delinquent boys in Philadelphia. Thornberry found that among boys arrested for equally serious offenses and who had similar prior offense records, police were more likely to refer to lower-class youths than the more affluent ones to juvenile court. The police were more likely to deal with the wealthier youngsters informally, for example, by holding them in the station house until their parents came rather than instituting formal procedures. Of those referred to juvenile court, Thornberry found further that for equally serious offenses and with similar prior records, the poorer youngsters were more likely to be institutionalized than were the affluent ones. The wealthier youths were more likely to receive probation than the poorer ones. As might be expected, Thornberry found the same relationships when comparing the treatment of black and white youths apprehended for equally serious offenses.  

Recent studies continue to show similar effects. For example, Sampson found that, for the same crimes, juveniles in lower-class neighborhoods were more likely to have some police record than those in better-off neighborhoods. Again, for similar crimes, lower-class juveniles were more likely to be referred to court than better-off juveniles. If you think these differences are not so important because they are true only of young offenders, remember that this group accounts for much of the crime problem. Moreover, other studies not limited to the young tend to show the same economic bias. McCarthy found that, in metropolitan areas, for similar suspected crimes, unemployed people were more likely to be arrested than employed.  

As I indicated above, racial bias is but another form in which the bias against the poor works. And blacks are more likely to be suspected or arrested than whites. A 1988 *Harvard Law Review* overview of studies on race and the criminal process concludes that “most studies … reveal what many police officers freely admit: that police use race as an independently significant, if not determinative, factor in deciding whom to follow, detain, search, or arrest.” “A 1994 study of juvenile detention decisions found that African-American and Hispanic youths were more likely to be detained at each decision point, even after controlling for the influence of offense seriousness and social factors (e.g., single-parent home). Decisions by both police and the courts to detain a youngster were highly influenced by race.” The study states that, “[n]ot only were there direct effects of race, but indirectly, socioeconomic status was related to detention, thus putting youth of color again at risk for differential treatment.” Reporting the results of University of Missouri criminologist Kimberly Kempf’s study of juvenile justice in fourteen Pennsylvania counties, Jerome Miller says that “Black teenagers were more likely to be detained, to be handled formally, to be waived to adult court, and to be adjudicated delinquent.” And the greater likelihood of arrest that minorities face is matched by a greater likelihood of being charged with a serious offense. For example, Huizinga and Elliott report that: “Minorities appear to be at greater risk for being charged with more serious offenses than whites when involved in comparable levels of delinquent behavior.” Bear in mind that once an individual has a criminal record, it becomes harder for that person to get employment thus increasing the likelihood of future criminal involvement and more serious criminal charges.  

For reasons mentioned earlier, a disproportionately large percentage of the casualties in the recent War on Drugs are poor inner-city minority males. Michael Tonry writes that, “according to National Institute on Drug Abuse (1991) surveys of Americans’ drug use, [Blacks] are not more likely than Whites ever to have used most drugs of abuse. Nonetheless, the … number of drug arrests of Blacks more than doubled between 1985 and 1989, whereas White drug arrests increased only by 27 percent.” A study conducted by the Sentencing
Project, based mainly on Justice Department statistics, indicates that “Blacks make up 12 percent of the United States’ population and constitute 13 percent of all monthly drug users…, but represent 35 percent of those arrested for drug possession, 55 percent of those convicted of drug possession and 74 percent of those sentenced to prison for drug possession.”

Numerous studies of police use of deadly force show that blacks are considerably more likely than whites or Hispanics to be shot by the police. For example, using data from Memphis, Tennessee, covering the years from 1969 through 1974, James Fyfe found that blacks were 10 times more likely than whites to have been shot unsuccessfully by police, 18 times more likely to have been wounded, and 5 times more likely to have been killed. A nation that has watched the brutal treatment meted out to Rodney King by California police officers will not find this surprising. Does anyone think this would have happened if King were a white man?

Any number of reasons can be offered to account for the differences in police treatment of poor versus well-off citizens. Some argue that they relied that the poor have less privacy. What others can do in their living rooms or backyards the poor do on the street. Others argue that a police officers decision to book a poor youth and release a middle-class youth reflects either the officer’s judgment that the higher-class youngster’s family will be more likely and more able to discipline him or her than the lower-class youngster’s, or differences in the degree to which poor and middle-class complainants demand arrest. Others argue that police training and police work condition police officers to be suspicious of certain kinds of people, such as lower-class youth, blacks, Mexicans, and so on. a thus more likely to detect their criminality. Still others hold that police mainly arrest those with the least political clout, those who are least able to focus public attention on police practices or bring political influence to bear, and these happen to be the members of the lowest social and economic classes.

Regardless of which view one takes, and probably all have some truth in them, one conclusion is inescapable. One of the reasons the offender “at the end of the road in prison is likely to be a member of the lowest social and economic groups in the country” is that the police officers who guard the access to the road to prison make sure that more poor people make the trip than well-to-do people.

Likewise for prosecutors. A recent study of prosecutors’ decisions shows that lower-class individuals are more likely to have charges pressed against them than upper-class individuals. Racial discrimination also characterizes prosecutors’ decisions to charge. The Harvard Law Review overview of studies on race and the criminal process asserts, “Statistical studies indicate that prosecutors are more likely to pursue full prosecution, file more severe charges, and seek more stringent penalties in cases involving minority defendants than in cases involving nonminority defendants.” One study of whites, blacks, and Hispanics arrested in Los Angeles on suspicion of having committed a felony found that, among defendants with equally serious charges and prior records, 59 percent of whites had their charges dropped at the initial screening, compared with 40 percent of blacks and 37 percent of Hispanics.

The weeding out of the wealthy starts at the very entrance to the criminal justice system: The decision about whom to investigate, arrest, or charge is not made simply on the basis of the offense committed or the danger posed. It is a decision distorted by a systematic economic bias that works to the disadvantage of the poor.

This economic bias is a two-edged sword. Not only are the poor arrested and charged out of proportion to their numbers for the kinds of crimes poor people generally commit—burglary, robbery, assault, and so forth—but when we reach the kinds of crimes poor people almost never have the opportunity to commit, such as antitrust violations, industrial safety violations, embezzlement, and serious tax evasion, the criminal justice system shows an increasingly benign and merciful face. The more likely that a crime is the type committed by middle and upper class people, the less likely that it will be treated as a criminal offense. When it comes to crime in the streets, where the perpetrator is apt to be poor, he or she is even more likely to be arrested and formally charged. When it comes to crime in the suites, where the offender is apt to be affluent, the system is most likely to deal with the crime non-criminally, that is, by civil litigation or informal settlement. Where it does choose to proceed criminally, as we will see in the section on sentencing, it rarely goes beyond a slap on the wrist. Not only is the main entry to the road to prison held wide open to the poor but the access routes for the wealthy are largely sealed off. Once again, we should not be surprised at whom we find in our prisons.
CONVICTION

Between arrest and imprisonment lies the crucial process that determines guilt or innocence. Studies of individuals accused of similar offenses and with similar prior records show that the poor defendant is more likely to be adjudicated guilty than is the wealthier defendant.\(^4^2\) In the adjudication process the only thing that should count is whether the accused is guilty and whether the prosecution can prove it beyond a reasonable doubt. Unfortunately, at least two other factors that are irrelevant to the question of guilt or innocence significantly affect the outcome: One is the ability of the accused to be free on bail prior to trial; and the second is access to legal counsel able to devote adequate time and energy to the case. Because both bail and high-quality legal counsel cost money, it should come as no surprise that here as elsewhere the poor do poorly.

Being released on bail is important in several respects. First and foremost is that those not released on bail are kept in jail like individuals who have been found guilty. They are thus punished while they are still legally innocent. “On June 30, 1995, an estimated 44 percent of the nation’s adult jail inmates had been convicted on their current charge. An estimated 223,000 adult jail inmates were serving a sentence, awaiting sentencing, or serving time in jail [or a probation or parole violation. Between 1985 and 1995 the number of convicted inmates rose by nearly 100,000—up from 13,409. During the same period, the number of convicted jail inmates, including those on trial or awaiting arraignment or trial, doubled (from 127,059 to an estimated 284,100).”\(^4^3\)

Beyond the obvious ugliness of punishing people before they are found guilty, confined defendants suffer from other disabilities. Specifically, they cannot actively aid in their own defense by seeking out witnesses and evidence. Several studies have shown that among defendants accused of the same offenses those who make bail are more likely to be acquitted than those who do not.\(^4^4\) In a recent study of unemployment and punishment, Chiricos and Bales found that after the effects of other factors [seriousness of crime, prior record, etc.] were controlled, an unemployed defendant was 3.2 times more likely to be incarcerated before trial than his employed counterpart.”\(^4^5\)

Furthermore, because the time spent in jail prior to adjudication of guilt may count as part of the sentence if one is found guilty, the accused are often placed in a ticklish position. Let us say the accused believes he or she is innocent, and let us say also that he or she has been in the slammer for two months awaiting trial. Along comes the prosecutor to offer a deal: If you plead guilty to such-and-such (usually a lesser offense than has been charged, say, possession of burglar’s tools instead of burglary), the prosecutor promises to ask the judge to sentence you to two months. In other words, plead guilty and walk out of jail today (free, but with a criminal record that will make finding a job hard and insure a stiffer sentence next time around)—or maintain your innocence, stay in jail until trial, and then be tried for the full charge instead of the lesser offense! In fact, not only does the prosecutor threaten to prosecute for the full charge, but this is often accompanied by the implied but very real threat to press for the most severe penalty as well—for taking up the court’s time.

Plea bargaining such as this is an everyday occurrence in the criminal justice system. Contrary to the Perry Mason image, the vast majority of criminal convictions in the United States are reached without a trial. It is estimated that between 70 and 95 percent of convictions are the result of a negotiated plea.\(^4^6\) That is, a bargain in which the accused agrees to plead guilty (usually to a lesser offense than he or she is charged with or to one offense out of many he or she is charged with) in return for an informal promise of leniency from the prosecutor with the tacit consent of the judge. If you were the jailed defendant offered a deal like this, how would you choose? Suppose you were a poor black man not likely to be able to retain F. Lee Bailey or Edward Bennett Williams for your defense.

The advantages of access to adequate legal counsel during the adjudicative process are obvious but still worthy of mention. In 1963, the U.S. Supreme Court handed down the landmark Gideon v. Wainwright decision, holding that the states must provide legal counsel to the indigent in all felony cases. As a result, no person accused of a serious crime need face his or her accuser without a lawyer. However, the Supreme Court has not held that the Constitution entitles individuals to lawyers able to devote equal time and resources to their cases. Even though Gideon represents significant progress in making good on the constitutional promise of equal treatment before the law, we still are left with two transmission belts of justice: one for the poor and one for the affluent. There is an emerging body of case law on the right to effective assistance of counsel;\(^4^7\) however, this is yet to have any serious
The Rich Get Richer and the Poor Get Prison

impact on the assembly-line legal aid handed out to the poor.

Indigent defendants, those who cannot afford to retain their own lawyers, will be defended either by a public defender or by a private attorney assigned by the court. Because the public defender is a salaried attorney with a case load much larger than that of a private criminal lawyer, and because court-assigned private attorneys are paid a fixed fee that is much lower than they charge their regular clients, neither is able or motivated to devote much time to the indigent defendant’s defense. Both are strongly motivated to bring their cases to a close quickly by negotiating a plea of guilty. Because the public defender works in day-to-day contact with the prosecutor and the judge, the pressures on him or her to negotiate a plea as quickly as possible, instead of rocking the boat by threatening to go to trial, are even greater than those that work on court-assigned counsel. In an essay aptly titled “Did You Have a Lawyer When You Went to Court? No, I Had a Public Defender,” Jonathan Casper reports the perceptions of this process from the standpoint of the defendants:

Most of the men spent very little time with their public defender. In the court in which they eventually plead guilty, they typically reported spending on the order of five to ten minutes with their public defender. These conversations usually took place in the bull-pen of the court house or in the hallway.

The brief conversations usually did not involve much discussion of the details surrounding the alleged crime, mitigating circumstances or the defendants’ motives or backgrounds. Instead, they focused on the deal, the offer the prosecution was likely to make or had made in return for a cop out. Often the defendants reported that the first words the public defender spoke (or at least the first words the defendants recalled) were, “I can get you…, if you plead guilty.”

As might be expected, with less time and fewer resources to devote to the cause, public defenders and assigned lawyers cannot devote as much time and research to preparing the crucial pretrial motions that can often lead to dismissal of charges against the accused. A recent study of 28,315 felony defendants in various county and city jurisdictions in Tennessee, Virginia, and Kentucky shows that public defenders got cases dropped for 11.3 percent of their defendants, and private attorneys got dismissals for 48 percent of their defendants. As also might be expected, the overall acquittal rate for privately retained counsel is considerably better than that for public defenders. The same study shows that public defenders achieved either dismissal of charges or a finding of not guilty in 11.4 percent of the indictments they handled, and private attorneys got their clients off the hook in 56 percent of their cases. The superior record of private attorneys held good when comparisons were made among defendants accused of similar offenses and with similar prior records.

The problem of adequate legal representation is particularly acute in capital cases. According to Robert Johnson, “Most attorneys in capital cases are provided by the state. Defendants, as good capitalists, routinely assume that they will get what they pay for: next to nothing.” Their perceptions, he concludes, “may not be far from right.” Indeed, Stephen Gettinger maintains that an inadequate defense was “the single outstanding characteristic” of the condemned persons he studied. The result: Capital defendants appeared in court as “creatures beyond comprehension, virtually gagged and masked in preparation for the execution chamber.”

The popular perception is that the system guarantees a condemned person a lawyer. But most states provide counsel only for the trial and the automatic review of the sentence by the state appeals court. Indigent prisoners—a description that applies to just about everybody on death row—who seek further review must rely on the charity of a few private lawyers and on cash-starved organizations like the Southern Prisoners Defense Committee.

A recent Time magazine article on this topic is entitled You Don’t Always Get Perry Mason.” Says the author, “Because the majority of murder defendants are ... broke..., many of them get court-appointed lawyers who lack the resources, experience or inclination to do their utmost.... Some people go to traffic court with better prepared lawyers than many murder defendants get.”

Needless to say, the distinct legal advantages that money can buy become even more salient when
we enter the realm of corporate and other white-collar crime. Indeed, it is often precisely the time and cost involved in bringing to court a large corporation with its army of legal eagles that is offered as an excuse for the less formal and more genteel treatment accorded to corporate crooks. This excuse is, of course, not equitably distributed to all economic classes, any more than quality legal service is. This means that regardless of actual innocence or guilt, one’s chances of beating the rap increase as one’s income increases. Regardless of what fraction of crimes are committed by the poor, the criminal justice system is distorted so that an even greater fraction of those convicted will be poor. And with conviction comes sentencing.

SENTENCING

On June 28, 1990, the House Subcommittee on Financial Institutions Supervision, Regulation and Insurance met in the Rayburn House Office Building to hold hearings on the prosecution of savings and loan criminals. The chairman of the subcommittee, Congressman Frank Annunzio, called the meeting to order and said:

The American people are furious with the slow pace of prosecutions involving savings and loan criminals. These crooks are responsible for 1/3, 1/2, or maybe even more, of the savings and loan cost. The American taxpayer will be forced to pay $500 billion or more over the next 40 years, largely because of these crooks. For many Americans, this bill will not be paid until their grandchildren are old enough to retire.

We are here to get an answer to one question: “When are the S&L crooks going to jail?

The answer from the administration seems to be: “probably never.”

Frankly, I don’t think the administration has the interest in pursuing Gucci-clad white-collar criminals. These are hard and complicated cases, and the defendants often were rich, successful prominent members of their upper-class communities. It is far easier putting away a sneaker-clad high school dropout who tries to rob a bank of a thousand dollars with a stickup note, than a smooth talking S&L executive who steals a million dollars with a fraudulent note.

Later in the hearing, Chairman Annunzio questioned the administration’s representative:

You cited, Mr. Dennis, several examples in your testimony of successful convictions with stiff sentences, but the average sentence so far is actually about 2 years, compared to an average sentence of about 9 years for bank robbery. Why do we throw the book at people who rob a bank in broad daylight but we coddle people who … rob the bank secretly?56

The simple fact is that the criminal justice system reserves its harshest penalties for its lower-class clients and puts on kid gloves when confronted with a better class of crook.

We will come back to the soft treatment of the S&L crooks shortly. For the moment, note that the tendency to treat higher-class criminals more leniently than lower-class criminals has been with us for a long time. In 1972, the New York Times did a study on sentencing in state and federal courts. The Times stated that “crimes that tend to be committed by the poor get tougher sentences than those committed by the well-to-do,” that federal “defendants who could not afford private counsel were sentenced nearly twice as severely as defendants with private or no counsel,” and that a “study by the Vera Institute of Justice of courts in the Bronx indicates a similar pattern in the state courts.”57

More recently, D’Alessio and Stolzenberg studied a random sample of 2,760 offenders committed to the custody of the Florida Department of Corrections during fiscal year 1985. Although they found no greater sentence severity for poor offenders found guilty of property crimes, they found that poor offenders did receive longer sentences for violent crimes, such as manslaughter, and for morals offenses, such as narcotics possession. Nor, by the way, did sentencing guidelines reduce this disparity.58 A study of individuals convicted of drunk driving found that increased education (taken as an indicator of higher occupational status) “increase[d] the rate of movement from case hung to probation and decrease[d] the rate of movement to prison.” And though when probation was given, more educated offenders got longer probation, they also got shorter prison sentences, if sentenced to prison at all.59
Chiricos and Bales found that, for individuals guilty of similar offenses and with similar prior records, unemployed defendants were more likely to be incarcerated while awaiting trial, and for longer periods, than employed defendants. They were more than twice as likely as their employed counterparts to be incarcerated upon a finding of guilt. And defendants with public defenders experienced longer periods of jail time than those who could afford private attorneys.\(^6\) McCarthy noted a similar link between unemployment and greater likelihood of incarceration.\(^6\) In his study of 28,315 felony defendants in Tennessee, Virginia, and Kentucky, Champion also found that offenders who could afford private counsel had a greater likelihood of probation, and received shorter sentences when incarceration was imposed.\(^6\) A study of the effects of implementing Minnesota’s determinate sentencing program shows that socio-economic bias is “more subtle, but no less real” than before the new program.\(^6\)

Tillman and Pontell examined the sentences received by individuals convicted of Medicaid provider fraud in California. Because such offenders normally have no prior arrests and are charged with grand theft, their sentences were compared with the sentences of other offenders convicted of grand theft and who also had no prior records. While 37.7 percent of the Medicaid defrauders were sentenced to some jail or prison time, 79.2 percent of the others convicted of grand theft were sentenced to jail or prison. This was so even though the median dollar loss due to the Medicaid frauds was $13,000, more than ten times the median loss due to the other grand thefts ($1,149). Tillman and Pontell point out that most of the Medicaid defrauders were health professionals, while most of the others convicted of grand theft had low-level jobs or were unemployed. They conclude that “differences in the sentences imposed on the two samples are indeed the result of the different social statuses of their members.”\(^6\)

As usual, data on racial discrimination in sentencing tell the same story of the treatment of those who cannot afford the going price of justice. A study of offender processing in New York State counties found that, for offenders with the same arrest charge and the same prior criminal records, minorities were incarcerated more often than comparably situated whites.\(^6\) A study of sentencing in Miami concludes that when case-related attributes do not clearly point to a given sentence, sentencing disparities are more likely to be based on race.\(^6\) Most striking perhaps is that, in 1993, 51 percent of inmates in state and federal prisons were black and 44 percent of inmates of jails were black, whereas blacks make up only 36.5 percent of those arrested for serious (FBI Index) crimes.\(^7\) Furthermore, when we look only at federal prisons, where there is reason to believe that racial and economic discrimination is less prevalent than in state institutions, we find that in 1986, nonwhite inmates were sentenced, on average, 33 more months for burglary than white inmates and 22 more months for income tax evasion. In 1989, the average federal sentence for blacks found guilty of violent offenses was 10 months longer than for whites.\(^6\)

Here must be mentioned the notorious “100-to-1” disparity between sentences for possession of cocaine in powder form (popular in the affluent suburbs) and in crack form (popular in poor inner-city neighborhoods). Federal laws require a mandatory five-year sentence for crimes involving 500 grams of powder cocaine or 5 grams of crack cocaine. This yields a sentence for first-time offenders (with no aggravating factors, such as possession of a weapon) that is higher than the sentence for kidnapping, and only slightly lower than the sentence for attempted murder.\(^6\) About 90 percent of those convicted of Federal crack offenses are black, about 4 percent are white. “As a result, the average prison sentence served by Black federal prisoners is 40 percent longer than the average sentence for Whites.”\(^\) In 1995, the United States Sentencing Commission recommended ending the 100-to-1 disparity between powder and crack penalties, and, in an unusual display of bipartisanship, both the Republican Congress and the Democratic President rejected their recommendation.\(^7\)

Sentencing disparities between the races are, of course, not new. An extensive study by the Boston Globe of 4,500 cases of armed robbery, aggravated assault, and rape found that “blacks convicted in the superior courts of Massachusetts receive harsher penalties than whites for the same crimes.”\(^\) The authors of a study of almost 1,200 males sentenced to prison for armed robbery in a southeastern state found that “in 1977 whites incarcerated for armed robbery had a greater than average chance of receiving the least severe sentence, while nonwhites had a greater than average chance of receiving a moderately severe sentence.”\(^7\) A study of 229 adjudicated cases in a Florida judicial district yielded the finding that “whites have an 18 percent greater chance in the predicted probability of receiving probation than blacks when all other things are
equal.” 74 A recent study of criminal justice systems in California, Michigan, and Texas by Petersilia confirms the continuation of this trend. “Controlling for the factors most likely to influence sentencing and parole decisions,” she writes, “the analysis still found that blacks and Hispanics are less likely to be given probation, more likely to receive prison sentences, more likely to receive longer sentences, and more likely to serve a greater portion of their original time.” 75 Myers found that “harsher treatment of persons with fewer resources (e.g., female, unemployed, unmarried, black is … pronounced in highly unequal counties.”76

The federal government has introduced sentencing guidelines and minimum mandatory sentences that might be expected to eliminate discrimination, and many states have followed suit. The effect of this, however, has been not to eliminate discretion but to transfer it from those who sentence to those who decide what to charge—that is, from judges to prosecutors. Prosecutors can charge in a way that makes it likely that the offender will get less than the mandatory minimum sentence. Says U.S. District Judge J. Lawrence Irving of San Diego, “the system is run by the U.S. attorneys. When they decide how to indict, they fix the sentence.”77

We have seen in this [selection] … that the criminal justice system is triply biased against the poor. First, there is the economic class bias among harmful acts as to which get labeled crimes and which are treated as regulatory matters …Second, there is economic class bias among crimes that we have already seen in this [selection]. The crimes that poor people are likely to commit carry harsher sentences than the “crimes in suites” committed by well-to-do-people. Third, among defendants convicted of the same crimes, the poor receive less probation and more years of confinement than well-off defendants, assuring us once again that the vast majority of those put behind bars are from the lowest social and economic classes in the nation. On either side of the law, the rich get richer…

... AND THE POOR GET PRISON

At 9:05 A.M. on the morning of Thursday, September 9, 1971, a group of inmates forced their way through a gate at the center of the prison, fatally injured a guard named William Quinn, and took 50 hostages. The Attica uprising had begun. It lasted four days, until 9:43 AM, on the morning of Monday, September 13, when corrections officers and state troopers stormed the prison and killed 29 inmates and 10 hostages.78 During those four days the nation saw the faces of its captives on television—the hard black faces of young men who had grown up on the streets of Harlem and other urban ghettos. Theirs were the faces of crime in America. The television viewers who saw them were not surprised. Here were faces of dangerous men who should be locked up. Nor were people outraged when the state launched its murderous attack on the prison, killing many more inmates and guards than did the prisoners themselves. Maybe they were shocked—but not outraged. Neither were they outraged when two grand juries refused to indict any of the attackers, nor when the mastermind of the attack, New York Gov. Nelson Rockefeller, was named to be vice president of the United States three years after the uprising and massacre.79

They were not outraged because the faces they saw on the TV screens fit and confirmed their beliefs about who is a deadly threat to American society and a deadly threat must be met with deadly force. How did those men get to Attica? How did Americans get their beliefs about who is a dangerous person? These questions are interwoven. People get their notions about who is a criminal at least in part from the occasional television or newspaper picture of who is inside our prisons. The individuals they see there have been put in prison because people believe certain kinds of individuals are dangerous and should be locked up.

I have argued in this [selection] that this is not a simple process of selecting the dangerous and the criminal from among the peace-loving and the law-abiding. It is also a process of weeding out the wealthy at every stage, so that the final picture—a picture like that that appeared on the TV screen on September 9, 1971—is not a true reflection of the real dangers in our society but a distorted image, the kind reflected in a carnival mirror.

It is not my view that the inmates in Attica were innocent of the crimes that sent them there. I assume they and just about all the individuals in prisons in America are probably guilty of the crime for which they were sentenced and maybe more. My point is that people who are equally or more dangerous, equally or more criminal, are not there; that the criminal justice system works systematically not to punish and confine the dangerous and the criminal but to punish and confine the poor who are dangerous and criminal.
It is successful at all levels. In 1973, there were 204,211 individuals in state and federal prisons, or 96 prisoners for every 100,000 individuals (of all ages) in the general population. By 1979, state and federal inmates numbered 301,470, or 133 per 100,000 Americans. By 1995, there were a total of 1,585,401 persons in state and federal prisons and in local jails, a staggering 600 for every 100,000 in the population. One in 167 U.S. residents (of all ages and both sexes) was behind bars by the end of 1995. However, of the 1,585,401 prisoners, more than a million are men, virtually all above the age of 18. Because the adult male population in the United States is about 93 million, this means that more than one out of every 100 American adult men is behind bars. This enormous number of prisoners is, of course, predominantly from the bottom of society.

Of the estimated 711,643 people in state prisons in June 1991, 33 percent were not employed at all (full or part time) prior to their arrests. About half of these were looking for work and half were not. Another 12 percent had only part-time jobs before prison, making fully 45 percent who were without full-time employment prior to arrest. These statistics represent a general worsening compared with 1986, when 31 percent of state inmates had no pre-arrest employment at all, and 43 percent had no full-time pre-arrest employment. Of those 1991 state inmates who had been free at least a year before arrest, 19 percent had some pre-arrest annual income but less than $3,000 50 percent had some pre-arrest annual income but less than $10,000.

To get an idea of what part of society is in prison, we should compare these figures with comparable figures for the general population. Because 95 percent of state inmates are male, we can look at employment and income figures for males in the general society in 1990. Statistics on employment and income for 1990 are close to those for 1988 and 1989, and so will give us a fair sense of the general population from which the current state inmates came.

In 1990, 5.6 percent of males, 16-years-old and above, in the labor force were unemployed and looking for work. This corresponds to half the state inmates who were unemployed before arrest, because the other half who were unemployed were not looking for work. Where 16 percent of state prisoners had been unemployed and still looking for work, only 5.6 percent of males in the general population were in this condition. Thus, prisoners were unemployed and looking for work at a rate three times that of males in the general population. But this doesn’t give us the full picture, because it doesn’t capture the unemployed prisoners who had not been seeking work. To capture that, let us assume that, as among the prisoners, the number of males in the general population who are unemployed and not looking is equal to the number in the labor force who are unemployed and looking. (Note that this assumption is high, but for present purposes conservative, as the higher it is the more it will decrease the relative difference between prisoners and general male population.) The 5.6 percent of males in the labor force represents approximately 3,799,000 persons. If we double it, we get 7,598,000 as an estimate of the total number of males in the general population who are unemployed, looking for work or not. As a percentage of the total noninstitutionalized population of males 16 and over, this is 8.5 percent. Compare this with the 33 percent of state inmates who were unemployed prior to being arrested. Then, state prisoners were unemployed at a rate nearly four times that of males in the general population.

Where 19 percent of prisoners with any pre-arrest income at all earned less than $3,000 a year, 6.8 percent of males in the civilian labor force in 1990 earned between $1 and $2,499 a year, and 12.3 percent earned between $1 and $4,999. Fifty percent of the inmates had annual incomes between $1 and $10,000, while 25 percent of males in the general population earned in that range.

Our prisoners are not a cross-section of America. They are considerably poorer and considerably less likely to be employed than the rest of Americans. Moreover, they are also less educated, which is to say less in possession of the means to improve their sorry situations. Of all U.S. prison inmates, 47 percent did not graduate from high school, compared to 21 percent of the U.S. adult population. Sixteen percent of prisoners said they had some college, compared to 43 percent of the U.S. adult population.

The criminal justice system is sometimes thought of as a kind of sieve in which the innocent are progressively sifted out from the guilty, who end up behind bars. I have tried to show that the sieve works another way as well. It sifts the affluent out from the poor, so it is not merely the guilty who end up behind bars, but the guilty poor.
Endnotes

1. Compare the statement, written more than half a century ago, by Professor Edwin H. Sutherland, one of the major luminaries of twentieth-century criminology:

*First, the administrative processes are more favorable to persons in economic comfort than to those in poverty, so that if two persons on different economic levels are equally guilty of the same offense, the one on the lower level is more likely to be arrested, convicted, and committed to an institution.*

*Second, the laws are written, administered, and implemented primarily with reference to the types of crimes committed by people of lower economic levels.* [E. H. Sutherland, *Principles of Criminology* (Philadelphia: Lippincott, 1939), p. 179].

2. For example, in 1991, when black made up 12 percent of the national population, they accounted for 46 percent of the U.S. state prison population. BJS, *Survey of State Prison Inmates.* 1991, p. 3.


Negroes are more likely to be suspected of crime than are whites. They are also more likely to be arrested. If the perpetrator of a crime is known to be a Negro the police may arrest all Negroes who were near the scene—a procedure they would rarely dare to follow with whites. After arrest Negroes are less likely to secure bail, and so are more liable to be counted in jail statistics. They are more liable than whites to be indicted and less likely to have their case nol prossed or otherwise dismissed. If tried, Negroes are more likely to be convicted. If convicted they are less likely to be given probation. For this reason they are more likely to be included in the count of prisoners. Negroes are also more likely than whites to be kept in prison for the full terms of their commitments and correspondingly less like to be paroled.


Another study that finds no greater likelihood of incarceration based on socioeconomic status is Michael Benson and Esteban Walker, “Sentencing the White-Collar Offender,” *American Sociological Review* 53 (April 1988), pp. 291–302. And yet another found higher-status offenders to be more likely 10 be incarcerated. David Weisburd, Elin Waring, and Stanton Wheeler, “Class, Status, and the Punishment of White Collar Criminals,” *Law and Social Inquiry* 16 (1990), pp. 223–41. These last two studies are limited to offenders convicted of white-collar crimes, and so they deal with a sample that has already been subject to whatever discrimination exists in the arrest, charging, and conviction of white-collar offenders.


19. Empey and Erikson “Hidden Delinquency and Social Status,” pp 549, 551. Nye, Short, and Olson also found destruction of property to be committed most frequently by upper-class boys and girls, “Socioeconomic Status and Delinquent Behavior,” p. 385.

22. Ibid., p. 44.
23. Comparing socioeconomic status categories, ‘scant evidence is found that would support the contention that group delinquency is more characteristic of the lower-status levels than other socioeconomic status levels. In fact, only arrests seem to be more characteristic of the low-status category than the other categories.” Erikson, “Group Violations, Socioeconomic Status and Official Delinquency,” p. 15.
25. Ibid., p. 38
37. This view is widely held, although the degree to which it functions as a self-fulfilling prophecy is less widely recognized. Versions of this view can be seen in Challenge, p. 79; Jerome Skolnick, Justice Without Trial (New York: Wiley, 1966), pp. 43–48, 217–218; and Jessica Mitford, Kind and Usual Punishment, p. 53. Piliavin and Briar write in “Police Encounters with Juveniles”:

Compared to other youths, Negroes and boys whose appearance matched the delinquent stereotype were more frequently stopped and interrogated by patrolmen—often even in the absence of evidence that an offense had been committed—usually were given more severe dispositions for the same violations. Our data suggest, however, that these selective apprehension and disposition practices resulted not only from the intrusion of long-held prejudices of individual police officers but also from certain job-related experiences of law enforcement personnel. First, the tendency of police to give more severe dispositions to Negroes and to youths whose appearance correspond to that which police associated with delinquents partly reflected the fact, observed in this study, that these youths also were much more likely than were other types of boys to exhibit the sort of recalcitrant demeanor which police construed as a sign of the confirmed delinquent. Further officers assumed partly on the basis...
of departmental statistics that Negros and juveniles who “look tough” (e.g. who wear chinos, leather jackets, boots, etc.) commit crimes more frequently than do other types of youths. [p. 212]


43. BJS, Prison and Jail Inmates, 95, p. 11.


47. A good summary of these developments can be found in Joel Jay Finer, “Ineffective Assistance of Counsel,” Cornell Law Review 58, no. 6 (July 1973), pp. 1077–1120.


52. Of those defendants convicted in U.S. district courts in 1971, 46 percent had assigned lawyers (including public defenders); of those acquitted, 37.5 percent had assigned counsel; and of those dismissed, only 33.3 percent had assigned counsel. Sourcebook-1974, p. 388.


68. Sourcebook-1987, pp. 376, 491, 518; Sourcebook-1992, p. 492, Table no. 5.21.

69. Criminal Justice Newsletter, March 1, 1995, p. 3; Criminal Justice Newsletter, April 17, 1995, p. 5.


