How hinging eligibility for reforms on criminal history favors white Americans: The case of California's public safety realignment

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Abstract

Recent criminal justice reforms have significantly reduced state prison populations, though we do not yet know whether racial groups were affected in distinct ways. Using the case of California's public safety realignment (AB 109), we find that Black people were twice as likely as other groups to have prior convictions that disqualified them from serving sentences locally under AB 109, instead of in state prison. Moreover, once we include incarceration to jail, we find that racial disparities in total imprisonment increased following reform. Results point to the need for criminal justice reforms to account for the long history of racially disproportionate punishment that persists through criminal histories. Hinging eligibility on prior convictions will likely favor white Americans in most contexts in the United States where, like California, criminal histories vary across racial groups.

Mass incarceration is a defining American problem. Roughly twenty percent of the world's incarcerated population is in the United States, despite the fact that the nation only has about five percent of the global population. Perhaps the most damaging facet of this phenomenon is the deep racial and ethnic disparity that exists throughout the criminal justice pipeline, starting from arrest, to conviction and sentencing, and through to the likelihood of returning to custody after release. Despite making up roughly 13% of the general population, Black Americans account for roughly 40% of the prison population (Carson & Anderson, 2016). At the start of the 21st century, one in three Black men were estimated to be incarcerated during their lifetime, compared to one in 17 of their white counterparts (Bonczar, 2003).

In recent years, however, we have witnessed a range of new policies introduced across many states, designed to reduce the number of people behind bars (Lerman & Mooney, 2021). Since its peak in 2008 at 1,000 inmates per 100,000 adults, the incarceration rate declined to 860 per 100,000 adults at the end of 2016 (Kaeble & Cowhig, 2016), representing the lowest point since 1996. This trend is important, and might signal the beginning of a reversal in the type of "tough on crime" policies that led to the country's prison explosion. At the same time, however, little attention has been given to who benefits most from recent policies aimed at decarceration. Racial discrimination in otherwise similar cases, as well as systematic differences in eligibility for alternatives to incarceration, might substantially affect how the benefits of reform are distributed across racial groups.

In this paper, we use data from the California Department of Justice (CA DOJ) to explore the impact of a major state policy reform on racial disparities in imprisonment: California's historic criminal justice reform, Public Safety Realignment (AB 109). AB 109 reduced the prison population by nearly 30,000 in the first year of implementation (Lofstrom et al., 2016), but its impact on sentencing across racial/ethnic groups has not yet been evaluated. Like other decarceration policies enacted in recent years, the goal of AB 109 was to reduce incarceration for certain low-level offenses. However, we find that its benefits were not experienced equally across racial/ethnic groups.

Specifically, we find that Black people were twice as likely as other groups to have prior convictions that disqualified them from serving sentences locally under AB 109, instead of in state prison.

Once we weight the criminal history and arrest charges of Black defendants to those of whites, we find that the former actually had a lower likelihood of prison pre-AB 109 but this difference disappeared under the reform. Moreover, once we include incarceration to jail, we find that racial disparities in total imprisonment (i.e., prison and jail combined) actually increased following reform. Our results point to the need for future reform efforts to account for the long history of racially disproportionate punishment. Hinging eligibility on prior convictions will likely favor white Americans in most contexts in the United States where, like California, criminal histories vary across racial groups.

Prison Reform and Racial Disparities

Over the past decade, correctional reforms have been introduced across a diverse array of states aiming to reduce the number of people in state prisons (Lerman & Mooney, 2020). In Kentucky, for example, HB 463 expanded community supervision and reduced penalties for drug crimes. Nebraska's LB 605 similarly increased the use of post-release supervision and diverted low-level felony crimes to probation. As part of a set of criminal justice reforms, Arkansas passed SB 750 to respond to a growing drug crisis, creating alternatives to imprisonment and expanding drug courts and probation. Similarly, South Carolina aimed to reduce the number of people returned to prison through its Omnibus Crime Reduction and Sentencing Reform Act.

These varied policies suggest a broad effort to reduce mass incarceration across states, with varying degrees of success. However, decarceration policies of this kind rarely have an explicit mandate to also address the racial disproportionality of who goes to prison. As a result, it is possible that criminal justice reforms are reducing the overall numbers of persons imprisoned, without disrupting racial patterns in who winds up behind bars. Whites, who have historically been least affected by punitive policies, might also be most likely to benefit from their reversal.

The persistence of racial disparities in imprisonment could occur in at least two distinct ways. First and most obviously, reform efforts might lead to disparate outcomes through discretionary decision making. In this scenario, racial disparities in the likelihood of a prison sentence could result from racially

disparate treatment of otherwise similar cases following an arrest, such as whether to file charges and what charges to file, and/or the sentence imposed following a conviction (Frase, 2009; Rehavi & Starr, 2014; Wooldredge et al., 2015). If white defendants are disproportionately favored in these discretionary decisions, this group could experience a greater reduction (or lesser increase) in prison sentencing than other groups with the same disqualifying priors. Likewise, minority defendants may receive longer sentences on average than similar white defendants (Rehavi & Starr, 2014; Yang, 2015). One study, for instance, finds that individuals with more "Afrocentric features" received harsher sentences than others with equivalent criminal histories (Blair et al., 2004).

In addition to the persistence of racial bias, however, reform efforts might have different impacts across racial groups due to racial differences in prior offenses (Franklin & Henry, 2019; Frase et al., 2015; Hester, 2018; Skeem & Lowenkamp, 2016; Tillyer, 2014). The use of criminal history as a primary factor in decision making has sometimes been employed explicitly as an attempt to avoid using race as a determining factor. However, using criminal history instead of race does not, in practice, eliminate racial bias. This is because a criminal record is not a race-neutral metric of past criminal behaviors. Rather, the likelihood that criminal activity is detected, that a person is arrested, and the decisions made during prosecution all influence the distribution of prior records in the population, creating accumulated disparities which resurface as people proceed through subsequent stages of the criminal legal system (Wooldredge et al., 2015).

One example of this occurs when criminal history is used as a metric for predicting future behavior, such as in risk assessment algorithms (Brame, 2017, as cited in Taxman, 2017; Harcourt, 2015). These risk assessment processes, even those that remove race as an explicit factor, can give Black people systematically higher scores, and this bias is largely attributable to the use of criminal history (Harcourt, 2015; Skeem & Lowenkamp, 2016; Vincent & Viljoen, 2020). In one study, Baglivio and Jakowski (2012) found that the use of a criminal history sub-score in an assessment tool "significantly predicted subsequent arrest and conviction." However, in the same study, the authors note that estimates of predictive validity are likely affected by "differential law enforcement practices...across gender and

race/ethnicity subgroups." In this way, risk assessment tools can contribute to further marginalization of populations that are already disadvantaged within the criminal legal system (Silver & Miller, 2002).

In the same vein, several studies have found that racial stereotypes of criminality and dangerousness are compounded by extensive criminal histories for Black and Latinx defendants, leading to harsher criminal sentences (Johnson & DiPietro, 2012; Rouse & Hanson, 1991; Spohn & Holleran, 2006; Steffensmeier & Demuth, 2000; Steffensmeier & Demuth, 2006). For instance, non-white youth are more likely to be committed to harsher facilities than their white counterparts, who are more likely to be committed to therapeutic facilities. These early experiences with the justice system increase the odds that young people encounter the criminal legal system later in life, at which point their criminal histories can be used to justify more restrictive measures (Fader et al., 2014). Ulmer and Laskorunsky (2016) find that Black men are "significantly more likely to receive a prison sentence as a result of having a juvenile adjudication, and this likelihood increase[s] with each additional adjudication."

The literature points to an additional consideration when criminal history is used as a factor in sentencing decisions: namely, the likelihood of desistance over time. As Kurlychek et al. (2006) write, "individuals who have offended in the distant past seem less likely to recidivate than individuals who have offended in the recent past." Although there is a documented relationship between past and future offending, the length of time that has passed since an individual last committed an offense is strongly predictive of a decreased likelihood of future offending (Hester et al., 2018; Kurlychek et al., 2006). Thus, looking solely at the charges that appear on a criminal history, without taking into account how much time has passed, does not summarize individual risk of committing another offense. This point is further contextualized by the fact that Black defendants receive longer sentences on average than similar white defendants (Hester et al., 2018; Rehavi & Starr, 2014; Yang, 2015).

Overall, there is little evidence to support the notion that increasing penalties based on criminal history provides crime control benefits (Frase et al., 2015). Yet studies have shown consistent evidence suggesting that the use of criminal history can ratchet up punishment, exacerbating racial disparities in the likelihood and extent of criminal sanctions. Thus, we suspect that decarceration reforms, which are

explicitly designed to decrease the overall punitiveness of the system, might also result in racial disparities when they likewise are premised on criminal history. Specifically, we hypothesize that when reform efforts use criminal history as a criterion for eligibility to receive alternatives to incarceration, these reforms might disproportionately exclude Black people from their intended benefits.

California's recent reform efforts provide an opportunity to explore this hypothesis. In California, litigation began percolating through the lower courts starting in the mid-2000s, claiming that prison overcrowding created unconstitutionally cruel and unusual punishment. In 2011, the Supreme Court ordered California to reduce its prison population from 200 percent of design capacity to 137.5 percent—a reduction of between roughly 38,000 and 46,000 inmates. The California legislature passed AB 109 several months later, as the state's first substantial effort to meet the court's order. Called "Public Safety Realignment," AB 109 significantly reduced the scope of state-level corrections and expanded the responsibility of local counties for people convicted of some felony crimes. The "realigned" responsibilities that now fell on the shoulders of local counties can be summarized into three main categories:

- People convicted of non-sexual, non-violent, and non-serious offenses (so-called "non-non-nons") without serious prior convictions on their record now serve their sentences under county supervision rather than in state prison.
- People incarcerated in state prison for a "non-non-non" at the time the law took effect are to be supervised by county probation departments, in lieu of state parole, upon release.
- People who violate the terms of their parole now serve short sentences in local jail (known as a "flash incarceration") or face other local sanctions, as opposed to returning to state prison.

Extant analyses suggest that outcomes of the policy at the state level were largely in line with the goal of decreasing prison overcrowding; AB 109 successfully reduced the overall state prison population

in its first year of implementation (Lofstrom & Martin, 2015). At the same time, though, we hypothesize that the reform systematically benefited one racial group over another. First, AB 109 might have disparate impacts by race due to the decision making of criminal justice agencies at the local level. For instance, for county agencies aiming to reduce supervision costs and jail crowding, realignment "incentivizes both leniency (i.e. not charging some crimes) and severity (i.e. "charging up" to a prison eligible offense)," both of which are at the discretion of the prosecutor (Petersilia et al., 2014).

Alternatively, or in addition, changes in arrest practice may change disparities in prison sentencing if charges following an arrest increase in overall severity. If local-level authorities began to view AB 109 offenses as low priority, discretionary decisions to make fewer arrests for these offenses could have disproportionately benefited one racial group over another.[1] For instance, one racial group could experience greater declines in arrest rates overall, but an increase in the severity of current charges for the average person arrested. If this were the case, the likelihood of prison could actually increase among that group, and racial disparities in prison sentencing would change as a result.

AB 109 might also have impacted racial disparities because of the different distribution of criminal histories across the population. Under AB 109, serious or violent prior felony convictions can render defendants ineligible for sentencing to local supervision, in lieu of prison. Black people in California, as in other contexts, might be more likely to have disqualifying prior convictions on their record. In this way, the history of racism could be preserved despite overall reductions in the prison population, affecting new case dispositions and widening disparities in prison sentences (Harcourt, 2015). In the following sections, we examine the racial impacts of AB 109 and assess the role of both discretionary decisions and criminal histories in shaping outcomes across racial groups.

[1] The core feature of realignment was the shift in supervision – and its associated costs – from state prisons to county jails and probation departments. Overcrowding in county jails led to early releases, which, from the police and district attorneys' points of view, meant resource expenditures on these cases became disproportionate to the short jail terms they received (Bird & Grattet, 2017; Lofstrom et al., 2016; Petersilia et al., 2014).

Data and Methods

To investigate how AB 109 affected prison sentencing, we utilize individual-level data from the CA DOJ's Automated Criminal History System for all adults 18 and over arrested in California in the two years pre-AB 109 implementation (October 1, 2009 – September 30, 2011) and two years post-AB 109 (October 1, 2011 – September 30, 2013). We include all arrests of Black, Latinx, and white defendants (95.2% of all arrests) and restrict to arrests with an AB 109 offense as the highest arrest charge. These are further defined below, and total 935,340 arrests in the two years prior to AB 109 and 974,474 in the two years post-AB 109.

The data include each person's arrest charges, charges filed, charges convicted on, and sentence length and location, along with dates of arrest and case disposition. The records contain all of the sample's prior arrests in California, allowing us to control for criminal history in our models. Finally, each arrest record contains the person's demographic information: age at arrest, race/ethnicity, sex, and the county in which the arrest occurred. The CA DOJ relies upon agencies in 58 counties to report arrests through disposition. The disposition is missing in 34% of arrests and we assume that no charges were filed in these cases, so these represent arrests with no prison sentence.[2]

AB 109 amended approximately 500 criminal statutes to be eligible for 1170(h) sentencing to community supervision rather than prison after October 1, 2011 (Appendix 1). Certain serious or violent prior convictions render a person ineligible for 1170(h) sentencing, even if their current case was for an AB 109 offense. A case is also ineligible for 1170(h) sentencing if it includes a more serious non-AB 109 felony. We use the *Felony Sentencing After Realignment* guide developed by Judges Couzens and Bigelow (2016) to identify AB 109 offenses. We use a broad definition including all charges where proper designation is unknown because more information is required, the state law is unclear, or where the data

[2] The assumption that these represent arrests with no prison sentence is the general consensus among researchers using CA DOJ data. However, this could affect our findings if some missing dispositions were in fact prison sentences, particularly if missing data were associated with more punitive counties, or counties with greater racial disparities.

lack proper precision. When we use the term "AB 109" to describe a set of cases, we are including all cases that have one or more of the eligible AB 109 criminal statutes as their most serious offense and may or may not have prior convictions that render them ineligible. See Appendix 1 for additional information.

Statistical Analysis

To assess the changes that occurred in prison sentences statewide in the two years pre- and post-AB 109, we first make descriptive comparisons across race/ethnicity and time period for all cases with AB 109 arrest charges. This includes the arrest charges and criminal histories of the people arrested, the share of arrests with AB 109 or other felony charges filed, and the share of charges resulting in prison. We then use a modeling approach that tests whether the likelihood of prison sentencing differs by race before or after AB 109, when holding criminal history and case characteristics constant.

We do this using a propensity score weighting approach, weighting all defendants to the white population in the post-AB 109 period. We weight to a single time period to allow for a comparison of whether the effects of criminal history and case characteristics on racial disparities change over time. We use the post-period because it is of more relevance to understand effects among people who were, or likely would have been, arrested under these policy conditions. We use the white population because we conceptualize this group to have criminal histories that represent the counterfactual to those of Black and Latinx people, whose criminal histories were more heavily affected by prior punitive criminal justice policies (Alexander, 2011).

To generate propensity scores, we use a logit model to estimate the probability (propensity score, or ps) of belonging to the white population post-AB 109, given criminal history, arrest charges, and demographics. Demographic and contextual variables include age modeled as a cubic spline, a binary measure of sex, and county and calendar month of arrest. Three sets of variables are used for case characteristics and criminal history: 1) binary variables for felony and misdemeanor arrest charges in each offense category: weapons, sex, drug, property, violent, or other; 2) categorical variables (0, 1, 2+) for prior felony and misdemeanor convictions in each of the same offense categories; 3) and binary variables

for prior sentences to probation, jail, or prison. We also use a cubic spline for number of prior arrests. For the county variable, we group counties with small populations by region, generating 40 unique counties or county groupings. County groupings include 1) Sierra Region: Alpine, Amador, Calaveras, Inyo, Mariposa, Mono, Tuolumne; 2) Del Norte, Lassen, Modoc, Siskiyou; 3) Colusa, Glenn, Tehama, Trinity; 3) Nevada, Plumas, Sierra; 4) Lake, Mendocino; 5) Monterey, San Benito; 6) Sutter, Yuba. All other counties are accounted for individually.

We use separate models to generate propensity scores for each population, where each model uses *race=white* and *time=post-AB 109* as a binary outcome, and includes the white/post-AB 109 group and one of the following: a) white pre, b) Black pre, c) Latinx pre, d) Black post, or e) Latinx post). Ps are the model-predicted probabilities of belonging to the white/post-AB 109 group. We then set weights equal to one for the white population post-AB 109, to retain this population as-is, and set weights equal to ps / (1-ps) for all other defendants. In effect, this gives greater weight to people whose criminal histories and arrest charges more closely match those of the white population post-AB 109, and less to those who differ.

Next, we use logit models to estimate the probability of a) a prison sentence, and b) a prison or jail sentence for all people arrested for an AB 109 offense in the two years pre- and two years post-realignment. Each person is weighted as described above. Covariates in the model include race/ethnicity, a binary variable for whether the time period was pre- or post-AB 109, and an interaction between race/ethnicity and time to allow for the effect of race/ethnicity to change over time. If racial differences in criminal history and arrest charges fully explain the association between race and sentencing, then the weighted model should theoretically eliminate the association.

However, it is also possible that the effect of a set criminal history depends upon one's race/ethnicity, and this effect could change under AB 109. In other words, criminal history may be a mediator *and* moderator of the effect of race on sentencing. As a conceptual example, Black defendants may be more likely to be sentenced to prison because they are more likely to have serious prior felonies, *and* because Black defendants with serious prior felonies are more likely to be sentenced to prison than

White or Latinx defendants with serious prior felonies. AB 109 could alter the moderating effect of criminal history by standardizing eligibility for prison versus alternative sanctions based on criminal history.

To assess the interaction between race and criminal history, and whether it is altered by the reform, we include a set of criminal history variables in the weighted model and allow each to interact with time and race/ethnicity. Criminal history variables include: 1) a binary variable for any prior prison, and 2) a categorical variable for conviction history (no prior felonies, prior felonies excluding disqualifiers, or prior felony disqualifiers). We then generate model estimates (using Stata's margins command) of racial differences in the likelihood of a prison sentence at set levels of criminal history, and whether these differences change post-AB 109. Levels are set at each value of the two categorical variables. Finally, we replicate the analysis, incorporating sentences to jail. This allows us to examine the extent to which reductions in prison sentences were replaced with jail sentences, and whether this depended upon a defendant's race/ethnicity.

Results

A total of 43,290 prison sentences were handed down to Black, Latinx, and white Californians arrested on one or more AB 109 charges in the two years leading up to the law's implementation. These numbers declined overall by 36.8% in the two years post passage, to 27,379. The proportional decline in the total number of prison sentences was only slightly higher among Black Californians convicted on AB 109 offenses – 40.4%, compared to 36.0% among whites and 35.3% among Latinx – leaving disproportionality largely intact. Though just 6.5% of California's population was Black, this group comprised 23.9% of prison sentences pre- and 22.6% post-AB 109.

The likelihood of prison on an AB 109 arrest charge declined in all groups when AB 109 took effect in October 2011, but remained lowest among whites (Figure 1). Whites had a 6.3% chance of a prison sentence prior to AB 109, and 3.5% after it was enacted. This compared to a change from 8.5% to 5.3% among Black Californians, and 7.8% to 4.6% among Latinx, respectively. Accounting for the shift

in sentencing from prison to jail, however, shows the likelihood of any incarceration actually *increased* slightly among Black Californians, from 30.2% to 30.8%, compared to slight declines among whites and Latinx (from 29.3% to 28.9%, and 31.4% to 31.3%, respectively).

FIGURE 1 HERE

Table 1 shows the arrest charge types and criminal histories across racial/ethnic groups, for everyone with AB 109 arrest charges before and after the policy's enactment. The right panel shows the same characteristics in the propensity score weighted sample. Each group was weighted to balance arrest charges and criminal histories to those observed among white defendants under AB 109. In the next section, we will use the weighted sample to assess whether the effects of criminal history and case characteristics on racial disparities change over time.

Arrest charges

As the Table shows, the total number of arrests with AB 109 charges increased among white (from 239,116 to 278,575) and Latinx (from 227,724 to 251,718) defendants, and decreased among Black defendants (from 121,589 to 117,507). Pre-AB 109, felony arrest charges were largely similar across groups, though whites had slightly higher shares of property charges and lower shares of "other" charges, such as traffic offenses and probation or parole violations. We see more variation in the change in arrest charges from pre- to post-AB 109. For all groups, the shares of weapons arrest charges increased, and "other" arrest charges declined. For Black defendants, there was a decline in drug charges replaced by a rise in property charges.

TABLE 1 HERE

Criminal History

Although arrest charges were similar across racial/ethnic groups pre-AB 109, criminal histories were hugely disparate. The disaggregated criminal histories in Table 1 show that in both periods, Black Californians were *more than twice as likely as other groups to have a record of disqualifying prior convictions* (pre-AB 109: 20.7%, vs. 10.3% among both whites and Latinx; post-AB 109: 22.9%, vs. 11.6% and 12.2% among whites and Latinx). As a result, compared to other racial/ethnic groups, a much larger share of Black defendants had criminal histories that would preclude their eligibility for alternatives to prison under the reform. In fact, Black defendants were more likely to have at least one prior felony across nearly every conviction type, as well as prior prison sentences (31.6% and 29.0% white and Latinx defendants had prior prison pre-B 109, vs. 46.4% among Black defendants). Moreover, the criminal histories of people arrested on AB 109 charges after the policy reform, compared to before the reform, suggests a shift towards people with more severe criminal histories. Across all racial/ethnic groups, there was an increase in the share of people with prior felonies for nearly every conviction type, including disqualifying priors and prior prison sentences (any prior prison comprised 31.6% to 33.5% of white defendants pre to post, 46.4% to 49.2% of Black defendants, and 29.0% to 32.4% of Latinx defendants).

In summary, felony arrest charges were similar across racial/ethnic groups, with some shift under the reform. Specifically, for all groups, there was a shift towards more severe criminal histories among people arrested under AB 109. However, Black people arrested on AB 109 charges were more than twice as likely as people of other racial/ethnic groups to have disqualifying criminal histories in both periods. Essentially, historic racial disparities in the criminal justice system carried over to eligibility for sentencing reforms through lasting racial differences in criminal histories.

Propensity score weighted models of likelihood of prison sentence across racial/ethnic groups

If different criminal histories are the primary factor contributing to racial differences in prison sentencing (as opposed to disparate treatment of otherwise similar cases), differences in prison sentencing should be eliminated when criminal histories and case characteristics are held constant. Table 2 shows results from models of the likelihood of prison by race/ethnicity for all AB 109 arrest charges before and

after AB 109. By restricting to arrest charges rather than charges filed or convictions, we capture all changes in decisions made from arrest to sentencing, particularly what charges are filed, and if charges are filed at all. The second model is weighted to balance defendant arrest charges and criminal histories across race and time.

Results from the unweighted model again show that overall, whites arrested on AB 109 charges had the lowest chance of a prison sentence both before and after AB 109. The interaction between race and time period indicates that although Black and Latinx defendants remained significantly more likely to be sentenced to prison post-AB 109, the difference compared to whites declined by 0.4 percentage points for both groups. This was likely driven by the declining racial disparity in prison sentencing among people with lesser criminal histories, suggested by the descriptives in Table 1.

We then use the weighted model to balance criminal histories and case characteristics in each group to white defendants in the post-AB 109 period (see Table 2). The weighted model results show that if Black Californians arrested on AB 109 charges had the same criminal histories and case characteristics as whites, the chance of a prison sentence would be 0.4 percentage points *lower* than that of whites pre-AB 109. A greater share of Black Californians had criminal histories that increased the likelihood of a prison sentence prior to AB 109, but when comparing Black Californians and whites with the *same* criminal history (i.e. prior prison), Black Californians actually had a lower likelihood of prison on a new case. This changed following the reform, however. Post-AB 109, the lower likelihood of prison among Black Californians in the weighted model was eliminated. This suggests AB 109 may have standardized sentencing across racial/ethnic groups with the same criminal history and case characteristics.[3]

TABLE 2 HERE

[3] For Latinx defendants, the chance of a prison sentence remained higher than for whites in both periods, but to a lesser extent than in the unweighted model. As with the Black-white difference, the Latinx-white difference also declined in the weighted model (0.7 percentage points lower post-AB 109). These results indicate that criminal history and case characteristics played a large role in racial differences in the likelihood of prison in both periods.

To further explore the interaction between criminal history, race/ethnicity, and AB 109, we next hold criminal history to set categories in the weighted model (1. no prior felonies; 2. prior felonies and prior prison; and 3. prior felonies and prior prison, including disqualifying prior convictions), compare the effect of a set category across race/ethnicity, and estimate whether that effect changed post-AB 109 (Table 3).

No prior felonies

We found in Table 1 that Black Californians arrested on AB 109 charges were far more likely to have prior felonies, compared to whites and Latinx. Findings from the weighted model show that for people with no prior felonies, whites also avoided prison to a greater extent than other groups (0.5 percentage points higher likelihood of prison among Blacks and 1.7 points higher among Latinx pre-AB 109). There was some decline in the Latinx-white disparity in prison sentencing post-AB 109, with the difference narrowing to 0.4 percentage points as a result of greater reductions in the likelihood of prison among Latinx. In comparison, there was no decline in the Black-white disparity. This suggests that the narrowing Black-white difference in the likelihood of prison on AB 109 charges may have been counteracted by a decline in AB 109 charges filed in cases involving Black Californians compared to whites.

Prior felonies and prior prison

People with prior felonies and prison but no disqualifiers had the greatest percentage point reduction in prison sentencing under AB 109. Among whites sentenced to prison pre-AB 109, the majority had this criminal history (58.0%; not shown in table). In the weighted model, we find that Black Californians with this history were less likely than whites to be sentenced to prison, but this difference diminished under AB 109 (2.2 percentage points lower than whites pre-AB 109, and 0.7 post AB 109). This might explain why the weighted model of arrests overall showed a lower likelihood of prison among

Black Californians pre-AB 109, which was eliminated post AB 109. There were no significant differences between whites and Latinx with this category of criminal history.

Prior felonies and prior prison, including disqualifying prior convictions

Table 1 showed that Black Californians arrested on AB 109 charges were more than twice as likely as other groups to have disqualifying prior convictions, and a much larger share of Black Californians sentenced to prison before the reform had disqualifying priors, compared to whites and Latinx. The weighted model results in Table 3 show that the likelihood of prison declined even for people with disqualifying prior convictions, but no difference was found across race/ethnicity in either period.

TABLE 3 HERE

Models of differences in any incarceration (prison or jail) sentence across race/ethnicity

In the previous results, we show that Black Californians were most likely to have criminal histories that raise the likelihood of prison, and this contributed to disparities overall. After holding criminal history and arrest charges constant, Black Californians had a lower likelihood of prison than whites pre-AB 109, and an equivalent likelihood under the reform. However, up to now we have focused on the likelihood of incarceration in state prison only. As we have already discussed, AB 109 shifted responsibility to local jurisdictions who might have changed their approach to arrests, charging, or sentencing as a result. We therefore also consider differences in *any* incarceration, in both prison or jail, by race/ethnicity.

Similar to the unweighted model of prison sentencing (see Table 2), the unweighted model of any incarceration sentence for people arrested on AB 109 charges shows that Black and Latinx people had a higher likelihood of incarceration in both periods (see Table 4). However, the decline in the Latinx-white difference seen in prison sentencing was eliminated after accounting for the rise in jail sentences. The decline in the Black-white difference in prison sentencing was counteracted by a *greater* rise in jail

sentences for Black Californians compared to whites, such that *the disparity in any incarceration actually widened by 1.0 percentage point*. Again, we see that criminal history played a significant role. Holding criminal history and case characteristics constant in the weighted model eliminates the rise in the Black-white disparity and results in a decline in the Latinx-white disparity.

TABLE 4 HERE

With regard to racial differences in sentences to any incarceration across categories of criminal history, patterns were largely similar to those seen in prison sentencing (see Table 5). Specifically, whites with no prior felonies avoided incarceration to the greatest extent, compared to Black and Latinx defendants. For people with this criminal history, likelihood of incarceration was 1.3 percentage points higher among Black Californians and 2.4 among Latinx pre-AB 109, and racial differences were not significantly affected by AB 109. Again, as with prison sentencing, Black defendants with prior felonies and prison but no disqualifiers were less likely than other groups to be sentenced to any incarceration (1.5 percentage points lower compared to whites), though unlike with prison sentencing AB 109 did not affect these differences. Moreover, no differences were found in the likelihood of any incarceration among people with disqualifying priors, across race/ethnicity or time period.

TABLE 5 HERE

Discussion

In comparison to what we know about the racial dynamics that preceded mass incarceration, we know far less about how recent reform efforts have been experienced across racial groups. In this study, we analyzed the interaction between criminal history and race/ethnicity in sentencing disparities in California pre- and post-AB 109. Several notable findings emerged. Specifically, we find that the greatest declines in prison sentencing under AB 109 occurred among people with prior prison but no disqualifiers.

Since this was the criminal history that predominated among whites sentenced to prison pre-AB 109, this racial group stood to gain the greatest change in prison sentencing under the reform. In contrast, Black defendants with prior prison but no disqualifiers were actually *less* likely than white defendants to be sentenced to prison before AB 109, and still, to a slightly lesser extent, under AB 109. In addition, Black defendants were more than twice as likely as white and Latinx defendants to have disqualifying prior convictions in both periods, increasing their likelihood of prison overall and precluding their eligibility for the sentencing reform. Most troublingly, we find that when we also factor in incarceration in a jail setting, the racial gap in incarceration actually *increased* in the post-reform period.

Our findings have important implications for both theory and practice, as well as for ongoing efforts to address racial inequities in criminal justice. Overall, the likelihood of a prison sentence declined under AB 109. This would imply not only fewer prison sentences but also fewer criminal records and the life-long barriers they create, particularly for employment. For those who are convicted, a shift away from prison sentences might also mitigate the collateral consequences of criminal records, because in many cases convictions sentenced to local supervision are eligible for expungement after time is served. In this sense, the reform was successful in achieving its primary intent. Given historic racial differences in the likelihood of arrest, charges filed, conviction, or in the sentence received, qualifying eligibility on these factors produced disparate impacts across racial groups.

These racial differences in criminal histories could be compounded by discrimination in discretionary charging and sentencing decisions. For instance, discretionary decisions leading up to a prison sentence for someone with a disqualifier will even further exacerbate disparities. For instance, research on California's Three Strikes Law found that strike sentences were disproportionately imposed upon Black defendants, with the largest gaps evident for offenses that could be charged as felonies or misdemeanors at the prosecutor's discretion (Chen, 2008). The result is that reforms that focus on reducing punishment for people with low-level offenses (and limited criminal histories) may achieve significant impacts in the population overall, while reproducing racial disproportionality.

Our analyses suggest several avenues for further inquiry, each of which might usefully contribute to our understanding of how to improve future reform efforts. First, future research might investigate whether, and in what cases, disqualifiers based on criminal history are necessary or useful for maintaining public safety. Many of the most widely used risk assessment tools have been shown to overpredict recidivism for Black defendants and underpredict recidivism for white defendants (Dressel & Farid, 2018). Indeed, actuarial risk assessment tools might be better construed as instruments for the management of institutional resources, rather than for improving social conditions or rehabilitating individuals (Silver & Miller, 2002).

We know that counties vary in the extent to which they leverage disqualifiers to continue imposing prison sentences under AB 109 (Petersilia et al., 2014). While this variation can generate enormous geographic and racial disparities in imprisonment, it can also provide empirical leverage for estimating whether sending a person with disqualifying priors to prison as opposed to county supervision impacts recidivism or other relevant outcomes. If the evidence suggests imprisoning someone with a prior does not substantially benefit public safety, or perhaps has greater detrimental effects, the justification for reforms that include disqualifiers should be re-examined.

Second, to the extent that criminal histories continue to be used in decision making around criminal sentencing, scholars and practitioners might consider ways to ensure that they do not systematically exacerbate historical biases. One promising path is to contextualize criminal histories as being linked not only to individual behavior, but also to structural inequalities that vary across racial groups. For instance, Franklin and Henry (2019) examine how criminal history and racial stereotypes play into sentencing decisions. Although they find that Black and Latino offenders receive harsher sentences "at the lower end of the criminal history scale," at the highest levels of criminal history, Black and Latino offenders actually received shorter sentences. The authors attribute this to judges who "guard against stereotypes and attempt to correct for disparate treatment of minority offenders." Other studies likewise find that disparities in race can be greater in sentencing decisions for defendants with no prior felonies, relative to those between Black and white defendants with more extensive criminal records (Spohn &

Cederblom, 1991). In part, this may be because judges are encouraged to recognize criminal history as itself a potential source of bias. In contrast, when judges (or other system actors) do not account for bias and stereotypes, the use of criminal history can be expected to exacerbate disparities and penalize minority defendants (Ulmer, 2012).

Finally, future reform efforts might focus on eliminating the consideration of criminal history as a criterion that conditions defendants' eligibility for relief. Recognizing that the likelihood of having a record is deeply intertwined with racial and socioeconomic stratification, policymakers might plausibly choose to ignore this factor when considering how to structure decisions around supervision and punishment going forward. In this vein, policymakers might consider implementing processes that allow individuals to clear a criminal record after their sentence is served or after a set waiting period. In California, for example, recent legislation enables the automatic clearance of misdemeanors and low-level felonies. We would caution, however, that the exclusion of some types of criminal histories from automatic record clearance might again result in disproportionate benefits to whites, if there are racial differences in the distribution of ineligible records prior to reform. More promising might be so-called "sunset policies," which provide for the automatic clearance of all records after some number of years.

In sum, our results suggest that recent reforms aiming to reduce mass incarceration have the potential to substantially benefit thousands of individuals, families, and communities experiencing the collateral consequences of criminal justice. For individuals, effects range from loss of income and employment to restrictions on political participation (Chesney-Lind & Mauer, 2002). Families endure numerous expenses in order to support and maintain contact with their incarcerated loved one (Comfort et al., 2016; Grinstead et al., 2001). Whole communities are impacted by the displacement of residents and the disruption of social bonds that result from geographically concentrated incarceration (Schnittker et al., 2011; Wildeman & Wang, 2017). Moreover, the effects of mass incarceration transfer across generations: children of incarcerated parents tend to have a higher number of other traumatic life events, emotional difficulties, high absentee rates, and more problems in school (Murphey & Cooper, 2015). Despite sizable progress on reducing incarceration overall, however, it is critical also to ensure that these benefits are

widely shared, especially those who have been historically harmed by the criminal justice system. To the extent that policies aiming to roll back the collateral consequences of mass incarceration are benefitting some groups more than others, they might inadvertently exacerbate the deep inequalities that have long been evident in American criminal justice.

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Table 1. Arrest charge types and criminal histories for people arrested on any AB 109 charge pre and post AB 109

	Pre AB 109 Unweighted			Post AB 109 Unweighted			Pre AB 109 Weighted			Post AB 109 Weighted		
	White N=239,116	Black N=121,589	Latinx N=227,724	White N=278,575	Black N=117,507	Latinx N=251,718	White	Black	Latinx	White	Black	Latinx
	% or Mean			% or Mean			% or Mean			% or Mean		
Age	34.5	35.8	30.6	34.6	35.7	31.1	34.7	34.9	35.2	34.6	35.0	35.0
Female	27.8	21.2	17.8	27.6	20.0	18.3	27.6	25.9	28.4	27.6	26.0	28.2
Felony arrest charge types												
Weapons	2.3	2.9	3.0	3.8	4.6	5.0	3.8	3.5	3.9	3.8	3.6	3.8
Sex	0.1	0.1	0.2	0.1	0.1	0.2	0.1	0.1	0.1	0.1	0.1	0.1
Drug	60.4	60.4	61.0	61.9	55.7	61.3	62.1	60.9	62.3	61.9	62.3	62.3
Property	36.3	34.4	33.0	35.0	38.1	32.7	35.1	36.2	34.9	35.0	34.6	34.9
Violent	2.3	3.0	2.3	2.2	3.3	2.4	2.2	2.1	2.3	2.2	2.1	2.1
Other	13.5	15.1	15.3	12.2	14.1	13.1	12.3	12.2	11.5	12.2	12.6	12.2
Criminal history												
Prior arrests	11.4	15.6	8.8	13.1	17.1	10.5	13.1	13.3	13.6	13.1	13.6	13.4
Disqualifying priors												
0	89.7	79.3	89.6	88.4	77.1	87.8	88.3	88.3	87.6	88.4	88.1	87.9
1	7.7	13.8	7.8	8.7	15.3	9.2	8.7	8.7	9.2	8.7	8.8	8.9
2+	2.6	6.9	2.5	2.9	7.6	3.0	3.0	3.0	3.2	2.9	3.1	3.1
Prior felony conviction types												
Drug												
0	59.6	48.0	65.6	55.1	48.3	61.4	55.3	57.4	54.0	55.1	56.0	54.4
1	19.2	19.6	18.6	20.4	18.8	19.5	20.3	20.6	20.4	20.4	21.4	20.4
2+	21.2	32.3	15.9	24.5	32.9	19.0	24.4	21.9	25.6	24.5	22.6	25.2
Weapons												
0	95.3	92.4	94.9	94.2	91.2	92.8	94.3	95.0	94.6	94.2	94.7	94.5
1	3.7	6.0	4.1	4.4	7.0	5.5	4.4	3.9	4.1	4.4	4.0	4.3
2+	1.0	1.5	1.0	1.3	1.8	1.7	1.3	1.1	1.3	1.3	1.2	1.2

Sex												
0	99.2	98.6	99.3	99.2	98.4	99.2	99.1	99.0	99.1	99.2	99.0	99.0
1	0.5	1.0	0.5	0.6	1.1	0.6	0.6	0.7	0.6	0.6	0.7	0.6
2+	0.2	0.4	0.2	0.3	0.6	0.2	0.3	0.3	0.3	0.3	0.3	0.4
Property												
0	66.0	61.5	73.3	62.7	57.8	69.2	62.9	61.7	61.6	62.7	61.9	61.9
1	14.4	16.6	13.2	14.9	17.3	14.3	14.9	14.7	14.7	14.9	14.5	14.8
2+	19.6	21.9	13.4	22.4	24.9	16.5	22.3	23.6	23.7	22.4	23.6	23.3
Violent												
0	92.0	81.8	91.2	90.7	79.3	89.1	90.6	90.5	90.2	90.7	90.7	90.5
1	5.9	12.1	6.5	6.8	13.7	8.0	6.9	6.8	7.2	6.8	6.6	6.9
2+	2.1	6.2	2.3	2.5	7.0	2.9	2.5	2.7	2.6	2.5	2.7	2.5
Other												
0	88.9	87.9	90.3	86.5	85.7	88.1	86.6	85.6	86.3	86.5	85.7	86.2
1	8.6	9.9	7.7	10.3	11.4	9.3	10.2	10.3	10.5	10.3	10.6	10.6
2+	2.5	2.2	2.0	3.2	2.9	2.6	3.2	4.1	3.2	3.2	3.7	3.2
Prior sentences												
Prison	31.6	46.4	29.0	33.5	49.2	32.4	33.3	33.0	34.2	33.5	32.8	33.9
Jail	75.8	82.8	69.9	79.4	84.5	74.3	79.4	79.6	79.8	79.4	80.0	79.4
Probation	79.1	84.6	72.9	81.8	85.3	76.3	81.8	82.1	82.1	81.8	82.4	81.7

Table 2. Weighted and unweighted models of likelihood of prison for AB 109 arrest charges

Probability of Prison Sentence for AB 109 Arrest Charge					
	Pre AB 109	**Difference**	**Post AB 109**	**Difference**	**Change in difference**
Unweighted Model					
White	6.3 (6.2, 6.4)	Reference	3.5 (3.4, 3.5)	Reference	
Black	8.5 (8.4, 8.7)	2.2 (2.0, 2.4)	5.3 (5.1, 5.4)	1.8 (1.7, 1.9)	-0.4 (-0.7, -0.2)
Latinx	7.8 (7.7, 8.0)	1.5 (1.4, 1.7)	4.6 (4.5, 4.7)	1.1 (1.0, 1.2)	-0.4 (-0.6, -0.2)
Weighted Model					
White	6.7 (6.6, 6.8)	Reference	3.5 (3.4, 3.5)	Reference	
Black	6.3 (6.0, 6.6)	-0.4 (-0.7, -0.1)	3.5 (3.3, 3.7)	0 (-0.2, 0.2)	0.4 (0.1, 0.8)
Latinx	7.6 (7.4, 7.8)	0.9 (0.7, 1.1)	3.6 (3.5, 3.8)	0.2 (0, 0.3)	-0.7 (-1.0, -0.5)

Table 3. Weighted models of likelihood of prison for AB 109 arrest charges, by criminal history

Probability of Prison Sentence for AB 109 Arrest Charge					
Weighted model	**Pre AB 109**	**Difference**	**Post AB 109**	**Difference**	**Change in difference**
No prior felony convictions					
White	1.1 (1.0, 1.2)	Reference	0.7 (0.6, 0.7)	Reference	
Black	1.6 (1.3, 1.9)	0.5 (0.2, 0.8)	1.2 (0.9, 1.4)	0.5 (0.2, 0.7)	-0.1 (-0.4, 0.3)
Latinx	2.8 (2.5, 3.0)	1.7 (1.4, 1.9)	1.1 (1.0, 1.2)	0.4 (0.3, 0.5)	-1.3 (-1.5, 1.0)
Prior felonies, no prison					

White	2.6 (2.5, 2.8)	Reference	1.0 (0.9, 1.0)	Reference	
Black	2.7 (2.4, 3.1)	0.1 (-0.3, 0.5)	1.2 (0.9, 1.4)	0.2 (-0, 0.4)	0.1 (-0.4, 0.5)
Latinx	3.6 (3.3, 3.8)	0.9 (0.6, 1.2)	1.1 (1.0, 1.2)	0.2 (0, 0.3)	-0.7 (-1.1, -0.4)
Prior felonies and prison					
White	15.2 (14.8, 15.5)	Reference	6.0 (5.8, 6.2)	Reference	
Black	12.9 (12.1, 13.8)	-2.2 (-3.1, -1.3)	5.3 (4.9, 5.7)	-0.7 (-1.2, -0.3)	1.5 (0.5, 2.5)
Latinx	15.0 (14.5, 15.6)	-0.1 (-0.7, 0.5)	5.7 (5.4, 6.0)	-0.3 (-0.7, -0)	-0.2 (-0.9, 0.5)
Prior felonies, incl disqualifiers, and prison					
White	19.8 (19.2, 20.4)	Reference	15.8 (15.4, 16.3)	Reference	
Black	18.6 (17.3, 19.8)	-1.2 (-2.6, 0.2)	15.2 (14.1, 16.3)	-0.6 (-1.8, 0.6)	0.6 (-1.2, 2.4)
Latinx	20.3 (19.3, 21.4)	0.5 (-0.7, 1.7)	16.4 (15.6, 17.2)	0.6 (-0.4, 1.5)	0 (-1.5, 1.6)

Table 4. Weighted and unweighted models of likelihood of any incarceration for AB 109 arrest charges

Probability of Any Incarceration for AB 109 Arrest Charge					
	Pre AB 109	**Difference**	**Post AB 109**	**Difference**	**Change in difference**
Unweighted Model					
White	29.3 (29.1, 29.5)	Reference	28.9 (28.9, 29.1)	Reference	
Black	30.2 (29.9, 30.5)	0.9 (0.5, 1.2)	30.8 (30.5, 31.0)	1.9 (1.6, 2.2)	1.0 (0.5, 1.4)
Latinx	31.4 (31.2, 31.6)	2.1 (1.8, 2.3)	31.3 (31.1, 31.5)	2.4 (2.2, 2.7)	0.3 (-0, 0.7)

Weighted Model					
White	28.8 (28.6, 29.0)	Reference	28.9 (28.7, 29.0)	Reference	
Black	28.8 (28.2, 29.5)	0 (-0.6, 0.7)	28.5 (28.0, 29.0)	-0.4 (-1.0, 0.2)	-0.4 (-1.3, 0.4)
Latinx	29.7 (29.3, 30.1)	0.9 (0.5, 1.3)	29.0 (28.7, 29.3)	0.2 (-0.2, 0.5)	-0.7 (-1.3, -0.2)

Table 5. Weighted models of likelihood of any incarceration for AB 109 arrest charges, by criminal history

Probability of Any Incarceration for AB 109 Arrest Charge					
Weighted Model	**Pre AB 109**	**Difference**	**Post AB 109**	**Difference**	**Change in difference**

No prior felony convictions					
White	30.1 (29.8, 30.4)	Reference	30.1 (29.8, 30.4)	Reference	
Black	31.3 (30.2, 32.4)	1.3 (0.1, 2.4)	32.2 (31.1, 33.2)	2.1 (1.0, 3.2)	0.8 (-0.8, 2.4)
Latinx	32.4 (31.9, 33.0)	2.4 (1.7, 3.0)	31.8 (31.3, 32.3)	1.7 (1.1, 2.3)	-0.6 (-1.5, 0.2)
Prior felonies, no prison					
White	22.8 (22.5, 23.2)	Reference	23.1 (22.8, 23.4)	Reference	
Black	22.8 (21.8, 23.9)	0 (-1.1, 1.1)	22.2 (21.2, 23.2)	-0.9 (-1.9, 0.1)	-0.9 (-2.4, 0.6)
Latinx	23.6 (22.9, 24.3)	0.8 (0, 1.5)	22.8 (22.3, 23.4)	-0.3 (-0.9, 0.3)	-1.0 (-2.0, -0.1)
Prior felonies and prison					
White	32.3 (31.9, 32.6)	Reference	31.8 (31.5, 32.2)	Reference	
Black	30.7 (29.6, 31.8)	-1.5 (-2.7, -0.3)	29.0 (28.1, 29.8)	-2.9 (-3.8, -1.9)	-1.3 (-2.9, 0.2)
Latinx	31.5 (30.8, 32.3)	-0.7 (-1.6, 0.1)	30.8 (30.2, 31.4)	-1.0 (-1.7, -0.3)	-0.3 (-1.4, 0.8)
Prior felonies, incl disqualifiers, and prison					
White	35.4 (34.7, 36.0)	Reference	36.1 (35.6, 36.7)	Reference	
Black	35.1 (33.7, 36.6)	-0.3 (-1.8, 1.3)	34.8 (33.5, 36.1)	-1.4 (-2.8, 0.1)	-1.1 (-3.2, 1.0)
Latinx	35.5 (34.3, 36.7)	0.1 (-1.3, 1.4)	35.1 (34.1, 36.1)	-1.0 (-2.2, 0.1)	-1.1 (-2.9, 0.7)

Appendix 1: Likely 1170(h) Eligible ("AB 109") Offenses

The first table lists the offenses for which it is unknown if they are 1170(h) eligible because either more information is required or because the law is unclear (Couzens, 2017). The second table lists offenses for which it is unknown if they are 1170(h) eligible because the data lacks the necessary detail.

182 (all felonies)	667.16(all)	12022.6(all)	12370(all)
182.5	667.17	12022.75(a)	25400(a)(all)
139(b)	1202.1 (follows base term)	12022.85(all)	25850(a)(all)
667.5(b)	12022.2(all)	12025(a)(all)	30615

Penal Code	Incomplete data explanation
459	Only first degree burglary is 1170(h) sentencing eligible. When the degree is not listed, we assume it is first degree and thus eligible.
459.2	
460	
484(c) (Public funds)	Cannot determine if the funds were public or private. Assume all offenses are public and thus ineligible.
504 (Public funds)	
505 (Public funds)	
506 (Public funds)	
514 (Public funds)	