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The color of punishment: African Americans, skin tone, and the criminal justice system

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ABSTRACT

Public debate and scholarly research has largely concentrated on the vast array of disparities between blacks and whites in their treatment by and experiences with the criminal justice system. Nevertheless, a growing body of research shows that African Americans' life chances are internally stratified by gradational differences in their skin tone. This study brings together research on race, color, and the criminal justice system by using nationally-representative data to examine whether (and to what extent) skin tone is associated with policing and punishment among African Americans. I find that skin tone is significantly associated with the probability of having been arrested and/or incarcerated, net of relevant controls. Further analyses, using a sub-sample of whites drawn from the same nationally-representative survey, show that disparities in policing and punishment within the black population along the colour continuum are often comparable to or even exceed disparities between blacks and whites as a whole.

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Introduction

A substantial (and growing) amount of evidence strongly suggests that African Americans' life chances and outcomes are significantly associated with variation in their skin colour (Keith and Herring 1991; Hunter 2005; Monk 2014). For example, while it is clear that whites, on average, have higher educational attainment than African Americans, a recent study reports that there is as much or even more educational inequality within the black population between the lightest and darkest-skinned, as there is between blacks and whites as a whole (Monk 2015). Indeed, studies show that darker-skinned African Americans have less income, have lower occupational prestige, and even worse mental and physical health outcomes (Monk 2015; Cobb et al. 2016).

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Thus, while the vast majority of research on ethnoracial inequality focuses on disparities between blacks and whites, research on skin tone stratification shows that matters are more complicated – the colour line, we must remember, is also a *continuum* (Du Bois 1940; Banton 2012). Yet, despite mounting evidence that skin tone is significantly associated with a wide variety of important outcomes research linking variation in skin tone to one of the most central domains of inquiry on ethnoracial inequality – the criminal justice system – is still emerging (see Gallagher 2007, 555–556). Indeed, as one recent study puts it, “research examining the association between skin tone and punishment is rare” (King and Johnson 2016, 91). Instead, existing research on race and the criminal justice system, due to data availability and conceptual limitations with respect to the measurement of race, “rarely acknowledges the degree of heterogeneity within racial groups” (King and Johnson 2016, 91) particularly with respect to physical appearance (e.g. skin tone).

Some recent studies, however, have identified significant relationships between skin tone and sentencing, arrests, and police stops (Vigliano, Hannon, and DeFina 2011; White 2014; Burch 2015; King and Johnson 2016; Kizer 2017; but see Branigan et al. 2017)¹. White (2014) and Kizer (2017) find that black young adults with darker skin have significantly higher rates of being stopped and/or arrested by police (net of controls for delinquency) and this relationship is robust to sibling comparisons. In this study², I use a survey that is nationally-representative of African Americans to extend this research by examining whether (and to what extent) skin tone is associated with arrest and incarceration among African American adults, even after taking respondents’ socioeconomic status and other potentially relevant factors such as neighbourhood conditions, drug use, and childhood delinquency into account. In so doing, this study moves beyond the laboratory where compelling evidence suggests that gradations of colour are linked to stereotypes about dangerousness and criminality (Blair et al. 2002, 2004; Eberhardt et al. 2004, 2006; Dixon and Maddox 2005).

Additionally, I conduct a series of supplemental analyses using a subsample of whites drawn from the same nationally-representative survey to compare criminal justice outcomes between blacks and whites (i.e. the approach used in most existing research). These whites tend to live in neighbourhoods that are around 10% black, which means this sub-sample is nationally-representative of whites who share neighbourhoods, to some degree, with African Americans. Thus, this analysis speaks to disparities between blacks and whites who are much more likely to live in the same or very similar neighbourhoods – just as our intraracial analyses are likely, given the use of controls for SES, region, and other factors, to compare blacks who live in the same or similar neighbourhoods and/or sociodemographic contexts – a strength that is seldom found in prior studies.

Race, colour, and the criminal justice system

Numerous studies document considerable ethnoracial disparities with respect to the criminal justice system. These disparities, research suggests, are typically greatest at the earliest point of contact with the criminal justice system where officials have the most discretion – arrest. In 2013, for example, more than one million youths had contact with the juvenile justice system and black youths experienced more than twice the rate of arrest than white youths (Hockenberry and Puzzanhera 2015). A meta-analysis of over 25 studies shows that race is significantly associated with arrest and the association persists after controlling for a host of legal factors such as: the presence of witnesses, the quantity of evidence at the scene, and even the prior criminal record of the suspect (Kochel, Wilson, and Mastrofski 2011, 495). Moreover, the authors find that racial disparities in arrest persisted across these 25+ studies even when taking into account potentially important extralegal factors such as demeanour and disrespectful behaviour. Studies also suggest that blacks are more likely to be arrested than whites, even after taking factors such as drug use and/or the incidence of drug-related into offending into account (Beckett et al. 2005; Mitchell and Caudy 2015).

There are also large disparities in incarceration. In 2005,

Blacks constituted 12.8% of the general population but nearly half of prison inmates and 42% of Death Row residents ... About a third of young black men aged 20–29 were in prison or jail or on probation or parole on an average day in 2005. The Bureau of Justice Statistics (BJS) estimated in 2003 that 32% of black men born in 2001 will spend some part of their lives in a state or federal prison. That is a substantial underestimate of the likelihood that black men will spend time behind bars [because] it does not take account of jail confinement, which is much more common than time in prison. (Tonry and Melewski 2008, 2)

Recent estimates show that black men are 5–8 times more likely to end up in prison than white men (Pettit and Western 2004). The pervasiveness of imprisonment for African Americans has even led some researchers to argue that imprisonment is a common and normalized stage of many African Americans' life course – especially for black men.

While it may be the case that ethnoracial discrimination is not the only or, perhaps, even the most important cause of disparities in the criminal justice system – some scholars point to the importance of differences in delinquency, drug use, earnings, employment, and criminal history & behaviours (see Spohn 2000; Demuth 2003) – to the extent that bias *does* play a role in shaping treatment by police and other figures of authority in the criminal justice system, these biases, given what is known about social cognition and categorization, are likely to play out in a way that is *continuous* and *graded*.

Indeed, research on social cognition and categorization demonstrates that we not only perceive whether or not an individual fits a particular category, but also the *degree* to which we perceive them to fit said category (see Lakoff 1987). One way of thinking about this is *typicality*: the idea that while various individuals may all technically belong to the same superordinate category, they still vary in how typical or atypical they are relative to other category members with respect to the presence, absence, and/or perceived intensity of key traits associated with categorical membership (Rosch and Mervis 1975). Critically, perceived *typicality* varies continuously within superordinate categories and often corresponds with socially salient and consequential subcategories nested within broader superordinate categories; and perceived typicality as well as membership in myriad subcategories is significantly associated with *variation* in the type, frequency, and harshness of biases individuals face in everyday life (Livingston and Brewer 2002; Maddox 2004).

Consider Eberhardt et al.'s (2006) infamous finding that even after controlling for relevant factors, the more stereotypically Black a defendant was perceived to be (i.e. darker skin tone and more Afrocentric facial features), the more likely that Black defendant was to be sentenced to death. As White (2014) and compellingly argues with respect to sentencing following the "focal concerns" framework of Steffensmeier, Ulmer, and Kramer (1998), sentencing decisions and decisions to incarcerate are likely to be shaped by stereotypes about dangerousness, likelihood of recidivism, and the prospect of future violence. Likewise, decisions to arrest and ultimately incarcerate may be shaped by similar stereotypes albeit in contexts of even shorter temporal ranges (e.g. relatively quick judgments in arrests vs. more drawn out decision processes in incarceration). These decisions, research suggests, are likely to manifest in a fundamentally *gradational* manner.

The vast majority of research on ethnoracial inequality, however, uses census-style categories, which essentially treat all members of a category as *equally prototypical*, even though we all vary in our [perceived] prototypicality (an important source of population heterogeneity, see Xie 2007). Conventional approaches to social inequality, then, rely upon a distorted vision of the relationship between difference and inequality that is rooted in an outmoded understanding of concepts, categories, and categorization. In analyzing what is doxically taken to be a dichotomous world, conventional approaches to social inequality end up, at least implicitly, accepting the Classical Theory of Concepts promulgated by Aristotle (though traces of the theory are found in Plato's dialogues with Socrates), which envisages an essentialist world of necessary-and-sufficient conditions for categorical membership (Murphy 2004). As Aristotle puts it in *Metaphysics* (VII, 102a3), "a definition is an account (*logos*) that signifies an essence". This rendering of reality, however, is largely untenable after Wittgenstein's (1953) seminal

intervention in *Philosophical Investigations* (and subsequent research by Rosch and Mervis), which highlighted the fundamentally *graded* manner that humans use [natural and social] categories (see Machery 2009).

Furthermore, conventional measures of social difference (i.e. dichotomous categories based on self-identification), bracket out the crucial role bodily cues play in social categorization. The central underlying premise for turning to skin tone and looking within traditional census race categories is that ethno-racial categorization is inextricably linked to physical markers such as skin tone, which are profoundly implicated in the explicit and implicit activation of stereotypes and biases (Maddox 2004; Kawakami, Amodio, and Hugenberg 2017).

Instead of conceiving the world as composed of homogeneous blocs or groups composed of equally prototypical individuals, contemporary theories of categories and categorization strongly suggest that analysts should focus on perceived typicality, locations along perceived categorical continua (sometimes marked by subcategories), which hinges upon the presence or absence (and the overall strength) of myriad cues of categorical membership (often embodied) that various individuals hold or are, at least, perceived to possess.

Breaking with conventional approaches, I consider the gradational nature of social categorization and the embodiment of social difference by conceptualizing skin tone as a [potential] form of *bodily capital* (see Bourdieu 1984; Wacquant 1995; Monk 2013, 2016). Bodily capital refers to phenotypical attributes such as skin tone, hair, height, weight, body size, faces, and notions of physical attractiveness (i.e. beauty) that operate as forms of symbolic capital (i.e. indicia of the honour or dishonour of the bearer), which serve as embodied markers or cues of social categories and perceived social status. Bodily capital is a fundamentally relational property whose salience, value, and consequentiality is socio-historically and contextually contingent (for example, skin tone discrimination is patterned differently interracially than intraracially for African Americans, see Monk 2015).

Still, to properly assess the consequences of colour in the criminal justice system we must also take class heterogeneity into account. Wacquant (2010, 80), for example, argues that we must look beyond the “black–white dichotomy”, which

obfuscates the fact that class disproportionality inside each ethnic category is greater than the racial disproportionality between them: African American men are eight times more likely to sojourn behind bars than European American men, but the lifetime probability of serving time in prison for African American males who did not complete their secondary education is twelve times that for African American males who went to college, whereas the class gap among white men stands at sixteen to one.

Within-race disparities associated with socioeconomic status with respect to policing and punishment are often larger than what obtains *between* blacks

and whites overall. These factors, many claim, are profound sources of unobserved heterogeneity that significantly diminish the ability of conventional black–white analyses to convincingly detect “racial bias” in the criminal justice system.

There is also socioeconomic inequality and class heterogeneity manifested at the neighbourhood level (Sampson, Morenoff, and Raudenbush 2005). African Americans face substantial and persistent residential segregation, which confines them to disadvantaged neighbourhoods that disproportionately bear the weight of high crime rates (Peterson and Krivo 2010; Sampson 2012). Sharkey (2013, 26–27) finds, for example, that 75% of white children are raised in neighbourhoods with less than 10% poverty compared to only 9% of African Americans; and while 30% of African American children are raised in neighbourhoods with at least 30% poverty, essentially no white children are.

Put simply, blacks and whites appear to be living, insofar as their neighbourhood contexts are concerned, in different worlds. To the extent that the “focal concerns” of decision makers in the criminal justice system (Steffensmeier and Demuth 2001) are guided by blameworthiness, protection of the community, and potential organizational costs incurred by the CJS, certain neighbourhoods may be especially targeted for policing and punishment. Studies still find sizable racial residuals in arrest rates between blacks and whites even after taking neighbourhood conditions into account (Kirk 2008).

By contrast, while African Americans and whites tend not to share neighbourhoods, research shows that African Americans, given ethnoracial segregation, tend to share neighbourhoods *regardless of their socioeconomic status* (Pattillo 1998). Thus, it stands to reason that looking *within-race* may be advantageous. By using skin tone as a measure of race to examine ethnoracial disparities in policing and punishment, we are able to effectively *hold categorical race constant* while controlling for important dimensions of *within-race* heterogeneity relevant to criminal justice contact such as socioeconomic status (e.g. education, employment, and earnings), drug-use, childhood delinquency, and neighbourhood conditions. Following the lead of Sampson’s (2012) comprehensive study of Chicago, I use measures of perceived neighbourhood disorder (e.g. frequency of crime and extent to which drug use is a problem). He finds that subjective measures of perceived neighbourhood disorder (e.g. perceptions of crime frequency, drug-use, and overall delinquency) were better predictors of homicide rates in Chicago than “objective” measures of neighbourhood disorder.

As with any study, however, there are some limitations. For one, even though, there are a whole range of important factors I *am* able to control for using these nationally-representative data, I am unable to take into account the seriousness of the alleged violation leading to arrest (though

one plausible channel for skin tone's influence on CJS outcomes could be that that skin tone biases could also affect the probability that any alleged or real violation may lead to an arrest), or the specific circumstances of respondents' incarceration. Some may wonder whether skin tone is associated with baseline differences in violence or criminality among African Americans – especially given the socioeconomic advantages of the lighter-skinned (though, note the extensive controls for SES and childhood delinquency). Perhaps, some may even believe that having a criminal record in and of itself affects how light or dark interviewer's rated the survey respondents' skin tone. Evidence of such a phenomenon, however, is lacking (see Hannon and DeFina 2016; Kramer, DeFina, and Hannon 2016; Foy, Ray, and Hummel 2017).

Thus, I submit that finding that skin tone is significantly associated with arrest and/or incarceration after the extensive set of controls I institute for earnings, employment, educational attainment, drug use, childhood delinquency, and neighbourhood conditions is, at least, suggestive of colour bias in the criminal justice system. Nonetheless, with observational data, I cannot make definitive claims about skin tone's potentially *causal* role in shaping CJS outcomes among African Americans.

Data and methods

This study uses the National Survey of American Life 2001–2003. The field work for the NSAL was completed by the University of Michigan's Institute for Social Research's Survey Research Center, in cooperation with the Program for Research on Black Americans. It employs a national multi-stage probability design which consists of 64 primary sampling units (PSU's). The data collection was conducted from February 2001 to June 2003. The interviews were administered face-to-face and conducted within respondents' homes and respondents were compensated for their time. All analyses are weighted to account for the complex design of the survey³ (see Heeringa et al. 2004).

The African American sample is nationally representative of Black households in the 48 coterminous states with one adult aged 18 and over (Jackson et al. 2004). The analyses presented here are restricted to native born U.S. blacks⁴. The overall response rate of 72.3% is excellent given that African Americans (especially lower income African Americans) are more likely to reside in major urban areas which are more difficult and expensive to survey effectively. For the purpose of comparison, however, I also use the nationally-representative sample of non-Hispanic whites in the NSAL. While this sample of non-Hispanic whites is nationally-representative, however, these whites are more likely to live in neighbourhoods with

African Americans than other whites (i.e. neighbourhoods with at least 10% African Americans).

Principal outcomes

The outcomes I examine are: (1) whether the respondent has ever been arrested and (2) whether the respondent has ever been incarcerated (confined in prison or jail). These questions are both dummy variables where “Yes” = 1 and “No” = 0.

Control variables

This study uses a range of sociodemographic, socioeconomic, and behavioural controls. *Age* is a continuous variable. *Female* is coded as a dummy variable where 0 = Male and 1 = Female. *Educational attainment* is a continuous variable capturing the number of years of completed education, ranging from 4 (min) to 17 years (max). *Marital status* is a dummy variable where 0 = Not Married and 1 = Married/Cohabiting. *Poverty index* is an ordinal categorical variable ranging from 0 to 17 which represents the degree to which respondents are above, below, or at the poverty line (Poverty index = Household Income/Poverty Threshold) – higher numbers represent greater household income (i.e. greater distance from the poverty line).

Employed is a dummy variable where 0 = Unemployed or Out of the Labor Force and 1 = Employed. Please note that while it may be true that being unemployed and out of the labour force may seem to be distinct states (perhaps for women with children in particular), studies by economists demonstrate that being unemployed and out of the labour force are experienced in psychologically *non-distinct* ways and that these two states are also empirically indistinguishable for the vast majority of the labour force (Goldsmith, Veum, and Darity 1995). I am, however, unable to account for whether respondent’s have experienced employment instability, which may also be a factor associated with contact with the criminal justice system.

Given that rates of incarceration are actually lower in the South I control for region using *South* (0 = Non-South and 1 = South) and *Rural* (0 = Non-Rural and 1 = Rural). Additionally, I control for potentially relevant behavioural factors. Specifically, I use measures of *drug use* and *childhood delinquency*. These are dummy variables in response to the questions whether the respondent has used marijuana and/or cocaine and whether the respondent was “frequently in trouble with adults for 6+ months in childhood or adolescence”.

Still, it may also be the case that neighbourhood conditions may also affect the probability that one is arrested or incarcerated (though, it is somewhat unclear whether there are significant enough within-race differences in

neighbourhood conditions above and beyond what would already be captured by the controls for educational attainment, urbanicity, and income (I employ). Following Sampson (2012), I use measures of perceived neighbourhood disorder such as the extent of “drug problems” in a respondent’s neighbourhood and the “seriousness of crime problems” in a respondent’s neighbourhood as proxies for potentially relevant neighbourhood factors (these are scales where 1 = “Never” and 5 = “Very Often”). Sampson (2012) finds that these subjective measures are not only predictive of actual neighbourhood conditions (e.g. homicide rates), but that they were *even more* predictive than objective measures of neighbourhood disorder.

Independent variable

To capture skin tone I use an interviewer-rated measure of respondent’s skin tone⁵, which is a scale ranging from 1 to 7 where 1 = “Very Light Skin” and 7 = “Very Dark Skin”; please note that interviewers, in this study, were trained and matched for race with respondents, so interviewer ratings of skin colour in this study were blacks interviewers rating the skin tones of other blacks (Jackson et al. 2004). This is advantageous because other blacks may be more able to explicitly name gradations in skin tone than non-blacks given their [potentially] heightened categorical expertise. Still, regardless of potential out-group homogeneity effects, research shows that both blacks and non-blacks see and discriminate on the basis of gradational differences in skin tone among African Americans (Maddox 2004; Song 2010). Given that this form of bias sometimes occurs outside of explicit awareness anyways (see Ito and Urland 2003), being able to explicitly name gradations is not a requirement for being able to *discriminate* gradationally Table 1.

Findings

Arrested

Table 2 presents the results of logistic regression analyses of the relationship between ever having been arrested and skin tone. As one would expect, I find that higher levels of educational attainment are associated with lower probabilities of ever having been arrested. Likewise, individuals with higher incomes (as indicated by higher Poverty Index scores) are also significantly less likely to report having ever been arrested. In addition to education and earnings, I also find that drug use (both marijuana and cocaine) are quite significantly associated with an increased risk of having ever been arrested. Nevertheless, even after taking all of these factors into account, I find that skin tone is a significant predictor of having ever been arrested. Specifically, a one-level increase in the darkness of respondents’ skin tone is associated

Table 1. Descriptive statistics of variables in analysis.

Variable	Mean	Std. Dev.	Min.	Max.	N
Age	43.14	16.34	18	93	2849
Years of Education	12.27	2.52	4	17	2849
Employed	0.65	0.48	0	1	2849
Poverty Index	2.44	2.25	0	17	2849
Marital Status	0.34	0.47	0	1	2849
Region (South)	0.66	0.48	0	1	2849
Rural	0.21	0.41	0	1	2849
Ever Arrested	0.33	0.47	0	1	2849
Ever Incarcerated	0.13	0.34	0	1	2849
Frequency of Neighborhood Crime	3.5	1.19	1	5	2849
Serious of Neighborhood Drug Problems	2.7	0.34	1	4	2849
Ever Used Marijuana	0.44	0.49	0	1	2849
Ever Used Cocaine	0.11	0.32	0	1	2849
Childhood Delinquency	0.19	0.39	0	1	2849
Skin Color Scale (Interviewer-Rated) (1 = Very Dark Skin to 7 = Very Light Skin)	3.75	1.26	1	7	2849

Table 2. Results of logistic regression analysis, arrested.

	(1)	(2)
Age		-0.00772 ⁺ (0.00381)
Sex		-1.477*** (0.132)
Educational Attainment		-0.0888** (0.0277)
Employed		-0.192 (0.133)
Poverty Index		-0.0967** (0.0294)
Married		-0.000354 (0.0961)
South		-0.455*** (0.116)
Rural		0.215 (0.136)
Skin Color Scale	0.165*** (0.0437)	0.132* (0.0487)
Frequency of crime in neighbourhood		0.106* (0.0448)
Seriousness of drug problems in neighbourhood		0.00493 (0.0617)
Ever used Marijuana		0.963*** (0.133)
Ever used Cocaine		1.056*** (0.172)
Childhood Delinquency		0.236 ⁺ (0.131)
Constant	-1.288*** (0.198)	1.228* (0.540)
Observations	3119	2849

Note: Standard errors in parentheses. All analyses are weighted to account for the survey's complex design (e.g. clustering and stratification).

+ $p < .10$, * $p < .05$, ** $p < .01$, *** $p < .001$ (Two-Tailed Tests).

with 14% higher odds [$\exp(.0.132)$] in ever having been arrested. This means that the darkest-skinned African Americans, according to this nationally-representative survey, have 121% higher odds of ever having been arrested compared to the lightest-skinned respondents [$\exp(.132)^6$]. Notably, the magnitude of this finding is similar to what was found by White (2014) using Add Health (i.e. 18% vs. 14% for each one-level increase in darkness of skin tone).

While the association between skin tone and arrest obtains for African Americans as a whole, its effects are particularly pronounced among darker-skinned African American men (results available by request). The predicted probability of ever having been arrested among African American males shifts from 36% to 66% as one moves across the colour continuum from the lightest to the darkest-skinned – a gap of 30% (net of the same controls used in the analysis of the full sample). To put this in perspective, the size of this gap in the predicted probability of arrest along the skin colour continuum among African American men is 2% larger than the “arrest gap” with respect to educational attainment (i.e. as one moves from respondents with 4 years or less education to respondents with 17 years or more education). In other words, the “arrest gap” between the lightest and darkest-skinned black males is roughly equivalent to a difference of *13 years or more of education*.

Arrest: a comparison of within-race colour inequality and between-race inequality

Using the sample of white Americans in the NSAL, I examine the association of “race” (as a dummy variable) with having ever been arrested. Beginning with descriptive statistics, I find that the mean of having ever been arrested for the lightest-skinned blacks is equivalent to that of whites as a whole (similar to Goldsmith, Hamilton, and Darity’s 2006 finding that the lightest-skinned blacks’ wages are virtually indistinguishable from that of whites). After instituting the same set of controls in Table 1, Model 1 (e.g. age, sex, education, etc.), I find that the predicted probability of having ever been arrested is 11% higher for African Americans than white Americans (Table A1). Given that whites in the NSAL are more likely to live in neighbourhoods with African Americans than other whites (Heeringa et al. 2004), one way of thinking about this finding is that whites who tend to live in neighbourhoods with African Americans are still significantly *less likely* to be arrested than African Americans.

Notably, however, the “race” gap is somewhat smaller than what obtains *within* the black population along the colour continuum. This also is the case with respect to the gap in the predicted probability of having ever been arrested between black and white American men is 15% (results not shown), which is 10 percentage points smaller than the gap *within* the black male population along the colour continuum (in other words, the

intra-racial colour gap is 166% larger than the black–white gap in arrest). Again, the findings of the present study suggest that disparities in arrest rates *within* the black population along the colour continuum are comparable to what obtains between blacks and whites as a whole.

Incarcerated

Next, I consider whether skin tone is a significant predictor of African Americans having ever been incarcerated, net of a variety of important controls. Similar to what was found regarding arrest, I find that educational attainment is negatively associated with incarceration among African Americans. Furthermore, higher earnings are associated with lower probabilities of arrest, while being unemployed is a significant predictor of higher probabilities of having ever been incarcerated. In contrast to the findings with respect to arrest, the measures of perceived neighbourhood crime and drug problems are not significant predictors of incarceration among African Americans. Drug use itself, however, is – both marijuana and cocaine use are significantly associated with incarceration among African Americans. Additionally, childhood delinquency is a significant predictor of incarceration among African Americans (Table 3).

Still, as was the case with respect to arrest, the results presented in Table 3 reveal that skin tone is indeed a significant predictor of African Americans ever having been incarcerated even after taking all of these important factors into account. I find that a one-level increase in the darkness of respondents' skin tone is associated with 13% [$\exp(.118)$] higher odds of ever having been incarcerated. This indicates that the darkest-skinned African Americans have 103% higher odds of having been incarcerated compared to the lightest-skinned African Americans [$\exp(.118)^6$].

Also similar to what was found with respect to the probability of arrest, further analyses (results available on request) reveal that association between skin tone and incarceration is especially dire among darker-skinned African American males. Specifically, the darkest-skinned African American males have 150% higher odds of having ever been incarcerated compared to the lightest-skinned African American males [$\exp(.153)^6$]. Moreover, the predicted probability of incarceration of along the colour continuum, among African American men, ranges from 0.13 to 0.28 – the darkest-skinned African American men have a predicted probability of having ever been incarcerated that is double that of the lightest-skinned African American men.

Incarceration: a comparison of within-race colour inequality and between-race inequality

By contrast, however, I find that the “race” gap in incarceration between black and white Americans is insignificant after controlling for respondents'

Table 3. Results of logistic regression analysis, incarcerated.

	(1)	(2)
Age		-0.00727 (0.00458)
Sex		-1.311*** (0.146)
Educational Attainment		-0.101** (0.0280)
Employed		-0.257* (0.120)
Poverty Index		-0.114** (0.0375)
Married		0.00854 (0.141)
South		-0.372* (0.142)
Rural		0.112 (0.186)
Skin Color Scale	0.170*** (0.0465)	0.119* (0.0472)
Frequency of crime in neighbourhood		0.0641 (0.0755)
Seriousness of drug problems in neighbourhood		0.0434 (0.0950)
Ever used Marijuana		0.771*** (0.192)
Ever used Cocaine		1.243*** (0.209)
Childhood Delinquency		0.400* (0.169)
Constant	-2.485*** (0.237)	0.0507 (0.540)
Observations	3039	2849

Note: Standard errors in parentheses. All analyses are weighted in order to account for the survey's complex design (e.g. clustering and stratification).

* $p < .05$, ** $p < .01$, *** $p < .001$ (Two-Tailed Tests).

education, earnings, and more (see [Table A2](#); for similar findings, see [Harris et al. 2009](#)). This is in stark contrast to the statistically significant association between skin tone and incarceration *within the black population*. Here, we see one advantage of using skin tone as a marker of ethnoracial inequality. Relying solely on race operationalized as a simple dichotomy would suggest that no ethnoracial disparity in incarceration once socioeconomic and demographic controls are taken into account. The intraracial analyses that use skin tone as a marker of race (and, ironically, an even richer set of individual-level controls), however, suggest that race may be a factor in incarceration, but in a more sophisticated (read: continuous and gradational) manner.

Similar to what obtained with respect to arrest, we can see evidence of this at the level of descriptive statistics. The lighter-skinned African Americans have mean incarceration levels that are indistinguishable from that of whites. Those at the darker end of the spectrum, however, have significantly higher mean incarceration levels (roughly 0.20) than both the lightest-skinned

African Americans (0.11) and whites (0.11). Nevertheless, it is worth noting that the results of these analyses do suggest that whites who live in neighbourhoods with some number of blacks do not have significantly lower odds of incarceration than blacks once certain socioeconomic and demographic factors are taken into account. The “racial” disparity, these results suggest, may be concentrated among those African Americans at the darker-end of the colour continuum.

Discussion

An undeniably vast literature – spanning across the social sciences – documents how African Americans experience a variety of penalties with respect to policing and punishment compared to whites. The vast majority of these studies use standard census race categories, which are dichotomous and typically based on self-identification. There is, however, mounting evidence that life chances among African Americans are *internally* stratified by gradational differences in their skin tone – a form of inequality and stratification that is missed by conventional analyses that use dichotomous, census “race” categories. From educational attainment to earnings and even their health, research on “colorism” documents significant intraracial skin tone stratification among African Americans (Keith and Herring 1991; Monk 2014, 2015). This research, however, is only beginning to detail how skin tone may be implicated in policing, punishment, and experiences with the criminal justice system.

Building on a growing body of research on skin tone and the criminal justice system this study brings nationally-representative data to bear on the question of whether and to what extent skin tone is associated with arrest and incarceration among African Americans. Net of a host of sociodemographic and other relevant controls (e.g. educational attainment, employment status, degree of impoverishment, drug-use, childhood delinquency etc.) – the darker their skin, the more likely one is to have contact with the criminal justice system. Remarkably, using a nationally-representative subsample of whites drawn from the same survey, I even find that the magnitude of these intraracial skin tone-related CJS disparities often rivals what obtains between blacks and whites as a whole.

Put bluntly, while being black (and poor) may already predispose one to have a higher probability of contact with the CJS and harsher treatment by the CJS (for a wide array of reasons), being perceived as *blacker* intensifies this contact further and may increase the harshness of one’s treatment by the CJS as an institution. In other words, the CJS indeed seems to be more finely targeted than common discourse, which tends to paint matters simply as “black and white” suggests. To the *triple selectivity* of class, race, and place (Wacquant 2010), the findings of the present study suggest that

one may also add colour, stratifying contact with and outcomes with respect to the CJS within (and, perhaps, across) ethnoracial categories (e.g. White 2014).

As with all observational data, however, one must exercise caution in interpreting these results. The findings presented here can only be said to be suggestive of causal links between variation in skin colour, policing, and punishment among African Americans. Moreover, it is still, of course, possible that the association between darker skin, policing and punishment, does not necessarily reflect bias on the part of officers and the criminal justice system, but instead, unmeasured differences in delinquency and behaviour among darker-skinned African Americans. As research, cited above, documents, darker-skinned individuals do face significant disadvantages in the education system, the marital market, and much more, which may, plausibly, yield differences in their behaviour and delinquency. This is a matter that future research should continue to examine.

Nevertheless, net of an extensive array of controls, this study finds that colour is quite consequential in the criminal justice system – intraracial colour inequality often rivals what obtains between blacks and whites. These findings should urge researchers and policy makers to look beyond [census] categorical race when examining and seeking to mitigate ethnoracial disparities in the criminal justice system. In particular, while police departments across the country turn to anti-bias training, ethnoracial biases are almost exclusively conceived of on a dichotomous basis, which necessarily truncates and distorts the complexity of how such biases actually manifest in practice. This tendency is further underwritten by a legal system, even after the passing of Civil Rights legislation, which is often blind to colour discrimination. So blind, in fact, that it is often difficult to even launch lawsuits on the basis of colour bias (Jones 2000). Ultimately, then, scholars and policymakers alike must attempt to conduct research and craft solutions that are more faithful to and better engage with the manifold complex processes implicated in the production and reproduction of [ethnoracial] inequality.

Notes

1. Branigan et al. (2017) uses nationally representative uses machine-rated melanin reflectance scores taken from the inner-arm (research, however, shows that race is typically perceived from faces). These scores may not represent or be commensurable with how humans socially perceive skin tone. Gravelle, Dressler, and Bernard (2005), for example, find that socially perceived colour categories significantly predict health while machine ratings do not. Consequently, given contemporary and historical findings regarding skin tone stratification, it is quite likely that out-group homogeneity effects are no bar to non-blacks practicing colorism.

2. An earlier version of this paper was presented at the 2015 Annual Meeting of the American Sociological Association (Chicago, IL).
3. Listwise deletion to produce a sample with the fullest set of controls results in an analytic sample of 2,849. Still, some controls may suffer from temporality issues (though, one may reasonably surmise that certain aspects of SES, in particular, may be relatively stable once measured in adulthood, i.e. post age 25). The findings pertaining to arrest with or without these controls for “unobservables” are substantively the same.
4. Respondents in this study are self-identified African-Americans born in the United States. A small number of respondents have non-black parents. Results are robust to controlling for having a non-black mother or father. In fact, results remain substantively the same even after removing all respondents with non-black parents from the analytic sample.
5. The distribution of respondent’s skin tones is: 2.7% “Very Dark”, 15.3% “Dark”, 18.34% “Somewhat Dark”, 41.91% “Medium”, 12.19% “Somewhat Light”, 7.05% “Light”, and 2.51% “Very Light”.

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Appendix

Table A1. Results of logistic regression, arrested.

Age	−0.0224*** (0.00336)
Female	−1.658*** (0.116)
Educational Attainment	−0.172*** (0.0234)
Employed	−0.215 (0.132)
Poverty Index	−0.00660 (0.0241)
Married	−0.0855 (0.112)
South	−0.603*** (0.137)
Rural	0.0492 (0.131)
African American	0.674*** (0.110)
Constant	3.130*** (0.436)
Observations	4297

Note: Standard errors in parentheses. All analyses are weighted in order to account for the survey's complex design (e.g. clustering and stratification).

*** $p < .001$ (Two-Tailed Tests).

Table A2. Results of logistic regression, incarcerated.

Age	-0.0149*** (0.00419)
Female	-1.633*** (0.174)
Educational Attainment	-0.173*** (0.0205)
Employed	-0.284 (0.192)
Poverty Index	-0.0189 (0.0262)
Married	-0.288 (0.203)
South	-0.637*** (0.139)
Rural	0.294 (0.236)
African American	0.165 (0.121)
Constant	2.087*** (0.399)
Observations	4197

Note: Standard errors in parentheses. All analyses are weighted in order to account for the survey's complex design (e.g. clustering and stratification).

*** $p < .001$ (Two-Tailed Tests).