

THE DRIVING FORCE IN THE CRIMINAL JUSTICE SYSTEM THAT PERPETUATES RACIAL AND SOCIOECONOMIC DISCRIMINATION: A CHILEAN AND U.S. COMPARATIVE ANALYSIS.<sup>1</sup>

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**I. Introduction**

Throughout history, in all societies, there have been spaces or places to enclose, isolate, and punish people who break the rules or laws. The evolution of these spaces has progressed from

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<sup>1</sup> Many of the sources cited in this paper were unavailable in English and have been translated by the author of this paper. Their citations will indicate “(personal translation).”

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disciplinary contexts, as Foucault described, to confinement without apparent justification, confinement of marginal people, or a declaration of people as dangerous.<sup>2</sup>

This paper is a comparative analysis between Chile and the United States. It examines their criminal systems' social and theoretical mechanisms to determine the core elements that support and legitimize racial and class-based discrimination. In particular, this paper will analyze the criminal justice systems in the United States and Chile and discuss whether both countries share a common idea that some mechanism allows legal racial and class-based discrimination in each country.<sup>3</sup>

Although the U.S. and the Chilean criminal systems have many similarities, they are not identical. Thus, to be accurate, this paper will analyze the Chilean criminal justice issue of confinement through a U.S. lens.

Finally, a significant fact for this analysis is that Chile, unlike the U.S., does not use a common law system.<sup>4</sup> It is a civil law country, which means that statutory laws are essential.<sup>5</sup> Therefore, this paper will begin with an analysis of the statutory laws that govern this issue.

#### A. Brief Analysis of U.S. Constitutional Law and Chilean Constitutional Law

The United States Constitution recognizes and protects these rights in Section One of the Fourteenth Amendment, stating:

[a]ll persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of

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<sup>2</sup> Fanny T. Añaños-Bedriñana & Francisco Jiménez-Bautista, *Población y Contextos Sociales Vulnerables: La Prisión y el Género al Descubierta*, 22 PAPELES DE POBLACIÓN 63, 64 (2016) (citing MICHEL FOUCAULT, *SURVEILLER ET PUNIR. NAISSANCE DE LA PRISON* (1975)) (personal translation).

<sup>3</sup> It is important to mention that this paper analyzes issues, cases, and research through April 2019. Many events happened after that date; therefore, another paper would be necessary to explain subsequent issues.

<sup>4</sup> Juan Enrique Vargas Viancos, *Políticas de Modernización del Sistema de Personal en el Poder Judicial Chileno*, DEPARTAMENTO DE DERECHO INTERNACIONAL, DEA, <http://www.oas.org/juridico/spanish/adjusti10.htm> [<http://perma.cc/SWZ8-NN8E>] (personal translation) (Chile's civil law system is strongly influenced by the Spanish and French legal systems, and more specifically by the Napoleonic Code model.) (personal translation).

<sup>5</sup> Jorge Baraona González, *La Cultura Jurídica Chilena: Apuntes Históricos, Tendencias y Desafíos*, 35 REV. DE DERECHO DE LA PONTIFICA UNIV. CATÓLICA DE VALPARAÍSO (2010), <https://dx.doi.org/10.4067/S0718-68512010000200013> [<https://perma.cc/XY8F-6MP4>] (personal translation).

To learn more information about Chile's civil law system, see Andrés Bordalí Salamanca, *Organización Judicial en el Derecho Chileno: Un Poder Fragmentado [Judicial Organization Chile: A Fragmented Branch]*, 36 REVISTA CHILENA DE DERECHO 215 (2009) (personal translation).

citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.<sup>6</sup>

The Chilean Constitution, in Article 19, numbers 2 and 3, states that the Constitution guarantees equal protection of the law to the people in the exercise of their rights.<sup>7</sup> In Chile, there is no privileged person or group, there are no slaves, and those who step onto the territory are free. Men and women are equal before the law. Neither the law nor any authority can establish arbitrary differences.<sup>8</sup>

As we can appreciate, the U.S. Constitution and the Chilean Constitution are extremely similar regarding these rights. Nevertheless, even though the law promotes equal protection, non-discrimination, and respect, there are—apparently—some issues deeper in our societies that the law fails to fix.

### B. The Scope of Discrimination in the Criminal Justice System

The U.S. criminal justice system is a patchwork system that was constructed and improvised over time.<sup>9</sup> As a result, while criminal justice systems exist everywhere, they are enacted differently in each city and state: “all of them operate somewhat alike. No two of them operate precisely alike.”<sup>10</sup>

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<sup>6</sup> U.S. CONST. amend. XIV, § 1.

<sup>7</sup> CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE CHILE [C.P.] art. 19.2–19.3 (personal translation).

<sup>8</sup> *Id.*

<sup>9</sup> RONALD J. ALLEN ET AL., CRIMINAL PROCEDURE: INVESTIGATION AND RIGHT TO COUNSEL 3 (3d ed. 2016) (citing THE PRESIDENT’S COMM’N ON L. ENFORCEMENT & ADMIN. OF JUST., THE CHALLENGE OF CRIME IN A FREE SOCIETY 7 (1967)).

<sup>10</sup> *Id.* (“The system of criminal justice America uses to deal with those crimes it cannot prevent and those criminals it cannot deter is not a monolithic, or even a consistent, system. It was not designed or built in one piece at one time. Its philosophic core is that a person may be punished by the Government if, and only if, it has been proved by an impartial and deliberate process that he has violated a specific law. Around that core layer upon layer of institutions and procedures, some carefully constructed and some improvised, some inspired by principle and some by expediency, have accumulated. Parts of the system—magistrates’ courts, trial by jury, bail—are of great antiquity. Other parts—juvenile courts, probation and parole, professional policemen—are relatively new. The entire system represents an adaption of the English common law to America’s peculiar structure of government, which allows each local community to construct institutions that fill its special needs. Every village, town, county, city and State has its own criminal justice system, and there is a Federal one as well. All of them operate somewhat alike. No two of them operate precisely alike.”).

Around fifty years ago, the president of this commission said that this system operates in similar ways across the country.<sup>11</sup> However, as this paper demonstrates, there are instances where the criminal justice system operates differently when the people involved are Black, Latino, and poor.

Specifically, this paper reveals that the criminal institutions have a fissure that divides the population into differently treated groups based on discrimination regarding economic status and race. To emphasize this idea, Professor David Cole explained that:

[t]he rhetoric of the criminal justice system sends the message that our society carefully protects everyone's constitutional rights, but in practice the rules assure that law enforcement prerogatives will generally prevail over the rights of minorities and the poor. By affording criminal suspects substantial constitutional protections in theory, the Supreme Court validates the results of the criminal justice system as fair. That formal fairness obscures the systemic concerns that ought to be raised by the fact that the prison population is overwhelmingly poor and disproportionately black . . . we have established two systems of criminal justice: one for the privileged, and another for the less privileged. Some of the distinctions are based on race, others on class, but in no true sense can it be said that all are equal before the criminal law.<sup>12</sup>

In the same vein, Professor Angela Onwuachi-Willig describes “pervasive stereotypes of Black males as inherently dangerous, criminally suspect, and disruptive to the social order.”<sup>13</sup>

U.S. society is far from becoming a bias-free society where racial stereotypes and racial bias do not negatively affect people of color.<sup>14</sup> Nevertheless, even though “[t]he criminal justice system remains dependent upon the exploitation of race and class inequities . . . public concern about that state of affairs has grown significantly.”<sup>15</sup>

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<sup>11</sup> *Id.*

<sup>12</sup> DAVID COLE, NO EQUAL JUSTICE: RACE AND CLASS IN THE AMERICAN CRIMINAL JUSTICE SYSTEM 8–9, xvii (1999).

<sup>13</sup> Angela Onwuachi-Willig, *Policing the Boundaries of Whiteness: The Tragedy of Being “Out of Place” from Emmett Till to Trayvon Martin*, 102 IOWA L. REV. 1113, 1151 (2017).

<sup>14</sup> *Id.* at 1185.

<sup>15</sup> David Cole, *No Equal Justice*, 1 CONN. PUB. INT. L.J. 19, 31 (2001).

### C. Major Forms of Discrimination in Both Countries: Race and Class

In terms of the laws and the purpose of the criminal justice system, both countries have the same laws and purpose, so what is happening? From where does the discrimination against people of color and people experiencing poverty arise?

Several studies and statistics show that Chile has one of the highest prison population rates in South America, with 233 people incarcerated for every 100,000 people.<sup>16</sup> Thirty percent of the Chilean prison population is being held in pre-trial detention.<sup>17</sup> In the U.S., mass incarceration<sup>18</sup> is a fact. The U.S. incarcerates 698 people for every 100,000, which means that the U.S. has incarceration rates higher than most independent countries in the world.<sup>19</sup>

According to the evidence, Chile and the U.S. share two things: (i) both countries have very high prison populations, and (ii) despite the rights guaranteed in the U.S. and Chilean Constitution, we can find rampant discrimination in both criminal systems.

In this context, Professors Richard Delgado and Jean Stefancic analyze the issue of “whether race or class is the dominant factor in the subjugation of people of color.”<sup>20</sup> They explore some aspects of critical race theory, focusing on race, class, welfare, and poverty.<sup>21</sup> In the same vein, Professor Cole calls this phenomenon the color of punishment.<sup>22</sup>

Two elements, physical characteristics and economic status, are the main bases of discrimination in Chile. A recent study of immigration in Chile shows that Haitians in Chile experience

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<sup>16</sup> Peter Wagner & Wendy Sawyer, *States of Incarceration: The Global Context 2018*, PRISON POLY INITIATIVE (June 2018), <https://www.prisonpolicy.org/global/2018.html> [<https://perma.cc/4BN3-9QXS>]; see also Quenton King, *Report Details Prison Woes in Chile*, INSIGHT CRIME (Feb. 19, 2016), <https://www.insightcrime.org/news/brief/report-details-prison-woes-in-chile/> [<https://perma.cc/WHY3-A87J>].

<sup>17</sup> King, *supra* note 16.

<sup>18</sup> THE SENTENCING PROJECT, REPORT TO THE UNITED NATIONS ON RACIAL DISPARITIES IN THE U.S. CRIMINAL JUSTICE SYSTEM 13 (2018), <https://www.sentencingproject.org/publications/un-report-on-racial-disparities/> [<https://perma.cc/2REU-RTXV>] (“For decades, the United States of America has employed mass incarceration as a convenient answer to inconvenient questions. These policies have produced dramatic rates of incarceration, with a particularly disproportionate impact on communities of color. In addition to the range of harmful consequences to people of color, mass incarceration has been a failed policy in regard to public safety outcomes. Research has documented that the effect of imprisonment on crime rates has been modest, and that at current levels the scale of incarceration is well past the point of diminishing returns for public safety. Mass incarceration has diverted resources from prevention and treatment initiatives that could have produced far more effective approaches to crime reduction.”).

<sup>19</sup> Wagner & Sawyer, *supra* note 16.

<sup>20</sup> RICHARD DELGADO & JEAN STEFANCIC, CRITICAL RACE THEORY: AN INTRODUCTION 107 (2d ed. 2001).

<sup>21</sup> *Id.* at 107–11.

<sup>22</sup> Cole, *supra* note 12, at 132.

three times more discrimination based on poverty, racism, and language.<sup>23</sup> The following sections will guide the reader to the main factor that creates this discrimination and legitimizes this status quo, allowing extreme discriminatory behavior by the citizens, the police, and the government.

**a. United States Statistics**

In 2001, “one of every three black boys born in that year could expect to go to prison in his lifetime, as could one of every six Latinos—compared to one of every seventeen white boys.”<sup>24</sup> Likewise, according to the U.S. Bureau of Justice,<sup>25</sup> in the criminal justice system in 2018, over 6.4 million individuals were under some form of correctional control; in other words, about one in forty adult U.S. residents were under some form of correctional supervision.<sup>26</sup> The statistics show racial disparities for Black people in particular:<sup>27</sup>

African Americans are more likely than white Americans to be arrested; once arrested, they are more likely to be convicted; and once convicted, and they are more likely to experience lengthy prison sentences. African-American adults are 5.9 times as likely to be incarcerated than whites and Hispanics are 3.1 times as likely.<sup>28</sup>

Finally, regarding “stop & frisk,”<sup>29</sup> the American Civil Liberties Union (ACLU) found that minorities, like Black people and Latinos, constitute populations upon which this tactic was used more

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<sup>23</sup> Andrea Bustos & Martín Espinoza, *Pobreza, Racismo e Idioma: La Triple Discriminación a los Haitianos en Chile*, RESUMEN LATINOAMERICANO (May 15, 2018), <http://www.resumenlatinoamericano.org/2018/05/15/pobreza-racismo-e-idioma-la-triple-discriminacion-a-los-haitianos-en-chile/> [https://perma.cc/6G5G-LH9H] (personal translation).

<sup>24</sup> THE SENTENCING PROJECT, *supra* note 18, at 1.

<sup>25</sup> “The Bureau of Justice Statistics of the U.S. Department of Justice is the principal federal agency responsible for measuring crime, criminal victimization, criminal offenders, victims of crime, correlates of crime, and the operation of criminal and civil justice systems at the federal, state, tribal, and local levels.” U.S. DEP’T OF JUST., PROGRAM REPORT: THE NATION’S TWO CRIME MEASURES, 3 (2014), [https://www.bjs.gov/content/pub/pdf/ntcm\\_2014.pdf](https://www.bjs.gov/content/pub/pdf/ntcm_2014.pdf).

<sup>26</sup> LAURA M. MARUSCHAK & TODD D. MINTON, CORRECTIONAL POPULATIONS IN THE UNITED STATES, 2017–2018, U.S. DEP’T OF JUST. 1 (Aug. 27, 2020), <https://www.bjs.gov/content/pub/pdf/cpus1718.pdf> [https://perma.cc/Q8YN-KBBX].

<sup>27</sup> THE SENTENCING PROJECT, *supra* note 18, at 1.

<sup>28</sup> *Id.*

<sup>29</sup> The American Civil Liberties Union (ACLU) of New Jersey defines stop-and-frisk as a “police tactic that allows officers to briefly stop and question somebody based on reasonable suspicion that the person is committing or is about to commit a crime.” *Stop-and-Frisk: The Facts*, ACLU N.J., <https://www.aclu-nj.org/theissues/policepractices/newark-stop-and-frisk-data/stop-and-frisk-facts> [https://perma.cc/LAC3-4WPT]. In addition, ACLU of New Jersey explains that: [i]f the officer reasonably believes that person has a dangerous weapon, and the officer fears for his or her safety, the officer may pat the suspect down to search for the weapon. Then, if based on the frisk an officer forms probable cause that a weapon is present, the officer may conduct a more extensive search of the person’s clothing or bag. The U.S. Supreme Court upheld

aggressively.<sup>30</sup> In zones where these two minority groups represent less than 10% of the total population, Black and Latino individuals made up more than half of the total stops made.<sup>31</sup> Black people made up 30% of all persons stopped in these zones, and Latinos made up 23.4% of all persons stopped.<sup>32</sup>

#### b. Chile Statistics

There is also racial discrimination in Chile. According to the United Nations Development Program (UNDP), the higher classes have always been predominantly white since the beginning of the country's formation. The Mestizos<sup>33</sup> occupied a lower tier in the social hierarchy, and black people were even lower.<sup>34</sup> Today, race is an accurate predictor of social class in Chile—a society with low social mobility where prejudice and discrimination in access to opportunity have prevailed.<sup>35</sup> In fact, the UNDP describes the notion that the socioeconomic inequality in Chile has a racial connotation.<sup>36</sup>

In the last decade, the chances of an innocent person ending up in jail in Chile grew.<sup>37</sup> The jail experience has a huge impact on those incarcerated in many ways, such as affecting a person's working life.<sup>38</sup> The intensive use of pre-trial detention in Chile, among other mechanisms, is making a poor group poorer.<sup>39</sup> The social stigma of this criminal system is something that should alarm us because the damage that the state is inflicting upon these citizens is immeasurable.<sup>40</sup>

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the constitutionality of the stop-and-frisk tactic in *Terry v. Ohio* in 1968. However, the circumstances that led to the Supreme Court's decision differ radically from what stop-and-frisk has become today. *Id.*

<sup>30</sup> *Racial Profiling: Definition*, ACLU, <https://www.aclu.org/other/racial-profiling-definition> [<https://perma.cc/8427-LVFE>].

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> Mestizo means “any person of mixed blood. In Central and South America, it denotes a person of combined Indian and European extraction.” *MESTIZO*, ENCYCLOPAEDIA BRITANNICA (2013).

<sup>34</sup> *Desiguales. Orígenes, cambios y desafíos de la brecha social en Chile*, PROGRAMA DE LAS NACIONES UNIDAS PARA EL DESARROLLO 154 (June 2017) (personal translation).

<sup>35</sup> *Id.* at 34; *Discriminación Racial en Chile: Más Blancos y Menos Sucios, Así Nos Percibimos*, INSTITUTO NACIONAL DE DERECHOS HUMANOS (Jan. 17, 2018), <https://www.indh.cl/discriminacion-racial-chile-mas-blancos-menos-sucios-asi-nos-percibimos/> [<https://perma.cc/9Z9B-V5P8>] (Personal translation); see also *Informe Anual 2017 Situación de Los Derechos Humanos en Chile 2017*, INSTITUTO NACIONAL DE DERECHOS HUMANOS (2017), <https://www.indh.cl/destacados-2/informe-anual/> [<https://perma.cc/LV5Z-EY3S>] (personal translation).

<sup>36</sup> *Desiguales. Orígenes, cambios y desafíos de la brecha social en Chile*, *supra* note 34, at 154.

<sup>37</sup> Nicolás Grau & Jorge Rivera, *Abuso de La Prisión Preventiva y su Impacto: Empobrece a Los Pobres*, CENTRO DE INVESTIGACIÓN PERIODÍSTICA (CIPER) (April 6, 2018), <https://ciperchile.cl/2018/04/06/abuso-de-la-prision-preventiva-y-su-impacto-empobrece-a-los-pobres/> [<https://perma.cc/BQ2S-74W9>] (personal translation).

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

A study by the Institute of Complex Systems of Engineering (ISCI) revealed that people with lower incomes are 9.5% more likely to be in pre-trial detention in comparison to those who are well off economically.<sup>41</sup> This study also shows that when it comes to indigenous people, such as Mapuches,<sup>42</sup> the percentage in pre-trial detention is extremely high—they are 25% more likely to be pre-trial detainees.<sup>43</sup>

The researchers from ISCI concluded that pre-trial detention is a criminal instrument, the use of which has increased in the last years, and that its implementation is very discriminatory.<sup>44</sup>

## II. Policing Race and Class

### A. Racial Profiling

The race of a person plays an important role in the criminal justice system. For instance, as Professor Armour explains, in the U.S., citizens and jurors have conscious or unconscious racial biases.<sup>45</sup>

In this chapter, I will focus my analysis on racial profiling, not because other methods or figures in the criminal system are less problematic, but because racial profiling is what starts this potential chain of discriminatory events. In other words, racial discrimination might begin when people have a police encounter in Chile and in the U.S.

Professor Wheeler has examined the marginalization of and microaggressions against the black population and other minorities in U.S. society.<sup>46</sup> I then ask, are police procedures themselves—in some contexts—a form of microaggressions and do they contribute to marginalization?

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<sup>41</sup> Nicolás Acevedo, *Mapuches y Pobres a la Cárcel: Estudio Confirma Discriminación Judicial a La Hora de Dictar Prisión Preventiva*, EL MOSTRADOR (Jan. 11, 2019), <https://www.elmostrador.cl/noticias/pais/2019/01/11/mapuches-y-pobres-a-la-carcel-estudio-confirma-discriminacion-judicial-a-la-hora-de-dictar-prision-preventiva/> [https://perma.cc/6SYL-ESJX] (personal translation).

<sup>42</sup> The Mapuche people are “the most numerous group of Indians in South America. They numbered more than 1,400,000 at the turn of the 21st century. Most inhabit the Central Valley of Chile, south of the Biobío River. A smaller group lives in Neuquén *provincia*, west-central Argentina” *MAPUCHE*, ENCYCLOPAEDIA BRITANNICA (2014).

<sup>43</sup> Acevedo, *supra* note 41.

<sup>44</sup> *Id.*

<sup>45</sup> SANFORD H. KADISH ET AL., *CRIMINAL LAW AND ITS PROCESSES: CASES AND MATERIALS* 880 (10<sup>th</sup> ed. 2016) (citing Jody D. Armour, *Race Ipsa Loquitur: of Reasonable Racist, Intelligent, Bayesians, and Involuntary Negrophobes*, 43 STAN L. REV. 781, 781–795 (1994)).

<sup>46</sup> Ronald Wheeler, *About Microaggressions*, 108 L. LIBR. J. 321 (2016).

To answer this question, racial profiling must be talked about. According to the ACLU, “racial profiling” is:

a longstanding and deeply troubling national problem despite claims that the United States has entered a “post-racial era.” It occurs every day, in cities and towns across the country, when law enforcement and private security target people of color for humiliating and often frightening detentions, interrogations, and searches without evidence of criminal activity and based on perceived race, ethnicity, national origin, or religion. Racial profiling is patently illegal, violating the U.S. Constitution’s core promises of equal protection under the law to all and freedom from unreasonable searches and seizures. Just as importantly, racial profiling is ineffective. It alienates communities from law enforcement, hinders community policing efforts, and causes law enforcement to lose credibility and trust among the people they are sworn to protect and serve.<sup>47</sup>

The concept of racial profiling is very controversial and against the U.S. Constitution. It violates the Fourth Amendment, which limits the power of the police to seize and to search people, their property, and their homes:<sup>48</sup>

[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.<sup>49</sup>

The discussion of this racial profiling issue is something “‘entrenched and ubiquitous’ that individuals of all ethnicities . . . internalize.”<sup>50</sup> As Professor David Rossman clearly explains, “the Court

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<sup>47</sup> *Racial Profiling*, ACLU, [https://www.aclu.org/issues/racial-justice/race-and-criminal-justice/racial-profiling#:~:text=Racial%20profiling%20is%20a%20longstanding,humiliating%20and%20often%20frightening%20detentions%2C.\[https://perma.cc/2J66-VYYY\]](https://www.aclu.org/issues/racial-justice/race-and-criminal-justice/racial-profiling#:~:text=Racial%20profiling%20is%20a%20longstanding,humiliating%20and%20often%20frightening%20detentions%2C.[https://perma.cc/2J66-VYYY]).

<sup>48</sup> Barry Friedman & Orin Kerr, *Common Interpretation: The Fourth Amendment*, NAT’L CONST. CTR., <https://constitutioncenter.org/interactive-constitution/interpretation/amendment-iv/interps/121> [https://perma.cc/558S-MD68].

<sup>49</sup> U.S. CONST. amend. IV.

<sup>50</sup> Aya Gruber, *Race to Incarcerate: Punitive Impulse and the Bid to Repeal Stand Your Ground*, 68 U. MIAMI L. REV. 961, 991 (2014).

has constructed a Fourth Amendment conditional rule that makes the legitimacy of what a police officer does dependent on how the target of his actions responds.”<sup>51</sup> For instance, in *Hübel v. Sixth Judicial District Court of Nevada*, a case from 2004, the U.S. Supreme Court decided that it is constitutional to arrest and convict a person if they refuse to identify themselves to the police during an investigative stop involving a reported assault.<sup>52</sup>

Article 85 of the Chilean Criminal Procedure Code states that the police, without a prior warrant from the prosecutor, can request the identification of any person that they presume intends to commit or has attempted to commit a crime.<sup>53</sup> During this police procedure, and without further evidence, the police may also search the clothes, luggage, or vehicle of the person whose identity is being questioned and check for outstanding arrest warrants that they might have.<sup>54</sup> However, this procedure, aimed at obtaining the identity of a person, must be carried out in the most efficient manner possible, and its abuse may constitute an offense.<sup>55</sup>

In Chile, a recent study by Professors Mauricio Duce and Ricardo Lillo found that during 2017 and 2018, the police requested the identification of 70,317 people between the ages of fourteen and eighteen years old.<sup>56</sup> This occurred even though the Chilean law explicitly says that in cases where the age of a person is in doubt, it will always be understood that the suspect is a minor.<sup>57</sup>

This Chilean law largely resembles the Fourth Amendment of the U.S. Constitution. However, while the law intends to prevent discriminatory acts based on stereotypes, Chilean people are frequently treated as suspect just because of the clothes they are wearing.<sup>58</sup> This illustrates the concept that Professor Aya Gruber accurately explains as socioeconomic discrimination and anti-color-

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<sup>51</sup> David Rossman, *Conditional Rules in Criminal Procedure: Alice in Wonderland Meets the Constitution*, 26 GA. STATE U. L. REV. 417, 466 (2010).

<sup>52</sup> *Hübel v. Sixth Jud. Dist. Ct. of Nev.*, 542 U.S. 177 (2004).

<sup>53</sup> CÓDIGO PROCESAL PENAL [CÓD. PROC. PEN.] [CRIMINAL PROCEDURE CODE] art. 85. (Chile) (personal translation).

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> Juan Manuel Ojeda G., *Carabineros Realizó 70.317 Controles Preventivos a Menores de Edad*, LA TERCERA (Mar. 17, 2019), <https://www.latercera.com/nacional/noticia/carabineros-realizo-70-317-controles-preventivos-menores-edad/573906/> [<https://perma.cc/ZF3W-26U8>] (personal translation).

<sup>57</sup> Law No. 20.931 art. 12 (2016) (Chile) <https://www.bcn.cl/leychile/navegar?idNorma=1092269>. [<https://perma.cc/2MRD-XJJG>] (personal translation)

<sup>58</sup> David Ignacio Mendoza Burgos, *Caracterización de la Pobreza Como Estereotipo Delictual: Un Análisis Crítico al Flaite Chileno y al Proyecto de Control Preventivo de Identidad* 78 (2016) (B.A. thesis, Universidad de Chile), <http://repositorio.uchile.cl/bitstream/handle/2250/146210/Caracterizaci%C3%B3n-de-la-pobreza-como-estereotipo-delictual-un-an%C3%A1lisis-cr%C3%ADtico-al-flaite-chileno-y-al-proyecto-de-control-preventivo-de-identidad.pdf?sequence=1&isAllowed=y> [<https://perma.cc/24MM-P95J>] (personal translation).

consciousness regarding the wearing of “criminal clothes.”<sup>59</sup> Generally, in Chile, the police enjoy significant discretion and freedom in finding probable cause.<sup>60</sup>

Racial profiling in Chile is not new. At the end of the twentieth century, poor young people were the subject of this socioeconomic discrimination, which had a deep and worrisome impact on them.<sup>61</sup> The result was, in essence, the criminalization of the poor, which is very much in line with the economic, political, social, and cultural norms or values that prevail in Chile.<sup>62</sup>

## B. Police and Government Behavior

### a. Police Violence Against Less Privileged Groups and the Consequences

This subsection will exhibit three cases from Chile and the U.S. that expose the high levels of police violence against less privileged groups. Pay special attention to these three elements in each case: (i) the criminal; (ii) the victim; and (iii) the consequences of the perpetrator’s actions.

In a 2016 Chilean police operation, an officer detained, threw to the ground, and pointed a gun at a thirteen-year-old child, Isaías Hernández Huentecol.<sup>63</sup> His brother, Brandon, who was seventeen at the time, came to help him.<sup>64</sup> At that moment, the police officer forced Brandon to lie on the ground and shot him with more than 100 metal pellets.<sup>65</sup> Currently, Brandon lives with eighty-seven pellets lodged in his body because, according to the doctors, the pellets cannot be extracted

<sup>59</sup> Gruber, *supra* note 50, at 991.

<sup>60</sup> See Manuel Rodríguez Vega, *Jurisprudencia Reciente de la Corte Suprema de Chile Sobre Control de Identidad*, 15 POLÍTICA CRIMINAL 452 (2020). (personal translation).

<sup>61</sup> Mendoza Burgos, *supra* note 58.

<sup>62</sup> *Id.*; Gruber, *supra* note 50, at 991.

<sup>63</sup> Tribunal de Juicio Oral en lo Penal de Angol [T.J.O.P. de Angol] [Criminal Trial Court] Jan. 18, 2019, Sentencia RUC: 1601191684-1, RIT: 71-2018 (personal translation); Corte de Apelaciones de Temuco [C. Apel.] [Court of Appeals], May 10, 2019, “Ministerio Público c. Christian Edgardo Rivera Silva” rol de la causa: 102-2019 (Chile) (personal translation); PODER JUDICIAL, *Top de Angol Condena a 3 Años de Libertad Vigilada Intensiva a Autor de Lesiones Graves a Joven Mapuche*, PODER JUDICIAL REPÚBLICA DE CHILE (Jan. 24, 2019), [http://www.pjud.cl/noticias-del-poder-judicial/-/asset\\_publisher/kV6Vdm3zNEWt/content/top-de-angol-condena-a-3-anos-de-libertad-vigilada-intensiva-a-autor-de-lesiones-graves-a-joven-mapuc-1?redirect=http://www.pjud.cl/noticias-del-poder-judicial%3Fp\\_id%3D101\\_INSTANCE\\_kV6Vdm3zNEWt%26p\\_p\\_lifecycle%3D0%26p\\_p\\_state%3Dnormal%26p\\_p\\_mode%3Dview%26p\\_p\\_col\\_id%3Dcolumn-2%26p\\_p\\_col\\_pos%3D1%26p\\_p\\_col\\_count%3D2](http://www.pjud.cl/noticias-del-poder-judicial/-/asset_publisher/kV6Vdm3zNEWt/content/top-de-angol-condena-a-3-anos-de-libertad-vigilada-intensiva-a-autor-de-lesiones-graves-a-joven-mapuc-1?redirect=http://www.pjud.cl/noticias-del-poder-judicial%3Fp_id%3D101_INSTANCE_kV6Vdm3zNEWt%26p_p_lifecycle%3D0%26p_p_state%3Dnormal%26p_p_mode%3Dview%26p_p_col_id%3Dcolumn-2%26p_p_col_pos%3D1%26p_p_col_count%3D2) [https://perma.cc/N5WJ-DX4S] (personal translation); *Carabiniero que Disparó Más de 100 Perdigones a Brandon Hernández Huentecol Cumplirá Condena en Libertad Vigilada*, CNN CHILE (Jan. 24, 2019, 2:46 PM), [https://www.cnnchile.com/pais/carabiniero-que-disparo-mas-de-100-perdigones-a-brandon-hernandez-huentecol-cumplira-condena-en-libertad-vigilada\\_20190124/](https://www.cnnchile.com/pais/carabiniero-que-disparo-mas-de-100-perdigones-a-brandon-hernandez-huentecol-cumplira-condena-en-libertad-vigilada_20190124/) [https://perma.cc/2NWZ-VU2A] (personal translation)

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

because of their proximity to his vital organs.<sup>66</sup> Thus, Brandon Hernández Huentecol, a young Mapuche,<sup>67</sup> will live the rest of his life with eighty-seven metal pellets inside his body.<sup>68</sup> The police officer who injured this young, Mapuche child was convicted for the felony of serious injuries and unfair humiliation, but he was acquitted of unlawful coercion.<sup>69</sup> The officer, Christian Rivera Silva, was allowed to serve his sentence under supervised probation.<sup>70</sup>

In 2017, during an identity check in Chile, a police officer pushed a man causing him to fall off a two-meter platform to his death.<sup>71</sup> Two years later, that police officer was sentenced to five years in jail.<sup>72</sup> Although the judicial process ended there, the police officer continues to be part of the police department because the police department's administrative process on the issue is ongoing.<sup>73</sup>

In the U.S., there are many similar cases, such as the emblematic case of Tamir Rice. In 2014, a police officer shot and killed a twelve-year-old, Tamir Rice,<sup>74</sup> “after a witness called 911 to report that someone was brandishing a gun in a park. The caller noted that the person was ‘probably a juvenile’ and that the gun was ‘probably fake,’ records show.”<sup>75</sup>

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<sup>66</sup> *Id.*

<sup>67</sup> See ENCYCLOPAEDIA BRITANNICA, *supra* note 42 (defining Mapuche).

<sup>68</sup> *Id.*; PODER JUDICIAL, *supra* note 63.

<sup>69</sup> PODER JUDICIAL, *supra* note 63.

<sup>70</sup> *Id.*

<sup>71</sup> INSTITUTO NACIONAL DE DERECHOS HUMANOS DE CHILE, Ex Carabinero es Condenado a 5 Años de Cárcel por Violencia Innecesaria con Resultado de Muerte en Puerto Montt (Jul. 5, 2019), <https://www.indh.cl/ex-carabinero-es-condenado-a-5-anos-de-carcel-por-violencia-innecesaria-con-resultado-de-muerte-en-puerto-montt/> [hereinafter INDH]; Nicole Briones, *Declaran Culpable a Carabinero Que Empujó y Provocó Muerte de Hombre en Calbuco*, BIOBIO CHILE (Mar. 14, 2019, 1:51 PM), <https://www.biobiochile.cl/noticias/nacional/region-de-los-lagos/2019/03/14/declaran-culpable-a-carabinero-que-empujo-y-provoco-muerte-de-un-hombre-en-calbuco.shtml> (personal translation).

<sup>72</sup> INDH, *supra* note 71; Sebastián Asencio, *Sentencian a 5 años de Cárcel a Carabinero que Empujó a un Hombre y Provocó su Muerte en Calbuco*, BIOBIO CHILE (Mar. 19, 2019, 9:10 PM), <https://www.biobiochile.cl/noticias/nacional/region-de-los-lagos/2019/03/19/sentencian-a-5-anos-de-carcel-a-carabinero-que-provoco-muerte-de-un-hombre-en-calbuco.shtml> [https://perma.cc/7LLB-H4DC] (personal translation).

<sup>73</sup> Yessenia Máquez, *Carabinero Sentenciado por Causar Muerte de Hombre en Calbuco Aún es Parte de La Institución*, BIOBIO CHILE (Mar. 20, 2019, 11:49 PM), <https://www.biobiochile.cl/noticias/nacional/region-de-los-lagos/2019/03/20/carabinero-sentenciado-por-causar-muerte-de-hombre-en-calbuco-aun-es-parte-de-la-institucion.shtml> [https://perma.cc/5LVX-7H72] (personal translation).

<sup>74</sup> Amir Vera, *Officer Who Shot Tamir Rice Hired by Small Police Department in Ohio*, CNN (Oct. 6, 2018, 5:32 PM), <https://www.cnn.com/2018/10/06/us/timothy-loehmann-tamir-rice-ohio/index.html> [https://perma.cc/NC4B-74MF].

<sup>75</sup> *Id.*

**b. Racial Disparities in the U.S. Are Not New**

According to the U.S. Department of Justice, “[b]lack males ages 18 to 19 were 11.8 times more likely to be imprisoned than white males of the same age. This age group had the highest black-to-white racial disparity in 2016.”<sup>76</sup>

We can find this disparity in several cases. For instance, in 1953, the Alabama Court of Appeals instructed the jury in a rape case to “consider the social conditions and customs founded upon racial differences, such as that the prosecutrix was a white woman and the defendant was a Negro man.”<sup>77</sup>

Another instance of racial disparity occurred in Georgia in 1987 when a Black man named Warren McCleskey was sentenced to death for killing a white police officer during a robbery.<sup>78</sup> The most interesting component of this case is that it exposed to the U.S. Supreme Court the unconstitutionality of the capital sentencing system in Georgia because of race discrimination.<sup>79</sup> Supporting his claim of discrimination, McCleskey presented a study by Professors Baldus, Pulaski, and Woodworth: the Baldus study. First, this study indicated “that prosecutors sought the death penalty in 70% of the cases involving black defendants and white victims; 32% of the cases involving white defendants and white victims; 15% of the cases involving black defendants and black victims; and 19% of the cases involving white defendants and black victims.”<sup>80</sup> Second, it indicated “that, even after taking account of 39 nonracial variables, defendants charged with killing white victims were 4.3 times more likely to receive a death sentence as defendants charged with killing blacks.”<sup>81</sup> Hence, “the Baldus study indicates that black defendants, such as McCleskey, who kill white victims have the greatest likelihood of receiving the death penalty.”<sup>82</sup>

Although the court considered the Baldus study with care, it concluded that these statistics did not prove that the penalty imposed on McCleskey relied on his race, the victim’s race, or that it raised any Eighth Amendment constitutional concerns.<sup>83</sup>

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<sup>76</sup> E. Ann Carson, *Prisoners in 2016*, BUREAU OF JUST. STATS. BULL. 13 (2018), <https://www.bjs.gov/content/pub/pdf/p16.pdf> [<https://perma.cc/YAQ5-SJF4>].

<sup>77</sup> *McQuirter v. State*, 36 Ala. App. 707, 709 (Ala. Ct. App. 1953) (convicting a Black person of an attempt to commit an assault with intent to rape).

<sup>78</sup> *McCleskey v. Kemp*, 481 U.S. 279 (1987); *Case: Landmark: McCleskey v. Kemp*, LEGAL DEF. & EDUC. FUND, INC., <https://www.naacpldf.org/case-issue/landmark-mccleskey-v-kemp/> [<https://perma.cc/ZJR3-NSDN>].

<sup>79</sup> *McCleskey v. Kemp*, 481 U.S. 279.

<sup>80</sup> *Id.* at 287.

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> *See id.* at 306–08, 312–13.

In a case from 2012 that took place in Florida, a seventeen-year-old African American named Trayvon Martin was murdered by George Zimmerman, who lived in the same area. Zimmerman called 911 to report "a suspicious person" in the neighborhood, disregarded the order not to get out of his car or approach the person, and shot Martin.<sup>84</sup>

In her work, Professor Angela Onwuachi-Willig discusses the loss of Martin's life and the inaccurate conclusion that this teenager was a criminal.<sup>85</sup> The tragedy inspired nationwide discussions about racism, racial profiling, implicit bias, police brutality, and numerous inequalities in the criminal justice system.<sup>86</sup> Additionally, Professor Onwuachi-Willig provides an interesting, deep analysis about some similarities between the death of Martin in 2012 and the death of another black teenager, Emmet Till, in 1955.<sup>87</sup> In her article, she demonstrates how racist practices are deeply embedded in economic and social organizations.<sup>88</sup>

Similarly, two years before the fatal shooting of Martin, Professor Adam Benforado published an interesting study about the threat that African Americans face:

[a]dvances in implicit social cognition reveal that most people carry biases against racial minorities beyond their conscious awareness. These biases affect critical behavior, including the actions of individuals performing shooting tasks. In simulations, Americans are faster and more accurate when firing on armed blacks than when firing on armed whites, and faster and more accurate in electing to hold their fire when confronting unarmed whites than when confronting unarmed blacks.<sup>89</sup>

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<sup>84</sup> Press Release, Federal Officials Close Investigation into Death of Trayvon Martin, U.S. Dep't of Just. (Aug. 26, 2015), <https://www.justice.gov/opa/pr/federal-officials-close-investigation-death-trayvon-martin> [<https://perma.cc/KMD3-AC57>].

"The Justice Department announced today that the independent federal investigation found insufficient evidence to pursue federal criminal civil rights charges against George Zimmerman for the fatal shooting of Trayvon Martin . . . . The federal investigation sought to determine whether the evidence of the events that led to Martin's death were sufficient to prove beyond a reasonable doubt that Zimmerman's actions violated the federal criminal civil rights statutes."

*Id.*; *Trayvon Martin Shooting Fast Facts*, CNN (Feb. 7, 2016), <https://www.cnn.com/2013/06/05/us/trayvon-martin-shooting-fast-facts/index.html> [<https://perma.cc/M9BA-X24M>].

<sup>85</sup> See Onwuachi-Willig, *supra* note 13, at 1114–15.

<sup>86</sup> Valena Elizabeth Beety, *What the Brain Saw: The Case of Trayvon Martin and the Need for Eyewitness Identification Reform*, 90 DENV. U. L. REV. 331 (2012). "The shooting of Trayvon Martin caused many to question what exactly led to the death of an unarmed seventeen-year-old African-American teenager. This [e]ssay discusses one piece of the puzzle: the brain, in creating and preserving memories, can distort our perception of events and people around us." *Id.*

<sup>87</sup> Onwuachi-Willig, *supra* note 13.

<sup>88</sup> *Id.*

<sup>89</sup> Adam Benforado, *Quick on the Draw: Implicit Bias and the Second Amendment*, 89 OR. L. REV. 1, 3 (2010).

African Americans face a significant and menacing threat, but it is not the one that has preoccupied the press, pundits, and policy makers in the wake of several bigoted murders and a resurgent white supremacist movement. While hate crimes

Furthermore, Professor Khiara M. Bridges describes many factors that contribute to the narrative about the close relationship between Black men and crimes in her book about critical race theory.<sup>90</sup> She explains how the critical race theorist understands that this issue is a macro problem, so the solution should be equally macro.<sup>91</sup> Additionally, she delves deep into the analysis, stating that the work of critical race theorists “must be truly transformative. If it is not, they are convinced that, as a nation, we will be doomed and continuously add names to the list of people of color who have been killed by the police.”<sup>92</sup>

### c. Socioeconomic Disparities in the Criminal Justice System in Chile

A recent economic scandal in Chile demonstrated the socioeconomic disparities in the criminal justice system. In 2015, a campaign finance scandal hit Chilean courts: the owners of Banco Penta,<sup>93</sup> Carlos Delano and Carlos Lavín, were charged for illegal political financing, bribery, and tax evasion.<sup>94</sup> After four years, they have only paid fines, and it is likely that none of them will go to jail.<sup>95</sup> Cases such as these are very harmful for Chilean society because they expose the corruption and lack of transparency.<sup>96</sup>

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and hate groups demand continued vigilance, if we are truly to protect our minority citizens, we must shift our most urgent attention from neo-Nazis stockpiling weapons to the seemingly benign gun owners among us—our friends, family, and neighbors—who show no animus toward African Americans and who profess genuine commitments to equality.

*Id.* at 2.

<sup>90</sup> KHIARA M. BRIDGES, *CRITICAL RACE THEORY: A PRIMER* 396, 396–97 (2019).

<sup>91</sup> *Id.* at 404.

<sup>92</sup> *Id.*

<sup>93</sup> Bank in Chile specialized in investment services. *Banco Penta*, BANKS AROUND THE WORLD, <https://www.relbanks.com/chile/banco-penta> [<https://perma.cc/8GA7-W2KP>].

<sup>94</sup> Ignacio de los Reyes, “*Pentagate*,” *El Caso Que Destapó la Corrupción en Chile*, BBC MUNDO (Jan. 16, 2015), [https://www.bbc.com/mundo/noticias/2015/01/150115\\_chile\\_caso\\_penta\\_corrupcion\\_irm](https://www.bbc.com/mundo/noticias/2015/01/150115_chile_caso_penta_corrupcion_irm) [<https://perma.cc/9RU9-PKLN>] (personal translation); Josefina Ríos, *Los Casos Que Redibujaron la Política Chilena*, PAUTA POLÍTICA (July 11, 2018), <https://www.pauta.cl/politica/penta-sqm-y-caval-los-casos-que-redibujaron-la-politica-chilena> [<https://perma.cc/53EQ-22NZ>] (personal translation).

<sup>95</sup> Claudia Carvajal G., *Nadie Irá a la Cárcel Por el Caso Penta*, DIARIO UCHILE (July 9, 2018, 6:25 PM), <https://radio.uchile.cl/2018/07/09/caso-penta-termina-con-todos-los-imputados-en-libertad-vigilada/> [<https://perma.cc/C2EK-HLZM>] (personal translation); *Caso Penta: Fiscalía y SII Defienden Multa para Salida Alternativa de Delano y Lavín*, COOPERATIVA.CL (Jun. 27, 2018, 2:28 PM), <https://www.cooperativa.cl/noticias/pais/politica/caso-penta/caso-penta-fiscalia-y-sii-defienden-multa-para-salida-alternativa-de/2018-06-27/141809.html> [<https://perma.cc/2DQG-X5DE>] (personal translation).

<sup>96</sup> According to Transparency International’s Corruption Perception Index, Chile is ranked fourth in corruption perception in the continents of North and South America, after Canada, United States, and Uruguay. See *Corruption Perceptions Index 2017*, TRANSPARENCY INT’L (Feb. 21, 2018), [https://www.transparency.org/news/feature/corruption\\_perceptions\\_index\\_2017](https://www.transparency.org/news/feature/corruption_perceptions_index_2017) [<https://perma.cc/9YKT-UE8K>].

On the other hand, in 2018, Manuel Saavedra was sentenced to five years in prison for attempted robbery when he was violent towards the guards of a supermarket.<sup>97</sup> He attempted to steal no more than \$20 USD worth of alcohol and when was moved by the guards to the supermarket security room, he damaged a little part of the roof. Saavedra was sentenced to five years in jail for the attempted robbery and roof damage.

In the Penta case, corporate bank owners committed treasury fraud for \$2.3 million USD; meanwhile, Mr. Saavedra committed an attempted robbery for no more than \$20 USD.<sup>98</sup> Both cases are examples of crimes against property and patrimony; however, the Penta case involves more money and powerful people, which has the potential to harm the transparency of the whole country. The Saavedra case was a small robbery in terms of monetary quantity that resulted in the deprivation of five years of freedom. The question arises by itself: what is the justification for such a huge difference in punishments?

If we argue that the justification is the deterrence against future crimes like this or the mere act of stealing something that is not yours, then the punishment should be the same, but—again—why is it not? Well, there is an implication of discrimination when considering who committed each of the crimes. Economic crimes, like in the Penta case, would have, as imputed potential, people with more education, higher economic status, and the ability to pay for expensive litigation.

This is a mere example of two types of criminal justice, which end with only impoverished people in prison—poor people are sentenced to prison, but wealthy people are not.<sup>99</sup> These two cases expose a clear disparity between punishments for crimes committed by poor people and by the wealthy. Poor people, of course, are persecuted more year after year.

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<sup>97</sup> Tribunal de Juicio Oral en lo Penal de Chillán [T.J.O.P. de Chillán] [Criminal Oral Trial Court of Chillán], July 10, 2018, RUC: 1700672791-3, RIT: 103-2018 (Chile) (personal translation).

<sup>98</sup> *Caso Penta: Juzgado de Garantía Condena a 4 años de Libertad Vigilada Intensiva a Controladores del Holding*, DIARIO CONST. (July 9, 2018), <https://www.diarioconstitucional.cl/2018/07/09/caso-penta-juzgado-de-garantia-condena-a-4-anos-de-libertad-vigilada-intensiva-a-controladores-del-holding/>; 8 Juzgado de Garantía de Santiago [J.G.] [Criminal Court] RUC: 1400637392-6, RIT: 6873-2014, July 9, 2018; Tribunal de Juicio Oral en lo Penal de Chillán [T.J.O.P. de Chillán] [Criminal Oral Trial Court of Chillán], July 10, 2018, RUC: 1700672791-3, RIT: 103-2018 (Chile) (personal translation).

<sup>99</sup> Victoria Viñals, *Las Miserias y Privilegios de la Ley Penal en Chile*, DIARIO UCHILE (Feb. 1, 2015, 9:03 PM), <https://radio.uchile.cl/2015/02/01/las-miserias-y-privilegios-de-la-ley-penal-en-chile/> [https://perma.cc/Z2U8-Q7QW] (personal translation).

### III. The Main Reason for Criminal Discrimination

Even though the idea of using physical characteristics and racial profiling as a mechanism to identify those who have engaged in a crime is unfounded,<sup>100</sup> it is something that exists. Therefore, we should ask: why is this extremely absurd and discriminatory practice used?

Many factors can be given as an answer to the question regarding this discriminatory mechanism of criminal justice. Nevertheless, in this paper, I will focus only on one factor, because (1) I believe that factor is the main reason for discrimination, and (2) it is closely shared in Chile and the U.S.

This factor is **Fear**. “Fear” is defined as an “unpleasant emotion . . . that you have when you are” worried that “something dangerous, painful, or bad” might happen.<sup>101</sup> The philosopher Martha Nussbaum explained the idea of fear from a social and biological perspective, and she exposed fear as “a very primitive emotion. Unlike compassion, which requires perspectival thinking.”<sup>102</sup> This phenomenon deserves some elaboration.

In 1988, more than thirty years ago, the U.S. Department of Justice understood that the fear of crime could be solved by increasing the presence of police and enhancing citizen-police encounters,<sup>103</sup> and that “[w]hat is more speculative (but quite plausible) is that community policing would also be successful in channeling the remaining fear along constructive rather than destructive paths. Criminal victimization would be reduced, and the overall quality of community life enhanced beyond the mere reduction in fear.”<sup>104</sup>

However, what is happening is that the citizens are calling the police because racial bias and discrimination are so deep-seated in U.S. culture.<sup>105</sup> In other words,

[t]he sad irony in all of these cases is, the people who called police out of a fear of danger, wound up inflicting harm and humiliation on the very people they were afraid of. Racial bias and discrimination are so deep-seated in this country that they

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<sup>100</sup> Amit Pundik, *Against Racial Profiling*, 67 U. TORONTO L.J. 175, 205 (2017).

<sup>101</sup> *FEAR*, CAMBRIDGE DICTIONARY (2019).

<sup>102</sup> MARTHA C. NUSSBAUM, *THE NEW RELIGIOUS INTOLERANCE: OVERCOMING THE POLITICS OF FEAR IN AN ANXIOUS AGE* 25 (2013).

<sup>103</sup> Mark H. Moore & Robert C. Trojanowicz, *Policing and the Fear of Crime*, Perspectives on Policing 6 (June 1988), <https://www.ncjrs.gov/pdffiles1/nij/111459.pdf> [<https://perma.cc/6N2C-L9EJ>].

<sup>104</sup> *Id.*

<sup>105</sup> Katie Hoepfner, *The Toxic Cocktail of White Fear and Police Power*, ACLU N.M. (May 10, 2018, 2:00 PM), <https://www.aclu-nm.org/en/news/toxic-cocktail-white-fear-and-police-power> [<https://perma.cc/5FVY-RZ8J>].

masquerade as credible fear. These injustices must stop. We all have biases, both conscious and unconscious, but it is our responsibility to ensure that those biases do not cause others harm.<sup>106</sup>

In 2018, in California,

a group of four women, including Bob Marley's eldest granddaughter, loaded luggage into the back of their car and exited a home they were renting off of Airbnb. Minutes later, several police cars surrounded them. A white neighbor had called the cops after the women – three of whom are black – failed to wave to her as they pulled out of the driveway. This, she assumed, meant they were surely burglarizing the house. The women say police detained them for forty-five minutes before letting them go.<sup>107</sup>

Two weeks later in Pennsylvania,

two Black men entered a Starbucks and waited for a white business associate to arrive. Within minutes, a Starbucks employee called police because the two men had not yet made a purchase. Officers handcuffed the men, placed them under arrest, and escorted them out of a coffee shop full of white onlookers, in an affluent white neighborhood.<sup>108</sup>

The sociologist Elijah Anderson has studied the devolution of black and white space.<sup>109</sup> Additionally, he has explored the connection between education and economic progress. In his study, he analyzes Philadelphia's inner-city high schools.<sup>110</sup> Professor Anderson explains that the “inner-city

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<sup>106</sup> *Id.*

<sup>107</sup> *Id.*; see also Daniel Victor, *A Woman Said She Saw Burglars. They Were Just Black Airbnb Guests.*, N.Y. TIMES (May 8, 2018), <https://www.nytimes.com/2018/05/08/us/airbnb-black-women-police.html> [<https://perma.cc/66G5-FR73>].

<sup>108</sup> See Hoeppner, *supra* note 106; see also Reggie Shuford, *Waiting While Black in Philadelphia Can Get You Arrested*, ACLU (Apr. 17, 2018, 10:30 AM), <https://www.aclu.org/blog/criminal-law-reform/reforming-police-practices/waiting-while-black-philadelphia-can-get-you> [<https://perma.cc/MDF6-5Z9N>].

The police service area where the Starbucks is located has a Black population of just 3 percent. But 67 percent of the stops that occurred there in the first half of 2017 were of African-Americans. The two other police service areas in this district—known as District 9—show similar lopsided disparities. In one of the bordering police service areas, a whopping 84 percent of pedestrians stopped were African-Americans in a neighborhood with a Black population of 16 percent.

*Id.*

<sup>109</sup> Elijah Anderson, *The Devolution of the Inner-City High School*, 673 ANNALS AM. ACAD. POL. & SOC. SCI. 60, 61 (2017).

<sup>110</sup> *Id.* at 62.

[M]any of these schools *have* become largely dysfunctional—not, as many outsiders imagine, because the black and Latino children who attend them come from a “culture of poverty,” but because they have suffered greatly from a pernicious combination of entrenched racism and the structural transformation of the economy. All too often, these problems frustrate inner-city schools’ educational mission.

schools and their students are deeply stigmatized by their blackness and association with the ghettos in which they are situated. These stereotypes are profound and persistent, and effectively seal the fate of the ‘inner-city school’ as the problem child of American public education,”<sup>111</sup> and that “[t]he worrisome state of inner-city schools today is a direct result of historic and recent socioeconomic forces that produce and reproduce racial inequality.”<sup>112</sup> He writes,

[t]he deep alienation felt by many black students is the crime of the final stage in the devolution of the inner-city school. The students’ strong suspicions that the dominant white society has a sinister plot against them engenders distrust of the school as an institutional arm of that society. Because of their pervasive sense of racial exclusion, many students find it difficult to fully embrace the mission of the school and tend not to believe that education is an effective route toward social mobility. . . . To understand the inner-city school, its historic, racial, and economic context must be appreciated. Fundamentally, traditional forms of capital and labor have long since departed the ghetto, and local residents must rely mainly on whatever resources they can scrape together. As the larger society fails the community, people fend for themselves in making a living and ensuring their own security and that of their loved ones in an environment of endemic violence.<sup>113</sup>

It is important to emphasize the socioeconomic-disparity issue here, which, as this paper establishes, is a problem shared by both countries. For instance, in the USA:

[a]lthough biases in the criminal justice system exaggerate the differences in rates of violent crimes by race, it may, tragically, still be true that blacks commit a disproportionate number of crimes. Given that the blight of institutional racism continues to disproportionately limit the life chances of African-Americans, and that desperate circumstances increase the likelihood that individuals caught in this web may turn to desperate undertakings, such a disparity, if it exists, should sadden but not surprise us . . . that socioeconomic status explains the overinvolvement of blacks in robbery and assaults (assuming that there is, in fact, such overinvolvement), race serves merely as a proxy for

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*Id.*

<sup>111</sup> *Id.*

<sup>112</sup> *Id.* at 61.

<sup>113</sup> *Id.* at 75–76.

socioeconomic status. But if race is a proxy for socioeconomic factors, then race loses its predictive value when one controls for those factors.<sup>114</sup>

As previously mentioned, this process similarly occurs in Chile, but studies of socioeconomics and crime show that socioeconomic inequality is an important factor in criminality.<sup>115</sup> This explains not only the commission of crimes, but also the subjective need to access higher socioeconomic levels.<sup>116</sup>

According to the philosopher Adela Cortina, regarding Haitian immigration in Chile, we live in an altruistic society that only wants to receive but give nothing in return.<sup>117</sup> She states that we are not bothered by athletes of other ethnic groups and the races or competitions they win, nor are we bothered by famous stars and singers of other races and ethnicities.<sup>118</sup> Rather, we are bothered by those people that seem to have nothing to give in return for the things they receive.<sup>119</sup> Cortina calls this phenomenon “aporophobia.”<sup>120</sup> Aporophobia consists of the fear and rejection of poverty.<sup>121</sup>

In Chile, José Tomás Vicuña<sup>122</sup> explains that Chileans living in poverty and immigrants have become the scapegoats for unsatisfactory policies and structures in Chile.<sup>123</sup> Chile has one of the lowest crime rates in Latin America.<sup>124</sup> Yet, the Chilean population reports having a high level of fear of

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<sup>114</sup> Jody D. Armour, *Race Ipsa Loquitur: of Reasonable Racist, Intelligent, Bayesians, and Involuntary Negrophobes*, 43 STAN L. REV. 781, 792 (1994).

<sup>115</sup> Steven D. Levitt, *Understanding Why Crime Fell in the 1990s: Four Factors that Explain the Decline and Six that Do Not*, 18 J. ECON. PERSPS. 163, 172 (2004).

<sup>116</sup> Macarena Cea et al., *Determinantes de la Criminalidad: Revision Bibliográfica*, 4 POLÍT. CRIM. 1, 6 (2006) (personal translation); see Levitt, *supra* note 115.

<sup>117</sup> Bustos & Espinoza, *supra* note 23.

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> Emilio Martínez Navarro, *Aporofobia*, in: GLOSARIO PARA UNA SOCIEDAD INTERCULTURAL 17, 17–23 (2002), <https://www.iidh.ed.cr/RedInciendo/media/5938/Aporofobia.pdf> [<https://perma.cc/FC5U-B3XS>] (personal translation); Milagros Pérez Oliva, *Cortina: “Lo Que Molesta de los Inmigrantes es Que Sean Pobres,”* EL PAÍS (May 10, 2017, 9:46 AM), [https://elpais.com/cultura/2017/05/08/actualidad/1494264276\\_545094.html](https://elpais.com/cultura/2017/05/08/actualidad/1494264276_545094.html) [<https://perma.cc/5NJS-SUHG>] (personal translation).

<sup>122</sup> José Tomás Vicuña is the former Director of the Migrant Jesuit Service (SJM) (2018–2020). *Refugees International and 36 Organizations Concerned over Restrictions Imposed on Venezuelan Refugees in Peru*, REFUGEES INT’L, <https://www.refugeesinternational.org/reports/2019/6/11/refugees-international-and-36-other-organizations-concerned-over-entry-restrictions-imposed-in-peru-on-venezuelan-refugees> [<https://perma.cc/C6P4-NKP6>]. He is now Chaplain at Migrant Jesuit Service (SJM).

<sup>123</sup> See Bustos & Espinoza, *supra* note 23.

<sup>124</sup> U.S. DEP’T OF STATE, OVERSEAS SECURITY ADVISORY COUNCIL, *Chile 2020 Crime & Safety Report* (2020), <https://www.osac.gov/Country/Chile/Content/Detail/Report/486f0bdc-3889-47ce-9d70-182a89d94a94> [<https://perma.cc/KWY4-97X8>].

crime.<sup>125</sup> One explanation for this is Setting and McCombs' theory that the media unduly presents issues such as crime and criminal violence to capture the attention of the population.<sup>126</sup> Thus, the media's focus on crime could be what increases public fear.<sup>127</sup> This possibility still appears relevant more than two decades later. According to the 2017 National Institute of Statistics in Chile, the main source of information about crime is the news reported on television.<sup>128</sup>

Even worse, the next main source of information that forms Chilean public opinion regarding their perception of crime —after the news—is personal experience and information from other people.<sup>129</sup> More than 80% of the population believes that crime has increased in the last twelve months.<sup>130</sup> However, statistics show that only 23.3% of households have had one household member who was a victim of a crime, which is the lowest number in the last years.<sup>131</sup>

The philosopher Martha Nussbaum concluded through analyzing human behavior that just as humans fear natural forces and diseases, they also feel threatened by human poverty and other abstract dangers like economic catastrophe, group discrimination, lack of politics, and social revolution, among others.<sup>132</sup> People make decisions based in their own safety and well-being. Thus, as this paper establishes, the structure of some institutions in the criminal justice system and the media exaggerate this unreasonable fear that is fueled by racial bias.

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<sup>125</sup> Andrés Scherman Teilerboim & Nicolle Etchegaray Thielemann, *Consumo de Noticias y Temor al Delito en Chile*, 19 ESTUDIOS SOBRE EL MENSAJE PERIODÍSTICO 563, 563 (2013).

<sup>126</sup> See Maxwell McCombs, *Influencia de las Noticias Sobre Nuestras Imágenes del Mundo*, ISSUU (2011) (personal translation).

<sup>127</sup> Teilerboim & Thielemann, *supra* note 125, at 564.

<sup>128</sup> INSTITUTO NACIONAL DE ESTADÍSTICAS, *Encuesta Nacional Urbana de Seguridad Ciudadana* (ENUSC) 2017 2 (2018) (personal translation); see also INSTITUTO NACIONAL DE ESTADÍSTICAS, ENCUESTA NACIONAL URBANA DE SEGURIDAD CIUDADANA 2017 - BOLETÍN INFORMATIVO, XIV ENUSC (2018), [https://www.ine.cl/docs/default-source/seguridad-ciudadana/publicaciones-y-anuarios/2017/bolet%C3%ADn--xiv-enusc-2017.pdf?sfvrsn=5f7996ae\\_2](https://www.ine.cl/docs/default-source/seguridad-ciudadana/publicaciones-y-anuarios/2017/bolet%C3%ADn--xiv-enusc-2017.pdf?sfvrsn=5f7996ae_2) [https://perma.cc/5SSK-LBK6] (personal translation) [hereinafter BOLETÍN, XIV ENUSC].

<sup>128</sup> NUSSBAUM, *supra* note 102, at 29.

<sup>129</sup> INSTITUTO NACIONAL DE ESTADÍSTICAS, *supra* note 128.

<sup>130</sup> *Id.* at 20; see also BOLETÍN, XIV ENUSC, *supra* note 128. In addition, surveys from 2018 and from 2019 show that these results have not changed in subsequent years. See INSTITUTO NACIONAL DE ESTADÍSTICAS, ENUSC 2018 (2019); INSTITUTO NACIONAL DE ESTADÍSTICAS, ENUSC XVI 2019 (2020), [https://www.ine.cl/docs/default-source/seguridad-ciudadana/publicaciones-y-anuarios/2019/s%C3%ADntesis-de-resultados-xvi-enusc-2019.pdf?sfvrsn=19167295\\_2](https://www.ine.cl/docs/default-source/seguridad-ciudadana/publicaciones-y-anuarios/2019/s%C3%ADntesis-de-resultados-xvi-enusc-2019.pdf?sfvrsn=19167295_2).

<sup>131</sup> BOLETÍN XVI ENUSC 2019, *supra* note 130; see also, *Victimización en Chile Llegó al 23,3% en 2019 y Registró Cifra Mas Baja en Seis Años, 24 HORAS TELEVISIÓN NACIONAL DE CHILE* (TVN) (May, 28, 2020), <https://www.24horas.cl/nacional/victimizacion-en-chile-llego-al-233-en-2019-y-registro-cifra-mas-baja-en-seis-anos--4209840#:~:text=%20Aton-,Victimización%20en%20Chile%20llegó%20al%2023%2C3%25%20en%202019%20y,un%20delito%20durante%20este%202020> (personal translation).

<sup>132</sup> NUSSBAUM, *supra* note 102, at 29.

#### IV. Conclusion

As this paper has demonstrated, Chile and the U.S. share similar issues regarding the criminal justice system. Police officers in both countries have a lot of discretion, and there is evidence of both implicit and explicit racial bias.

Even though both countries share this race-based prejudice, how this prejudice manifests in each country slightly differs. For instance, in the U.S., the police are concerned about people within minority groups like Latinos and black people. Analogously, in Chile, there is a racial bias against poor people and against minorities like Mapuches and indigenous people with a socioeconomic component.

There are two criminal justice systems in each country: in the U.S., whites experience a privileged system while Black people and Latinos experience a different system; and in Chile, socioeconomic disparity has a racial connotation in which there is one privileged system for the rich population, and another different system for the poor people.

Apparently, the purpose of this is to remove their presence —minorities (black people and Latinos) in the U.S. and poor people in Chile— under the criminal justice system because of an unreasonable feeling of danger fueled by racial bias. In other words, this unreasonable feeling has created two separate criminal justice systems, in which one is used as a tool to remove discriminated groups from society and into prisons.

White people in the U.S., and the wealthy class in Chile, cannot justify their presence in such privileged groups if, as a consequence, other groups of humans are being intimidated, harmed, and threatened.

This unreasonable fear, plus a biased criminal justice system that is unfair, discriminatory, and racist, places those who are less privileged under extremely unfair conditions. This fear cannot be a rational reason for stigmatizing and marginalizing groups of people. As the Second Circuit of the U.S. Court of Appeals stated in 1974:

[n]othing can corrode respect for a rule of law more than the knowledge that the government looks beyond the law itself to arbitrary considerations, such as race, religion,

or control over the defendant's exercise of his constitutional rights, as the basis for determining its applicability.<sup>133</sup>

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<sup>133</sup> United States v. Berrios, 501 F.2d 1208, 1209 (2d Cir. 1974).