

ARTICLE

Prior punishments and cumulative disadvantage: How supervision status impacts prison sentences*

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Abstract

This article explores one way prior punishments may contribute to cumulative disadvantage: through more severe sentencing of those under criminal justice supervision. We examine the impact of being on supervision in Michigan on receiving a sentence of imprisonment—comparing the magnitude of the impact reflected in the formal sentencing guideline recommendation with deviations made by court actors. We find that the formal penalty for supervision status is modest, whereas court actors place substantially more weight on current parole status than do the guidelines when deciding to sentence a defendant to prison. They do not seem to give current probation status extra weight in a consistent way. As such, parole is more likely to contribute to cumulative disadvantage stemming from prior punishments. This disproportionately impacts Black defendants because of their higher rates of parole—not through disproportionate sentencing conditional on parole status. Findings suggest that attempts to address factors contributing to cumulative disadvantage will need to consider not only formal rules but also how informal discretion contributes to prison sentences.

KEYWORDS

parole, prison, racial disparity, sentencing guidelines

1 | INTRODUCTION

Cumulative disadvantage is a process by which society's responses to an individual's involvement in crime build over time, resulting in limited future opportunities for a conventional life (Sampson & Laub, 1993, 1997). Often, these challenges are described as restrictions on opportunities outside the criminal justice system, such as access to education, employment, or housing (American Bar Association, 2013; Sampson & Laub, 1997). Cumulative disadvantage, however, can accrue within the criminal justice system: either across decision points in single case processing (Johnson, 2015; see also Kutateladze et al., 2014; Stolzenberg et al., 2013; Sutton, 2013; Wooldredge et al., 2015) or, more aptly, through repeated cycles (Kurlychek & Johnson, 2019).

State sanctions in the criminal justice system represent a distinct mechanism of cumulative disadvantage (Shen, 2020). One way this can occur in the courts is if formal rules or justice system actors consider those with certain types of criminal justice statuses as more deserving of harsher punishment. Growth in the U.S. prison population may partially be a result of the increased emphasis on criminal history in sentencing guidelines (King, 2019; Roberts & Frase, 2019; Shen et al. 2020). Within-system cumulative disadvantage driven by past justice system decisions (e.g., to convict, to put on supervision, and to send to prison) is particularly important if it contributes to racial disparity (Light, 2021; Rehavi & Starr, 2014; Roberts & Frase, 2019).

Although sentencing guidelines were created in part to increase equity by reducing discretion-based sentencing (Savelsberg, 1992), disparity and cumulative disadvantage could remain within this framework. Sentencing research has long established that a criminal justice record is a key determinant of punishment severity (e.g., Blumstein et al., 1983; Steffensmeier et al., 1998; Ulmer, 2012). In a sentencing guidelines framework, however, all prior records should be scored through the formal guidelines, making the "cost" of criminal justice contacts formalized and explicit (Frase et al., 2015). This cost can be substantial because guidelines often consider both prior criminal justice contacts (e.g., convictions), as well as punishments received (e.g., probation or parole status) as part of their scoring. The use of current status (e.g., supervision) on top of record (e.g., convictions) in constructing a criminal record score is controversial as some critics have argued that it essentially "double counts" some events (Hamilton, 2015; Hester et al., 2018). Therefore, current status is an important possible source of cumulative disadvantage to investigate. Additionally, earlier studies have raised questions about the ability of extra-guidelines variation to compound cumulative disadvantage (e.g., Bushway & Piehl, 2001). Certain elements of prior record that have salience—such as a current supervision status—may have an additional impact on new sentences to prison beyond their role in guidelines scoring. Although research on how specific elements of prior record contribute to sentence severity exists (e.g., Bales & Piquero, 2012; Kutateladze et al., 2014; Lowenkamp et al., 2013; Stolzenberg et al., 2013; Sutton, 2013; Wooldredge et al., 2015), it has often been limited to nonguidelines settings where the impact may be greater as a result of lack of formal scoring for prior record. Studies need to examine the role of specific elements of prior record and disaggregate the formal and informal routes for punishment accrual. In sentencing guidelines contexts, it is possible to examine both.

An important component of prior record that may especially contribute to cumulative disadvantage is prison sentences, which manifest through current parole status. All other factors being equal, being on parole may tip the scales toward a new prison sentence in ways that being on probation does not. This is because individuals on parole are perceived as more stigmatized and riskier than those with convictions in general (Opsal, 2011). Additionally, court actors may view those on parole as deserving more punishment than similarly situated offenders who were not previously sentenced to prison—especially if it influences their belief that they have a greater

“ability to do time” (Steffensmeier et al., 1998). Prior studies have found that a past prison sentence is associated with more severe sentencing (Kutateladze et al., 2014; Sutton, 2013; Wooldredge et al., 2015), but none of these studies have looked at its effect in a guidelines system where the impact should be formalized and limited to the penalty explicitly associated with it in the sentencing guidelines. The role of past prison, through current parole status, requires further study because this is a main area where either formal or informal pathways may contribute to more severe sentences and continue the cycle of cumulative disadvantage.

The role of prior punishments in cumulative disadvantage is important when considering that disadvantage may disproportionately accumulate for some individuals through the intersection of legal factors (e.g., prior punishments) and extra-legal factors (e.g., race)—particularly when “status-linked attributions and stereotypes” influence opinions on dangerousness or blameworthiness [see Ulmer (2012) for a theoretical review]. Although older sentencing research concluded that racial disparities are diminished when legal factors are controlled (Baumer, 2013; Spohn, 2000; Ulmer, 2012; Zatz, 2000),¹ recent decomposition studies have shown that racial disparity *stems from* those differences in prior legal factors (e.g., Donnelly & MacDonald, 2018; Omori & Petersen, 2020). This work has suggested that disparities build primarily through differential impact (i.e., Blacks have longer criminal record than Whites) rather than differential treatment (i.e., Blacks with same record as Whites are treated more harshly; Hamilton, 2015; Schlesinger, 2011). The process by which prior records are built “institutionalizes” inequality (Omori & Peterson, 2020). What is less well understood is if racial disparities persist in a sentencing guidelines setting after controlling for the formal impact of prior record in the guidelines scoring. Past decomposition studies have been primarily conducted in nonguidelines settings (MacDonald et al., 2014; MacDonald & Raphael, 2020; Owens et al., 2017) or did not look at the contribution of specific prior record elements, such as past prison or current supervision status (Donnelly & MacDonald, 2018; Omori & Petersen, 2020; Rehavi & Starr, 2014; Sorensen et al., 2012). Although sentencing guidelines should reduce discrepancy that can lead to differential treatment of Black defendants (i.e., prior record only influences sentence through formal criteria), it is possible that given the same observed characteristics as Whites, Blacks will be treated differently. A more precise examination of the possible system-driven sources of cumulative disadvantage and racial disparity is warranted to better understand the formal and informal ways in which racial disparity is created within guidelines systems.

The present study takes up these tasks by examining whether specific elements of prior record—current supervision status of probation or parole—have an additional informal impact on new commitments to prison beyond their formal role in sentencing guidelines among those with a felony conviction in Michigan in 2003–2006. We also explore how these potential sources of cumulative disadvantage contribute to racial inequality in imprisonment through decomposition analyses. Although previous studies have suggested the importance of system decisions in cumulative disadvantage, further discernment is needed of which decision points—such as prior sentences to probation or prison—and which pathways (formal rules or informal discretion) have a disparate impact on future outcomes (King & Light, 2019; Kurlychek & Johnson, 2019).

Michigan courts use sentencing guidelines that provide a unique context for teasing out these elements of past system decisions, as well as for examining formal and informal processes. In this article, the *formal* penalty for prior punishments is estimated through the contribution of

¹This is a simplified version of the narrative. Even in the 1980s, sentencing scholars recognized that racial bias can build in subtle, systemic ways (Zatz, 1987). Indeed, Zatz may have been one of the earliest to name “cumulative disadvantage” as a process building across subsequent steps of criminal justice system processing (p. 76).

supervision status to the prior record variable score. The *informal* penalty is evidenced by any additional variation associated with supervision status after controlling for cell placement in the sentencing guidelines grid.² Cell placement accounts for the current offense degree (e.g., Class E—determines the grid used), the offense severity factors (determines row), and prior record variables (determines column). We focus our main analyses on the cells of the guidelines grid where the recommended sentence straddles both imprisonment and nonprison sentences (i.e., the “straddle” cells)—that is, where there is no presumptive prison sentence. As such, this should be the place with the greatest possible variation in prison sentences and where possible informal differences would be observed. We also examine the formal and informal role of supervision status in the other sections of the guidelines where imprisonment is considered a departure (“intermediate” cells) and is the presumptive sentence (“prison” cells).

We find that supervision status uniquely contributes to the likelihood of receiving a prison sentence after controlling for sentencing grid cell placement, the additional contribution of other elements of prior record outside of the guidelines (e.g., prior felony convictions and current charge counts), and a rich set of extra-legal factors (e.g., employment, education, marital status, and substance use). The informal impact of parole status is especially large. Parole significantly increases the likelihood of receiving a prison sentence in the “straddle” cells—where we expect the most courtroom workgroup discretion—but also in the cells where nonprison sentences and imprisonment are the recommended sentence. The informal influence of probation status, on the other hand, was inconsistent. Probation had no informal impact on prison sentences in the straddle cells, whereas it contributed to a modest increase in prison sentences for cases in the intermediate cells but *decreased* the likelihood of receiving a prison sentence where prison was the recommended sentence (i.e., in the prison cells). In subsequent analyses, we estimate a modest formal impact of supervision status (both probation and parole) by reducing prior record variable scores by the requisite points and reestimating the likelihoods of prison sentences. Racial decomposition analyses suggest that if Blacks had the same characteristics as Whites (e.g., similar prior records and rates of parole supervision), they would be significantly less likely to receive a prison sentence. Differential treatment given characteristics was not a source of racial disparity disadvantaging Black defendants. Attempts to address racial disparities in cumulative disadvantage must consider how prior punishments contribute to prison sentences through both formal and informal pathways.

2 | BACKGROUND

2.1 | Prior punishment’s role in cumulative disadvantage through sentence severity

Previous research has suggested that sentencing decisions driven by criminal record factors can be a source of differential accumulation of punishments over time. A large body of work has

² Kurlychek and Johnson (2019) referred to these two parts as “structural effects” (systemic biases in justice policy) and “compounding effects” (i.e., when later justice system actors infer dangerousness and culpability signals from previous decision-makers). Engen and Gainey (2000) were among the first to apportion variation in sentencing into two parts: that attributed to the recommended or presumptive sentence and that attributed to the individual actors in the system. Later, Bushway and Forst (2013) defined the two pieces as Type B (i.e., formal rules) and Type A (i.e., individual actor discretion). We will use the more general language of *formal* and *informal*.

shown that an individual's criminal record is a primary driver of sentence severity (Blumstein et al., 1983; Bushway & Piehl, 2007; Hester & Hartman, 2017; King, 2019; Kleck, 1981; Miethe & Moore, 1985; Spohn, 2000; Steffensmeier et al., 1998; Ulmer, 2012; Zatz, 2000). Research has also shown that formal sentencing guidelines can build cumulative disadvantage—particularly when prior records are given undue weight in determining punishment (Frase et al., 2015; Hester et al., 2018; Roberts & Frase, 2019). Although this work has suggested that the *formal* role of a criminal record is relevant in understanding cumulative disadvantage, the research on *informal* variation beyond guidelines recommendations is mixed. On the one hand, one might expect that informal variation should be limited because all prior record factors are formally considered in the guidelines scoring. On the other hand, if court actors believe the guidelines are too lenient—or too strict—informal variation might be substantial. Some studies have suggested that guidelines and discretion can work together to compound punishment (e.g., Bushway & Piehl, 2001, 2011), whereas others have suggested courtroom actors may try to lessen the punishment associated with guidelines prior record scores (e.g., King, 2019; Ulmer & Johnson, 2017). Importantly, the guidelines context allows for a unique analytical opportunity to distinguish formal (guidelines scoring based) and informal (any remaining variation associated with prior record factors) pathways of cumulative disadvantage.

Earlier research suggesting that informal discretion may lessen the impact of criminal record on sentence severity and cumulative disadvantage considered prior record broadly. For example, King (2019) examined the impact of criminal record on the growth of the prison population in Minnesota from 1981 to 2013. Although criminal record was a strong and consistent predictor of a prison sentence, its impact on the likelihood of receiving a prison sentence decreased over time. As no major changes in the sentencing guidelines occurred, King proposed that judges were giving less weight to prior records in an attempt to countermand the high recommended sentences driven by those records. Similarly, Ulmer and Johnson (2017) found that districts with judges who on average disagreed with the federal sentencing guidelines were more likely to have downward departures, conditional on individual case characteristics. The findings from these studies are consistent with those of earlier work showing that downward departures are most common in cases with the highest sentences recommended by the guidelines (e.g., Bushway et al., 2012; Frase, 1993; Kramer & Ulmer, 2002; Moore & Miethe, 1986).

The previous studies suggesting that informal discretion can work in concert with formal sentencing rules to intensify punishment has further motivated a focus on specific elements of prior record that may be most salient (e.g., supervision status). Bushway and Piehl (2001) found that judges were most likely to order sentences that were longer than the Maryland sentencing guidelines recommendation midpoint in the parts of the grid with longer recommended sentences. Therefore, the potential exists for cumulative disadvantage generated by informal discretion—but that study did not isolate which individual components of the criminal record contributed to the harsher punishments. In later work, Bushway and Piehl (2011) examined the role of specific components of the sentencing guidelines, attributing informal discretion to juvenile and adult criminal history scores, as well as to being on court supervision at the time of the offense. Each of these specific elements contributed to increased prison sentence lengths beyond the recommended midpoint in the sentencing guideline grid (but previous probation violations did not). Controlling for detailed measures of current offense and prior conviction, as well as sentencing guidelines enhancement points, Bales and Piquero (2012) identified a unique influence of prior prison commitments on the likelihood of receiving incarceration sentences (jail or prison). Finally, past punishments have been shown to contribute to cumulative disadvantage in nonguidelines contexts (Kutateladze et al., 2014; Lowenkamp et al., 2013; Sutton, 2013;

Stolzenberg et al., 2013; Wooldredge et al., 2015), but we may expect smaller impacts in guidelines courts because prior record elements are thought to be restricted to a certain point value in formal scoring. Together, extant work has suggested that prior record may impact sentence severity through formal (sentencing guidelines) and/or informal (courtroom decision-making) pathways. But how do specific elements—particularly past punishments, like receiving probation or parole—contribute?

2.1.1 | Theoretical perspectives on prior punishment and cumulative disadvantage

Theory suggests that prior punishments—evidenced through current supervision status—may contribute additional weight outside of their formal role in sentencing guidelines, resulting in prison sentences and continuing the cycle of cumulative disadvantage. Although sentencing guidelines should reduce individual discretion (Savelsberg, 1992), theories of courtroom work-group behavior (Steffensmeier et al., 1998) and the behavior of law (Black, 1976) suggest that supervision status may continue to have an additional informal impact on sentence severity. Even though this study is not a test of these theories, they direct the focus of our examination on prior punishment's role in cumulative disadvantage, as well as propose possible mechanisms for why supervision status would increase sentence severity.

Focal concerns drive courtroom actors in the process of reaching sentencing decisions (Steffensmeier et al., 1998, 2017). Each of the three focal concerns specified by focal concerns theory suggests that supervision status would contribute to sentence severity beyond what is prescribed by the guidelines. The first, *blameworthiness*, concerns culpability and retributive aims of punishment. Defendants under any type of supervision may be viewed as more deserving of harsher punishments than those who are not under correctional control as a result of their continued recalcitrance. The second, *protection of the community*, would also motivate courtroom actors to seek harsher penalties for defendants under supervision because they have shown to be a continued risk to the public through their recidivism. It could be argued that length of criminal record in general (e.g., prior convictions) should drive this focal concern without respect to supervision status. *Ceteris paribus*, however, defendants on probation or parole have an additional mark on their record compared with recidivists who are free from correctional control. Similarly, the third concern, *practical constraints and consequences*, may also imply ways in which defendants on supervision would be more likely to receive prison sentences than those who are not. This concern includes how a court's reputation may be harmed by defendant recidivism (Steffensmeier et al., 1998). If the defendant is back before the court on a new charge, the court may be especially leery of giving a nonprison sentence for fear it would harm their reputation. Finally, focal concerns “proposes mechanisms by which social statuses combine and interact to influence criminal justice punishment decisions, advantaging some and disadvantaging others” (Steffensmeier et al., 2017, p. 811). Those under community supervision are often marginalized in other areas and may belong to other groups with stereotyped social statuses (e.g., young, Black, and male; Steffensmeier et al., 1998). On top of these, supervision status itself may be used as a “perceptual shorthand” (Steffensmeier et al., 1998) to quickly identify and severely punish the stereotypical probationer or parolee, even after current offense severity and detailed criminal record have been considered through formal sentencing guidelines scoring. Similarly, in Albonetti's (1991, 1997) integrated rational decision-making/causal attributions model, court actors rely on stereotypes of defendant dangerousness to make rational decisions in the face of incomplete knowledge. Although

sentencing guidelines should provide more complete knowledge of defendant risk, court actors may still rely on “patterned responses” when meting out harsher punishment to those on supervision.

Likewise, the tenets of Black’s behavior of law theory (1976) also motivate our examination of the additional influence of supervision status on sentence severity beyond its contribution to formal sentencing guidelines scoring. Of the five aspects of social life that Black proposed influence the amount and style of law applied, *social control* is the most relevant. Of course, social control includes the formal use of law and the criminal justice system, as well as informal social control, including etiquette and customs. It is the normative aspect of social life that ascribes “respectability” to individuals. A person subjected to more social control is considered more unrespectable, and therefore, known recidivists are subject to more law (Black, 1976). Extending this, those under current probation or parole will be viewed as even less respectable than defendants with similar criminal records who are not under supervision as they are currently subject to more application of law. Furthermore, Black argued that “the more social control to which he has been subject before, the worse it is if he deviates again” (p. 117)—which explains the process of cumulative disadvantage building within the justice system. Black refuted the role of defendant motivation or conduct (e.g., labeling arguments), instead contending that the law behaves in accordance with more punishment for those who are less respectable as a result of past social control.

Together, theory and extant research suggest that prior record—and its signaling via current supervision status—may relate to more punitive sentences. No studies, however, to our knowledge, have examined the formal and informal contribution of specific elements of criminal record, especially probation and parole, on receiving a new commitment to prison in a sentencing guidelines context. Informed by these theoretical perspectives and previous work, we propose our first hypothesis:

Hypothesis 1. After controlling for the contribution to sentencing guidelines scoring, current supervision status (probation and parole) will have an additional impact on the likelihood of receiving a prison sentence.

2.1.2 | Parole status and sentence severity

The theoretical perspectives and empirical work that motivate our first hypothesis also lead us to expect that we will find an especially large informal impact of parole (relative to probation) on sentence severity. The focal concerns of blameworthiness, protection of the community, and practical constraints and consequences (specifically, court reputation) are particularly relevant when considering defendants on parole. By returning to court on a new crime (rather than being handled through a parole violation), defendants on parole may be viewed as especially deserving of punishment, dangerous in the community, and a risk to the court’s reputation. Indeed, “being’ a parolee, although inextricably connected to the stigmatized felon identity, has unique consequences” in part because even the criminal processing system deems those on parole as especially risky (Opsal, 2011, p. 142). Additionally, court actors who view those with past prison sentences as having a greater “ability to do time” will be more comfortable with a new sentence to imprisonment (Steffensmeier et al., 1998).

Although the argument could be made that individuals on either probation or parole should know they are under supervision and should therefore avoid further criminal activity, the status of parole indicates *more* application of law as this supervision status was preceded by

imprisonment (Black, 1976). Black explicitly stated that “parole itself makes any ex-convict more vulnerable to the law” (p. 115). Additional aspects of social life from Black’s behavior of law also apply to those on parole, more so than to other recidivists or individuals on probation. For example, those who have been in prison are more likely to be of lower social status (stratification); marginalized from integrated social life, such as employment and marriage (morphology); and, perhaps as a result of prisonization, less likely to adhere to conventions of behavior, dress, speech, and the like (culture)—all of which make a person more susceptible to greater application of the law (punishment) in Black’s theory. As such, considerable cumulative disadvantage may build based on past prison sentences lingering through parole status—even when all other characteristics are the same (e.g., current offense severity and prior record “scoring” in guidelines systems).

Although theory leads us to believe that courtroom actors and the application of law will be more severe toward individuals on parole—research in this area is extremely limited. Harding et al. (2017) found that those on parole had a higher chance of revocation to prison compared with those on probation. In this case, there was no evidence of more crime but a differential system response to technical violations based on the criminal justice status of the individual. Similarly, parole status may be the deciding factor for whether defendants receive a prison sentence, whereas probation status or having other open cases awaiting sentencing may not. Few studies have parsed out the contribution of current supervision status (or the related factor of past prison sentences) separate from indicators of criminal record (e.g., convictions). Those studies that have examined these factors have done so primarily in nonguidelines settings where variation may be greater because sentencing in such settings is not constrained by explicit scoring. In that work, new commitments to prison have been explained by prior prison (Kutateladze et al., 2014; Sutton, 2013; Wooldredge et al., 2015) and current criminal justice status [probation or parole (no distinction) (Lowenkamp, 2013); probation, parole, diversion, fugitive, or already in custody (Sutton, 2013); and active criminal justice status not specified (Stolzenberg et al., 2013)]. One study in a guidelines context found that after controlling for the significant influence of sentencing guidelines enhancement points and recommended prison sentence (among other significant prior record variables), number of prior prison commitments had a unique impact on the likelihood of receiving an incarceration sentence (jail or prison) (Bales & Piquero, 2012). Together, this work underscores our second hypothesis.

Hypothesis 2. After controlling for the contribution to sentencing guidelines scoring, parole will have a substantially larger impact on the likelihood of receiving a prison sentence than probation.

2.2 | Cumulative disadvantage and racial disparity in sentencing outcomes

The role of prior punishments in cumulative disadvantage is particularly important when considering that disadvantage may disproportionately accumulate for some individuals through the intersection of legal factors (e.g., prior treatment by the system) and race (Rehavi & Starr, 2014; Roberts & Frase, 2019). It is generally understood that use of prior records in determining sentence severity contributes to racial disparity in prison admissions (e.g., Hester et al., 2018). If custody status has a unique influence in formal guidelines scoring, this gives undue weight to some prior crimes solely based on past punishments (e.g., once for the conviction and again for the custody

status; Hamilton, 2015; Hester et al., 2018). For example, research in Minnesota found that most racial disparity in sentencing came from the role of criminal history in the sentencing guidelines grid (Frase, 2009). Racial disparity can occur even when there is no disparate treatment if Black defendants have more prior involvement in the criminal justice system. Thus, seemingly “color-blind” policies disadvantage Blacks (e.g., Hamilton, 2015; Rose, 2021; Schlesinger, 2011). Harsher sentences stem from more serious criminal records—and the process that builds criminal records is not equal across groups. Therefore, meaningful differences in past criminal justice records further contribute to punishment severity and cumulative disadvantage, which disproportionately impacts Blacks and Latinos (Bushway & Piehl, 2011; Donnelly & MacDonald, 2018; MacDonald et al., 2014; MacDonald & Raphael, 2020; Omori & Peterson, 2020; Owens et al., 2017; Rehavi & Starr, 2014; Sorensen et al., 2012).

Decomposition studies in guidelines contexts have shown that criminal history (broadly defined) explains a good portion of the racial disparity in sentencing outcomes (differential characteristics, not differential treatment given characteristics; Donnelly & MacDonald, 2018; Omori & Petersen, 2020; Rehavi & Starr, 2014; Sorensen et al., 2012). Owens and colleagues (2017) provided a rare analysis on the specific impact of previous incarcerations, finding that these “account for 70–90% of the raw Black/White disparity” in length of incarceration sentences but in a nonguidelines context (p. 22). Notably, when formal rules are the driver of racial disparity in sentencing outcomes, lessening the weight given to criminal record can reduce Black–White disparities in court outcomes (MacDonald & Raphael, 2020). Similarly, when observable case characteristics become more similar between White and Black defendants over time, racial disparities in sentence severity also decline (Light, 2021). What is less understood is which pieces of a criminal record contribute to cumulative disadvantage and racial disparity.

2.2.1 | Theoretical perspectives on racial disparity and cumulative disadvantage

The theoretical perspectives that motivate our focus on supervision status as a potential source of cumulative disadvantage in sentencing severity would also suggest that Black defendants would receive more severe sentences. The first way is through the accumulation of prior records in a way that “institutionalizes” inequality (Omori & Peterson, 2020). Black’s (1976) fifth aspect of social life, social control, especially applies here. In each instance where more law has been applied before (e.g., sentenced to supervision or prison), the law operates to apply more law (e.g., social control) again. Black (1976) made clear that the additional social control applied to individuals in this case is “without regard to the motivation or even the conduct” of the person (p. 118). Individuals with longer records are less respectable, and the quantity of law applied varies inversely with respectability. Therefore, Black defendants with longer records receive more severe sentences as a result of that history of legal social control. For these reasons, we propose the following hypothesis regarding racial disparity in sentencing outcomes.

Hypothesis 3. A significant portion of the Black–White racial disparity in prison sentences will be attributed to Black defendants’ parole status (e.g., different characteristics).

Outside of the role of official prior record, the focal concerns perspective suggests that stereotypical judgments may cause minority groups—and especially those at the intersection of several stereotyped social statuses (e.g., young, Black, and male)—to be excessively punished

(Steffensmeier et al., 1998). Growing from studies of how sentencing operates under guidelines regimes, the focal concerns perspective gives a role to informal stereotypes, which may influence sentence severity through focal concerns (e.g., assessments of blameworthiness or dangerousness)—although it should be secondary to legal factors (Ulmer, 2012). Similarly, Albonetti's (1991, 1997) integrated rational decision-making/causal attributions model posited that court actors rely on stereotypes of defendant dangerousness to make rational decisions in the face of incomplete knowledge—and that these stereotypes would disproportionately affect Black and Latino defendants. Finally, it is possible that aspects outside of social control would lead to more severe sentencing of minority defendants through informal (discretion) pathways. In so much as minority defendants may be of a lower social status than courtroom actors (*stratification*) or perceived as less engaged in social life (e.g., work/school/family; *morphology*) or generally less conventional in their presentation in court (*culture*), they will be subject to more severe punishments (Black, 1976). As a result of the source of these disparities, they cannot be explained by legal factors and, therefore, would be attributed to differential treatment. In line with these expectations, research has shown that racial disparities can be exacerbated through departures from guideline recommendations (Albonetti, 1997; Bushway & Piehl, 2001, 2011; Engen et al., 2003; Johnson, 2003, 2005; Kramer & Steffensmeier, 1993; Kramer & Ulmer, 1996, 2002, 2009; Mustard, 2001; Painter-Davis & Ulmer, 2019; Spohn & Fornango, 2009). For these reasons, we propose an additional hypothesis regarding racial disparity in sentencing outcomes.

Hypothesis 4. A significant portion of the Black–White racial disparity in prison sentences will be attributed to different treatment (e.g., different impact of supervision status on Black defendants).

Although theoretical perspectives and extant research suggest that prior record may be a source of disparity in future sentencing, studies more precisely focused on which elements, such as supervision status, contribute disproportionately to prison sentences are needed. Little work has been done in the context of sentencing guidelines to explore both the formal and informal paths contributing to cumulative disadvantage. Additionally, the role of specific criminal record elements in contributing to racial disparities in prison sentences is underexplored. We believe the Michigan Sentencing Guidelines system is a good context in which to investigate these issues.

3 | CURRENT STUDY: THE MICHIGAN SENTENCING GUIDELINES CONTEXT

The formal use of supervision status in computing criminal record scores is common, yet there is no consensus around the desired impact of criminal history and the relative impact of custody status varies dramatically across states (Frase et al., 2015; Roberts & Frase 2019). In Michigan, the contribution of criminal justice supervision status to the prior record variable (PRV) score is modest. This is in line with recommendations that criminal record factors have lesser weight to maintain proportionality of the sentence to current offense severity and avoid criminal history contributing to racial disparity (Frase et al., 2015; Hamilton, 2015; Hester et al., 2018). In Michigan's guidelines, committing a crime while on *either* felony probation or parole supervision—or out on bond awaiting adjudication or sentencing on a felony—leads to an additional 10 points when

calculating a person's PRV.³ As a point of reference, having "2 prior low severity felony convictions" or "1 prior high severity juvenile adjudication" each also contributes 10 points to the PRV. The appropriate sentencing grid then translates that PRV score along with current offense variable (OV) score into a formal sentence recommendation. The actual impact of these rules depends on the "basket" of characteristics a person has when sentenced because guideline grids recommend punishment in nonlinear ways.

Take the example of a defendant currently being sentenced on a Class E felony as their most severe offense who has a current OV score of II (10–24 points; see figure 1 for a copy of this grid). The following three factors would contribute to a PRV score of 45 points, resulting in placement in a straddle cell in PRV column D with a recommended confinement sentence ranging from 7 to 23 months: having one prior high-severity felony conviction (25 points), four prior misdemeanor convictions or juvenile adjudications (10 points), and currently on *either* felony probation or parole (10 points). Similarly, a person with an open felony case awaiting adjudication or sentencing *or* a person convicted of one additional felony count in the current case would have 10 points added to the PRV. Therefore, the formal impact of supervision status (parole or probation) should not be large.

The court, however, may also seek more severe sentences for those on supervision over and above the sentences recommended by the grid. The relevant Code of Criminal Procedure states that a "court may depart from the appropriate sentence range established under the sentencing guidelines set forth in chapter XVII if the court has a substantial and compelling reason for that departure and states on the record the reasons for departure" [769.34 (3)]. Courts are prohibited, however, from basing a departure "on an offense characteristic or offender characteristic already taken into account in determining the appropriate sentence range unless the court finds from the facts contained in the court record, including the presentence investigation report, that the characteristic has been given inadequate or disproportionate weight" {769.34 [3(b)]}.⁴ Although we do not have access to these justifications, our main analyses examine cases that fall within the straddle cells where neither imprisonment nor nonprison sentences are a departure. In these cells, recommended incarceration sentence lengths "straddle" sentences of a year or less (that could be served in local jails—or fully nonconfinement sentences, such as probation) to more than 18 months (which would be served in prisons; see the example Sentencing Guidelines grid for Class E felonies in figure 1). The straddle cells provide valuable "windows of discretion" (Engen et al., 2003) for studying the extensive margin of imprisonment. Here the prison "in/out" decision is fully within the guidelines' recommendation and cumulative disadvantage stemming from informal discretion may be especially pronounced.

In Michigan, the potential exists for current supervision status penalties—formal or informal—to impact many defendants. The state had a considerable correctional population in the early 2000s, with incarceration and probation rates that ranked high nationally (12th and 10th, respectively; Glaze & Palla, 2004; Phelps, 2018). Furthermore, Michigan has one of the highest correctional release rates with more than 90 percent of prisoners put on parole (Harding et al., 2013). Our analyses focus on new prison sentences, which account for approximately 42–44 percent of

³ Copies of current and past sentencing guidelines manuals (SGMs) are available on the website of the Michigan Judicial Institute (MJI): <https://mjieducation.mi.gov/>

⁴ The relevant Code of Criminal Procedure was added in 1994. Amendments that overlapped with our data collection period include Am. 2000, Act 279, Eff. Oct. 1, 2000 and Am. 2002, Act 666, Eff. Mar. 1, 2003. Neither modified the language surrounding the use of factors already included in the guidelines. See Michigan Compiled Laws at the following URL: [http://www.legislature.mi.gov/\(S\(3semiv5odoa4jvqprx4imhhj\)\)/mileg.aspx?page=GetObject&objectname=mcl-769-34](http://www.legislature.mi.gov/(S(3semiv5odoa4jvqprx4imhhj))/mileg.aspx?page=GetObject&objectname=mcl-769-34)

Grids

Sentencing Grid for Class E Offenses—MCL 777.66
Includes Ranges Calculated for Habitual Offenders (MCL 777.21(3)(a)-(c))

OV Level	PRV Level						Offender Status					
	A 0 Points	B 1-9 Points	C 10-24 Points	D 25-49 Points	E 50-74 Points	F 75+ Points						
I 0-9 Points	0	3*	0	6*	5	23	7	23	9	23		
		3*		7*		11*		28		28	28	HO2
		4*		9*		13*		34		34	34	HO3
		6*		12*		18*		46		46	46	HO4
II 10-24 Points	0	6*	0	9*	7	23	10	23	12	24		
		7*		11*		13*		28		28	30	HO2
		9*		13*		16*		34		34	36	HO3
		12*		18*		22		46		46	48	HO4
III 25-34 Points	0	9*	0	11*	10	23	12	24	14	29		
		11*		13*		21		28		30	36	HO2
		13*		16*		25		34		36	43	HO3
		18*		22		34		46		48	58	HO4
IV 35-49 Points	0	11*	0	17*	12	24	14	29	19	38		
		13*		21		28		30		36	47	HO2
		16*		25		34		36		43	57	HO3
		22		34		46		48		58	76	HO4
V 50-74 Points	0	14*	5	23	14	29	19	38	22	38		
		17*		28		28		36		47	47	HO2
		21		34		34		43		57	57	HO3
		28		46		46		58		76	76	HO4
VI 75+ Points	0	17*	7	23	19	38	22	38	24	38		
		21		28		30		47		47	47	HO2
		25		34		36		57		57	57	HO3
		34		46		48		76		76	76	HO4

Intermediate sanction cells are marked by asterisks, straddle cells are shaded, and prison cells are unmarked.

The statutory percentage increases for habitual offenders are rounded down to the nearest whole month.
The cell range may be less than the maximum possible minimum sentence by a fraction of a month.

FIGURE 1 Copy of Michigan Sentencing Guidelines Grid for Class E Felonies
Source: State of Michigan Sentencing Guidelines Manual (2019) available from The Michigan Judicial Institute at <https://mjeducation.mi.gov/benchbooks/sgm>

prison admissions in Michigan annually during the years we study (2003–2006).⁵ Outside of the scope of our analyses are prison commitments for probation violations (30–33 percent of admissions annually 2003–2006) and parole violations (15–17 percent). That is, approximately half of annual prison admissions are through processes outside of the court. That is, Michigan Department of Corrections (MDOC) punishments (e.g., short-term jail detention and returns to prison) operate separately from court proceedings. Although MDOC probation staff members provide the presentence investigation and sentencing guideline reports used in sentencing decisions, prosecutors independently decide whether to file charges separately from revocation decisions that are made outside of the courts.⁶ Furthermore, although probation officers may be part of specialty court workgroups [e.g., Mental Health Courts (Dobson, 2019)], they do not typically have a role in traditional courtroom workgroups (personal communication with authors).

Even though cumulative disadvantage may build through imprisonment stemming from violations, in this analysis we only examine the role of supervision status in contributing (formally and informally) to new prison sentences imposed by the court. One could argue that new commitments to prison sink individuals deeper into cumulative disadvantage than revocations to prison because they, on average, result in longer terms and are accompanied by an additional new felony conviction. Notably, in Michigan, there are defendants on supervision with straddle cell cases who *neither* receive a new commitment to prison *nor* return on a revocation/technical violation. As such, prison is not a foregone conclusion for individuals on supervision who appear before the court with a new felony conviction. Therefore, the impact of supervision on the likelihood of receiving a new commitment to prison represents a distinct source of cumulative disadvantage, which may perpetuate the cycle of imprisonment.

4 | METHOD

4.1 | Data and sample selection

The starting sample for the study was all individuals sentenced for felonies in Michigan between 2003 and 2006 based on administrative databases at the MDOC ($N = 140,267$). These data included defendant and case characteristics, case processing factors (e.g., attorney type, bond status, and pretrial detention), and sentencing outcomes. Much of the data came from the presentence investigation reports prepared for the court by MDOC. Additional detail on the sample and general data preparation steps are discussed elsewhere (Harding et al., 2017, 2018).

To examine the additional contribution of legal factors beyond what is formalized in the sentencing guidelines, we restrict our analytic sample through the following steps. First, we select those who were not prosecuted as habitual offenders as this designation is infrequently used and complicates how scoring of PRVs and current OVVs corresponds with recommended sentences in the guideline grids ($N = 124,762$). Next, we restrict the sample to those who are White or Black ($N = 122,621$). There were too few individuals of another race or ethnicity for meaningful analyses. Finally, we select cases with complete information on sentencing guideline cell placement:

⁵Prison commitments by type obtained from Michigan Department of Corrections 2003–2006 Statistical Reports: <https://www.michigan.gov/corrections/0,4551,7-119-1441-00.html>

⁶In revocation decisions occurring outside of the courts, MDOC staff can make the decision to re-imprison, and then the parole board has 30 days to uphold that decision or overturn it. The individual on parole has a right to a hearing before the parole board (not in court).

TABLE 1 Descriptive statistics

Variables	Cases by Sentencing Guideline Cells		
	Straddle Mn (SD) / %	Intermediate Mn (SD) / %	Prison Mn (SD) / %
Dependent Variable			
% Sentenced to Prison (New Commitment)	29.75	2.01	78.03
Independent Variables			
Legal Factors Contributing to PRV			
Prior Felonies	2.17 (2.48)	.49 (1.19)	1.34 (2.24)
Prior Misdemeanors	3.86 (4.51)	1.89 (2.95)	2.01 (3.20)
% w/ Cases Pending	26.71	16.58	23.03
% on Probation	14.82	6.11	9.36
% on Parole	10.95	1.30	7.78
Current Charge Count			
1 (%)	76.12	88.76	56.83
2 (%)	17.01	9.06	26.06
3+ (%)	6.87	2.19	17.10
Legal Factors Contributing to OV			
Current Crime Group			
Controlled Substance (%)	13.19	32.90	10.63
Person (%)	28.84	16.71	81.28
Property (%)	30.24	29.30	3.87
Public Order (%)	4.85	5.84	.35
Public Safety (%)	22.17	14.72	3.22
Public Trust (%)	.70	.53	.65
Defendant Characteristics			
Age	33.41 (10.82)	30.73 (11.16)	30.79 (11.19)
Sex (% female)	9.71	21.16	6.29
Race (% Black)	42.62	39.06	42.37
<i>N</i>	19,225	90,409	12,465

Note: See appendix B in the online supporting information for additional sample descriptive statistics, including factors contributing to current offense variable (OV) scoring in the sentencing guidelines grid, other legal factors (e.g., bond status, attorney type), and additional defendant characteristics (e.g., marital, education, and employment status; mental health and substance abuse indicators).

current offense degree (e.g., Class E felony), which determines the grid, and PRV and OV scores, which determine the cell ($N = 122,099$).

Table 1 shows selected descriptive statistics for this analytic sample (see appendix A in the online supporting information for additional descriptives⁷). Among the straddle cell cases where extra-guidelines discretion may be greatest, 30 percent of cases receive sentences of imprisonment, compared with 2 percent of intermediate cell cases (where prison sentences are a departure) and 78 percent of prison cell cases (where imprisonment is the expected sentence). There is also

⁷ Additional supporting information can be found in the full text tab for this article in the Wiley Online Library at <http://onlinelibrary.wiley.com/doi/10.1111/crim.2022.60.issue-1/issuetoc>.

sufficient variation among defendants with cases that fall within the straddle cells to examine whether any additional impact of PRVs influences probability of prison sentences outside of their contribution to sentencing guideline cell placement. For example, 15 percent of defendants with straddle cell cases are currently on probation and 11 percent are on parole, whereas less than a quarter have multiple charges in the current case and slightly more than a quarter have other cases pending. These are among the factors that contribute directly to PRV score and cell placement in the guideline grids. Once sentencing grid cell placement is accounted for, any additional contribution of variables already used in the PRV and OV scores to the likelihood of receiving a prison sentence can be interpreted as the result of informal discretion by the courtroom actors.

4.2 | Variables

The dependent variable is new commitment to prison (0/1). The focal independent variables are the following criminal record factors that contribute to PRV and current OV scores in the sentencing guideline grids: flags indicating whether the defendant is currently on probation (0/1) or parole (0/1) or has other cases pending (0/1); number of prior felonies; number of prior misdemeanors⁸; current charge count (1 (reference category), 2, or 3 or more); and crime group of the sentencing offense (controlled substance (reference category), person, property, public order, public safety, public trust). A finding of systematic additional influence of legal factors, such as open probation or parole, after controlling for sentencing guideline grid cell placement would suggest the potential for cumulative disadvantage to stem from prior punishments.

The key controls are a set of dummy variables that serve as fixed effects for the exact guideline grid cell placement for each case [i.e., one dummy for each cell, indicated by grid (such as Class E), row (OV level), and column (PRV level)]. We also include a rich array of additional controls to partition out the effects of many other legal and extra-legal factors that have been considered influential to case outcomes in prior research (Blumstein et al., 1983; Mitchell, 2005; Ulmer, 2012). We include demographic characteristics of gender (0 = male, 1 = female), race (0 = White, 1 = Black), and age (and age squared). We include individual background characteristics of employment status around the time of the offense⁹ (0 = no formal employment, 1 = had formal employment), as well as education level (less than high school (reference), GED, high school, more than high school) and marital status (married/common law (reference), divorced/separated, single, widowed) at the time of the presentence investigation report. The presentence investigation reports also indicate whether the defendant has mental health (0/1), drug abuse (0/1), or alcohol abuse (0/1) problems. We include the following vital case processing factors as controls: defense attorney type (1 = appointed), pretrial bond status (not posted (reference), posted, revoked, unknown, not applicable), pretrial jail days served,¹⁰ and plea type (1 = pled guilty). Finally, we control for sentence year. The breadth of controls in this data set is beyond what is often available in sentencing research (e.g., Johnson & DiPietro, 2012).

⁸ Number of prior felony and number of misdemeanor convictions were top coded at the 99th percentile: 11 and 19 priors, respectively.

⁹ A defendant was classified as employed if they had any formal employment recorded in data provided by the Michigan Unemployment Insurance (UI) Agency during the quarter in which the offense date occurred. For details on data matching between MDOC and UI Agency records, see Harding et al. (2018).

¹⁰ Pretrial jail days served was top coded at 366 days (the 99th percentile was 309 days).

4.3 | Analyses

The main analyses are selection on observables logistic regression models predicting the receipt of a new prison sentence for cases in the straddle cells. In addition to the comprehensive set of control variables described above, we account for potential nonindependence of cases within counties by clustering standard errors at the county level. The baseline model includes the dummy variables for sentencing guideline grid cell placement and dummy variables for sentence year (see appendix B in the online supporting information). Model 1 adds the focal criminal record independent variables that also contribute to PRV and current OV scores in the sentencing guideline grids. Model 2 is our final, fully specified model, which includes the full array of controls.

After controlling for exact grid and cell placement from the sentencing guidelines scoring, any significant impact of factors already included in PRV or OV scores can be interpreted as the informal (discretionary) impact. The strategy of using cell placement dummies allows our models to account for nonlinearity in scoring, while isolating any additional within-cell variation resulting from already considered factors. For example, if the parole variable is statistically significant, it implies that within a given cell where all PRV and OV factors are already considered, parole status increases the likelihood of receiving a new prison sentence. This approach of sentencing guidelines cell placement dummies is the preferred strategy since straddle cells have no presumptive sentence (e.g., both prison and nonprison sentences are within the recommended “straddle” range). Furthermore, critiques have been raised about the presumptive sentence approach to studying punishment severity (Light, 2021).

We present the results of models with listwise case deletion since 96 percent of cases have complete data on all variables. Results were substantively similar in fully specified models with multiple imputation and those with dummy variables for missing data (results available from authors by request). We replicate our main model estimation on cases that fall outside the straddle cells. In these cases, where prison sentences exceed the recommended guidelines (intermediate cells) and where imprisonment is the presumed guidelines’ sentence (prison cells), some cells and cases are omitted as a result of no variation in outcome. These models, therefore, are limited to the sentencing guidelines cells where there is variation in the prison in/out decision.

Following our main model estimation, we conduct several follow-up analyses to contextualize our results for the primary cases of interest in the straddle cells. First, we estimate the predicted probability of receiving a prison sentence by supervision status, gauging the substantive informal impact of probation and parole status. Second, we conduct counterfactual logistic regression models where we subtract 10 points from the PRV for those on parole and reestimate probability of a prison sentence to illustrate the formal impact of parole status in the sentencing guidelines. Third, as descriptive statistics show that considerably more Blacks than Whites in our sample are on parole, we use Blinder–Oaxaca style decomposition to examine whether the raw Black–White difference in receiving prison sentences is a result of differential characteristics (e.g., more Blacks on parole) or differential treatment given those characteristics (e.g., of those on parole, Blacks are more likely to receive prison sentences). We use linear probability models (LPMs) to interpret decomposition results on a probability scale. Results obtained from a logit model extension (Fairlie, 2005; Jann, 2008) were substantively similar in terms of the overall decomposition and available in appendix C in the online supporting information. Among cases in the prison cells that receive a prison sentence (78 percent), we also estimate linear regression models to explore whether legal factors already considered in the sentencing guidelines placement have an additional contribution to the minimum sentence length ordered (appendix D in the online supporting information).

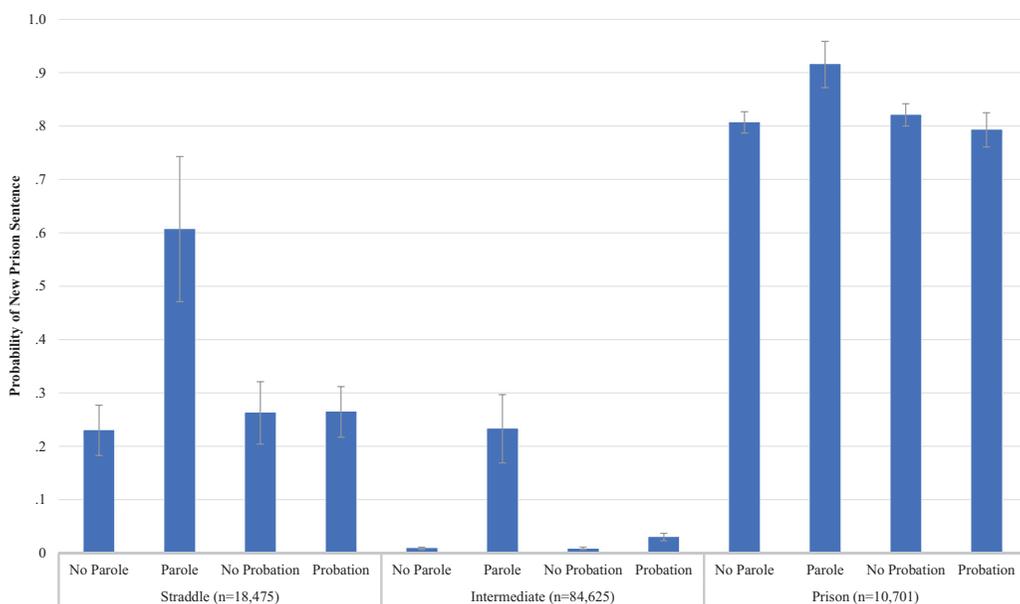


FIGURE 2 Predicted Probability of Receiving a Prison Sentence by Supervision Status [Color figure can be viewed at wileyonlinelibrary.com]

5 | RESULTS

5.1 | Prison sentences within the straddle cells

Three legal factors that directly contribute to prior record scoring in the sentencing guidelines have an additional *informal* influence on the likelihood of receiving a prison sentence for cases in the straddle cells. As shown in table 2, these factors include having other pending case(s), being on parole, and having three or more current charges (as opposed to one). Notably, these variables have a significant impact on the probability of receiving a prison sentence after controlling for not only sentencing guideline cell placement but also for a host of other important individual and case processing factors (e.g., age, gender, attorney type, bond status, and pretrial jail days—see appendix B in the online supporting information for full model results with coefficients on controls). Probation status, however, did not have an additional contribution to prison sentences outside of its role in guidelines scoring. Therefore, we find partial support for our first hypothesis for cases within the straddle cells where potential informal discretion is most likely: There is an additional informal impact of parole but not probation. In support of hypothesis 2, we find that the informal impact of parole is substantially greater than probation, as expected. Figure 2 illustrates the magnitude of the informal impact of supervision status on new prison sentences. Defendants in straddle cells who are on parole have a predicted probability of going to prison of greater than .60, holding all other predictors at their means.¹¹ In contrast, the predicted probability of receiving

¹¹ Figure 2 displays predicted probability of receiving a prison sentence based on the fully specified models from table 2. The marginal impact of current probation or parole status is estimated after holding all other covariates at their group averages. In other words, the predicted probability associated with parole is after controlling for the demographic and criminal background characteristics of those on parole.

TABLE 2 Logistic regression models predicting imprisonment

	Straddle Cells						Intermediate Cells						Prison Cells					
	Model 1			Model 2			Model 1			Model 2			Model 1			Model 2		
	coef	SE	sig	coef	SE	sig	coef	SE	sig	coef	SE	sig	coef	SE	sig	coef	SE	sig
Legal Factors Contributing to PRV																		
Prior Felonies	-.005	.026		-.009	.032		.144	.041	***	.110	.045	*	.000	.019		-.070	.020	***
Prior Misdemeanors	.012	.016		.005	.018		-.010	.019		-.025	.020		.008	.013		-.018	.014	
Cases Pending	.256	.072	***	.176	.075	*	.536	.060	***	.337	.065	***	.147	.108		.031	.138	
On Probation	.026	.084		-.011	.077		.632	.152	***	.485	.124	***	-.318	.103	**	-.287	.081	***
On Parole	1.232	.133	***	1.120	.171	***	1.907	.246	***	1.709	.248	***	.669	.097	***	.722	.207	***
Current Charge Count																		
(ref = One)																		
Two	.268	.139		.235	.130		.747	.146	***	.723	.155	***	.631	.137	***	.698	.129	***
Three or more	.387	.209		.400	.188	*	1.528	.305	***	1.508	.274	***	.733	.208	***	.831	.201	***
Legal Factors Contributing to OV^a																		
Sentencing Offense Crime Group																		
(ref = Controlled Substance)																		
Person	.096	.134		-.086	.129		.476	.150	**	.289	.147	*	-.540	.227	*	-.749	.201	***
Property	.006	.114		-.176	.112		.024	.128		-.029	.112		-.230	.124		-.225	.152	
Public Order	-.035	.212		-.200	.240		.163	.235		-.044	.215		-.617	.441		-1.084	.472	*
Public Safety	.434	.129	***	.314	.143	*	.625	.138	***	.475	.135	***	.186	.368		.042	.423	
Public Trust	-.042	.359		-.164	.364		-.130	.448		.098	.396		.188	.590		-.025	.464	

(Continues)

TABLE 2 (Continued)

	Straddle Cells						Intermediate Cells						Prison Cells						
	Model 1			Model 2			Model 1			Model 2			Model 1			Model 2			
	coef	SE	sig	coef	SE	sig	coef	SE	sig	coef	SE	sig	coef	SE	sig	coef	SE	sig	
Other Controls																			
Includes All Legal & Extra Legal Controls				X						X									X
Constant	-.574	.518		-1.377	.295	***	-1.487	.767		-2.868	.825	***	1.730	.705		-.383	.686		
Pseudo R ²	.097			.133			.200			.246			.148			.214			
Log pseudolikelihood		-10,534.8			-9,731.9			-7,053.5			-6,303.7			-5,353.2			-4,691.1		
N		19,156			18,475			87,707			84,625			11,461			10,701		

Notes: All models include dummy variables for sentence year (2003, 2004, 2005, 2006) and sentencing guidelines (SGL) cell placement (e.g., cell = Class E Felony Grid, OV 1, PRV D). See appendix C in the online supporting information for full model results and list of SGL dummy variables (and associated observations) omitted as a result of perfectly predicting imprisonment in intermediate and prison cells (none omitted in straddle models).

a: "The crime group of the sentencing offense determines which offense variables (OVs) must be scored" (p. 6, 2016 Sentencing Guidelines Manual).

Standard errors clustered at the county level (Stata code: vce(cluster county)).

*p < .05;

**p < .01;

***p < .001.

a new prison sentence for individuals with straddle cell cases who are not on supervision or on probation is considerably lower—at around .23 to .27. As such, a prior prison sentence, through current parole status, can contribute to cumulative disadvantage. Notably, of the PRV factors that have an additional influence on prison sentences, pending cases and a higher current charge count are indicators of the defendant's contemporaneous level of criminal involvement, whereas parole status reflects past punishments stemming from prior record. Therefore, courtroom workgroups put additional weight on past criminal justice decisions not directly stemming from defendant behavior (i.e., parole on top of prior convictions).

The informal impact of parole on the probability of receiving a prison sentence is not only large but also far exceeds the *formal* penalty of current supervision that is part of the PRV computations in the sentencing guidelines. To estimate the formal impact of parole status, we conducted counterfactual models where we subtracted 10 points from the PRV for each individual on parole (the formal penalty associated with parole status) and calculated their new cell placement. Because this reduction in 10 points resulted in so few cases changing PRV column (and, therefore, guideline grid cell) placement, the overall predicted probability of receiving a prison sentence was *unchanged* for those on parole. For the subset who changed PRV column (and, therefore, guideline grid cell) placement as a result of a reduction of 10 points (30 percent of defendants on parole), the resulting change in predicted probability of receiving a prison sentence was tiny: .049 from a base of .60. This suggests that the formal intended punishment for supervision status is modest in the Michigan sentencing guidelines.

5.2 | Prison sentences outside the straddle cells

We primarily focus on the cases falling within the straddle cells of the sentencing guidelines, where there is the potential for the biggest impact through informal courtroom workgroup discretion since the guidelines give imprisonment as one of several sentencing options. That is, neither prison nor nonprison options are considered departures. Our examination of cases in the other parts of the sentencing grid, however—where there is a presumption of nonimprisonment (in the intermediate sanction cells) or imprisonment (in the prison cells)—also reveals a strong informal impact of parole status on new prison sentences, whereas the informal penalty associated with probation status is inconsistent and modest.

Only ~2 percent of intermediate cell cases received a prison sentence (see table 1). Nevertheless, the informal effect of parole status on the probability of going to prison was statistically significant and large in magnitude after controlling for guideline grid placement and a host of individual and case factor controls (see table 2 and figure 2). Predicted probabilities based on the full model estimate that more than .20 of defendants on parole will receive a new prison sentence, holding all other predictors at their means, compared with .01 for those who were not on any supervision. In these intermediate guideline cells, probation status also significantly contributed to an increased probability of being sentenced to prison—above and beyond its formal contribution to the PRV score in the guidelines. The informal impact of probation, however, was considerably smaller in magnitude, corresponding with a predicted probability of receiving a new prison sentence of approximately .03. Having more current criminal justice system involvement (other pending cases, higher current charge count), as well as more prior felonies, also increased the chance of receiving a new prison sentence in the part of the guidelines grid where prison sentences are a departure from the recommended guidelines.

In the cases falling within the prison cells of the sentencing guideline grids, receiving a prison sentence is the presumption, but not a foregone conclusion, with slightly more than three quarters of defendants receiving a prison sentence (see table 1). Similar to the patterns observed in the straddle and intermediate cells, parole status exerts a large and statistically significant impact on the probability of receiving a prison sentence after controlling for sentencing guideline cell placement (formal effects) and a diverse set of other legal and extra-legal controls (see table 2 and appendix B in the online supporting information). Based on the full model results, the difference in the predicted probability of receiving a new prison sentence by parole status is .11 (.81 for those not on parole, .92 for defendants on parole; see figure 2). Probation status, however, was associated with a statistically significant *reduction* in the likelihood of receiving a prison sentence where imprisonment is the recommended sentence. That is, after controlling for the formal impact of probation and other prior record and current offense severity factors, individuals on probation with cases in the “prison cells” had a predicted probability of receiving a prison sentence that was .03 lower than those not on probation (.79 vs. .82). Finally, having additional current charge counts and more prior felonies also significantly contributed to the probability of a new prison sentence beyond the sentencing guidelines.

For the cases in the prison cells that received a sentence of imprisonment (78 percent of such cases; see table 1), we estimated a series of linear regression models to determine whether legal factors already considered in the sentencing guidelines had an additional contribution to minimum sentence length in months. The average minimum prison sentence in months for these cases was greater than five years (Mean = 68.4; SD = 61.4). After controlling for sentencing guidelines grid placement and the full array of controls, the only legal factor that statistically significantly and substantively increased the length of sentence was having more current charges, particularly three or more in the current charge count (compared with the reference of one; see appendix D in the online supporting information). Parole status had no additional influence on minimum prison sentence length among defendants receiving new prison sentences, whereas probation status was associated with a shorter minimum sentence length.

Across the entire swath of sentencing guideline cells—whether the presumption was a non-custodial sentence (intermediate cells), imprisonment (prison cells), or neither (straddle cells)—being on parole had a meaningful informal impact on the likelihood a defendant would go to prison. This impact was net of the “value” placed on current criminal justice system involvement in the formal guidelines accounting (10 points toward PRV) and a host of varied and statistically significant controls (e.g., age, gender, attorney type, bond status, and days detained pretrial). The potential for cumulative disadvantage stemming from prior prison seems to operate strongly through informal discretion applied to those currently on parole.

5.3 | Racial disparity in new prison sentences

Cumulative disadvantage can disproportionately impact racial minorities. Although the coefficient on race was statistically significant and negative, implying slightly lower probability of receiving a prison sentence for Black defendants with straddle cell cases (see appendix table B1 in the online supporting information), research has shown that differences in legal and other observed characteristics can mask or attenuate the amount of disparity associated with race variables in sentencing models (Blumstein et al., 1983; Brennan, 2006; Kutateladze et al., 2014; Miethe & Moore, 1985; Mitchell, 2005; Spohn, 2000; Ulmer, 2012; Wooldredge et al., 2015; Zatz, 2000). As in prior studies aiming to disentangle racial differences in sentencing outcomes, we examine the

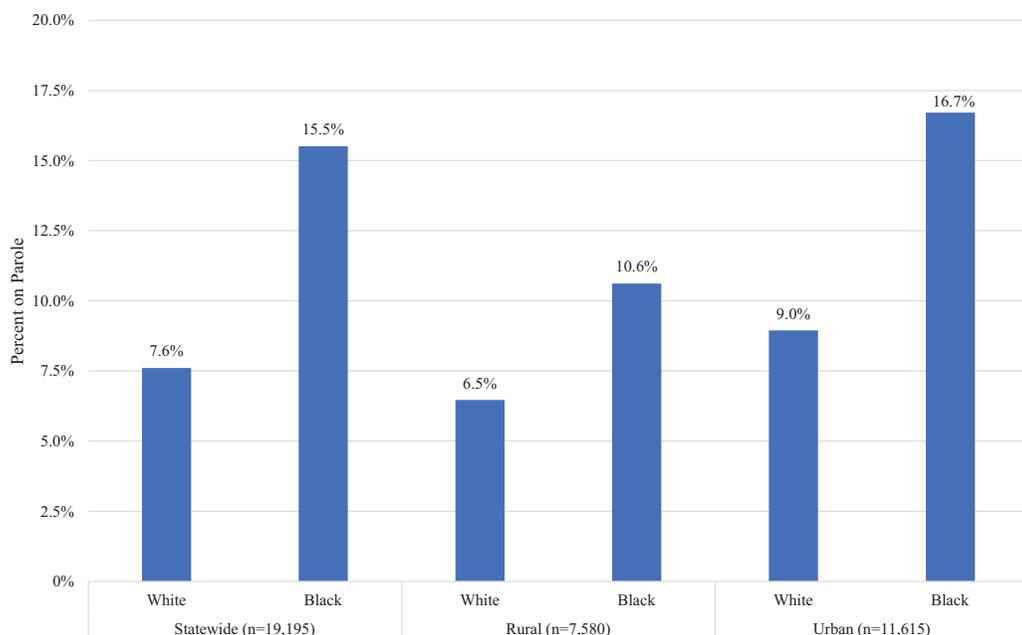


FIGURE 3 Percentage of Defendants on Parole by Race: Straddle Cell Cases [Color figure can be viewed at wileyonlinelibrary.com]

possibility that differences in prior record drive racial disparities using a Blinder–Oaxaca style decomposition (Donnelly & MacDonald, 2018; MacDonald et al., 2014; MacDonald & Raphael, 2020; Omori & Petersen, 2020; Owens et al, 2017; Rehavi & Starr, 2014; Sorensen et al., 2012). In these analyses, we can attribute Black–White differences in new prison sentences to group differences in characteristics (i.e., disparate impact from different group “endowments” for the factors included in the model, such as parole status) and differences in the effect of these predictors (i.e., different treatment given these characteristics; Jann, 2008).

Specifically, we are concerned with the large informal impact of parole on new prison sentences in straddle cell cases in Michigan since the informal discretion associated with parole status is large in these cases and almost twice as many Black defendants with straddle cell cases are on parole (see figure 3). This large disparity exists across both rural and urban courts (the 10 counties with the largest populations in Michigan). Although the statewide difference in prison sentences is negligible between Black and White defendants with cases in the straddle cells (approximately 30 percent each; see table 3), this obscures important racial disparity in prison sentences as the majority of Black defendants (80 percent) are in the 10 largest urban counties in Michigan where prison sentences for straddle cell cases are less common (26 percent) than in rural courts (35 percent). As shown in table 3, the total difference between Black and White defendants receiving prison sentences is 7.4 percentage points in rural courts and 3.3 percentage points in urban ones. The demographic difference between the rural and urban courts, as well as how statewide analyses mask racial disparities in receipt of prison sentences for straddle cell cases, necessitates decomposition analyses split into rural and urban jurisdictions.

In support of our third hypothesis, all the models show that statistically significant differences in group characteristics between Black and White defendants disadvantage Black defendants. That is, if Black defendants had overall characteristics that matched those of White defendants

TABLE 3 Blinder–Oaxaca decomposition of the probability of imprisonment by race: straddle cell cases

	Statewide Cases			Rural Cases			Urban Cases		
	coef	SE	sig	coef	SE	sig	coef	SE	sig
Overall									
White	.293	.024		.336	.020		.240	.006	
Black	.300	.034		.410	.038		.272	.006	
Total Difference	-.007	.019		-.074	.034	*	-.033	.008	***
From Characteristics	-.038	.016	**	-.096	.022	***	-.024	.007	**
From Coefficients	.041	.017	**	-.017	.030		-.009	.010	
Interaction	-.010	.012		.039	.020		.000	.009	
From Characteristics (Endowments)									
Legal Factors Contributing to PRV									
Prior Felonies	-.004	.007		.012	.008		-.017	.003	***
Prior Misdemeanors	.008	.005		.000	.000		-.002	.002	
Cases Pending	-.001	.000		-.001	.001		-.001	.000	*
On Probation	.000	.001		-.001	.002		-.001	.001	
On Parole	-.017	.004	***	-.005	.003		-.020	.002	***
Current Charge Count									
One	.003	.002		.000	.000		.005	.001	***
Two	.000	.000		.000	.001		.000	.000	
Three or more	.001	.001	*	.000	.001		.002	.001	**
Legal Factors Contributing to OV³									
Sentencing Offense Crime Group									
Controlled Substance	-.005	.004		-.017	.007	*	-.001	.002	
Person	-.001	.001		.001	.001		-.001	.001	
Property	.000	.000		.002	.002		.000	.001	
Public Order	.000	.001		-.001	.001		.000	.000	
Public Safety	.006	.002	**	.002	.002		.004	.001	**
Public Trust	-.001	.000		.000	.000		-.001	.001	
From Coefficients									
Legal Factors Contributing to PRV									
Prior Felonies	-.026	.021		.025	.020		-.024	.012	*
Prior Misdemeanors	-.026	.010	*	-.041	.015	*	.010	.006	
Cases Pending	.008	.004		.008	.007		.002	.005	
On Probation	.003	.004		.004	.005		-.001	.004	
On Parole	.010	.007		.018	.005	**	.007	.005	
Current Charge Count									
One	.025	.011	*	-.011	.012		.025	.012	*
Two	-.002	.003		-.004	.004		.001	.002	
Three or more	-.001	.001		.002	.002		-.002	.001	
Legal Factors Contributing to OV³									
Sentencing Offense Crime Group									
Controlled Substance	-.011	.008		-.038	.011	**	-.004	.006	

(Continues)

TABLE 3 (Continued)

	Statewide Cases			Rural Cases			Urban Cases		
	coef	SE	sig	coef	SE	sig	coef	SE	sig
Person	.005	.005		-.001	.009		.000	.007	
Property	-.003	.005		-.011	.006		-.006	.009	
Public Order	-.001	.001		.003	.002		-.001	.001	
Public Safety	-.010	.004	*	-.013	.012		-.007	.005	
Public Trust	.000	.000	*	.001	.000	*	.000	.000	

Notes: Statewide Cases ($N = 18,475$): White ($n = 10,649$), Black ($n = 7,826$).

Rural Cases ($N = 7,415$): White ($n = 5,843$), Black ($n = 1,572$).

Urban Cases ($N = 11,060$): White ($n = 4,806$), Black ($n = 6,254$).

Models conducted using Stata code: *oaxaca* (Jann, 2008). Categorical variable coefficients were transformed so the results of the decomposition are invariant to the choice of the base category (deviation contrast transform) (Jann, 2008). Linear probability models (LPMs) were used for the decomposition. Logit model conclusions are similar in terms of overall decompositions. See appendix D in the online supporting information for full Blinder–Oaxaca decomposition results (LPM and logit). All models include full set of controls (e.g., legal and extra-legal individual factors, sentencing guideline cell placement, and sentencing year dummies). Statewide and rural models have standard errors clustered at the county level (Stata code: *vce(cluster county)*). Urban model includes dummy variables for county.

^a“The crime group of the sentencing offense determines which offense variables (OVs) must be scored” (p. 6, 2016 Sentencing Guidelines Manual).

* $p < .05$;

** $p < .01$;

*** $p < .001$.

(for factors included in the model, e.g., criminal record and extra-legal factors), they would be less likely to receive prison sentences for straddle cell cases (3.8 percentage points statewide, 9.6 in rural courts, 2.4 in urban). As hypothesized, parole status was one of those legal factors leading to a higher percentage of Black defendants receiving prison sentences in the statewide and urban models. If urban Black defendants were on parole at similar rates as Whites, those receiving prison sentences would be two percentage points lower (1.7 percentage points statewide). Therefore, differences in past prison experiences—manifesting through current parole status—between White and Black defendants is a major contributor to racial disparity in prison sentences in urban courts. In rural courts, differences in the rate of parole status between the groups was not one of the characteristics that significantly contribute to this difference ($p = .058$). Differences in probation status did not contribute to the racial disparity in prison sentences. Other differences in the backgrounds of White and Black defendants that contributed to the disparity in prison sentences were bond status, employment status (rural only), and prior felonies (urban only; see appendix C in the online supporting information for the full Blinder–Oaxaca decomposition results).

Our fourth hypothesis, however, was not supported. Results of the decomposition show that in both rural and urban courts, there was no overall contribution of differences in coefficients, meaning that Black and White defendants with the same “package” of background characteristics were not treated differently in regard to new prison sentences. In fact, in the statewide analyses, the disparity resulting from coefficients was statistically significant and positive (see table 3). This means that if Black defendants were treated similarly to White defendants with the same characteristics, they would be more likely to receive new prison sentences (4.1 percentage points higher). As noted, however, this is partially an artifact of prison sentences being used for straddle cases more frequently in rural courts, where there are few Black defendants. Although the overall contribution of differences in coefficients was not statistically significant in rural and urban courts,

coefficient results suggest that rural Blacks on parole, if treated like rural Whites on parole, would be more likely to receive new prison sentences. Nonetheless, it is primarily the different makeup of these groups that contributes to disparities in cumulative disadvantage, with Black defendants having legal and extra-legal characteristics that lead to more punitive outcomes. In urban courts specifically, the cycle of “stickiness” associated with past prison sentences for Black defendants disproportionately contributes to cumulative disadvantage through the informal penalty placed on parole status and the greater probability of Black defendants being on parole.

6 | DISCUSSION

This article has examined some specific ways that cumulative disadvantage can accrue within the criminal justice system, namely through informal penalties associated with parole status that increase the probability of a prison sentence. Theoretical perspectives on courtroom workgroups and the behavior of law motivated our investigation of supervision status as a potentially important factor contributing to prison sentences, after controlling for sentencing guidelines scoring. Individuals on probation or parole may be considered more blameworthy, dangerous to the community, and riskier for a court’s reputation (Steffensmeier et al., 1998, 2017), leading the court to impose more severe punishments. Similarly, as a result of having more “law” applied to them in the past (e.g., conviction plus supervision status; Black, 1976), we hypothesized that defendants on supervision, especially parole, would be more likely to be sentenced to prison, all other factors being equal.

We find that the informal impact of parole on the probability of receiving a new prison sentence is an important source of cumulative disadvantage, whereas the informal impact of probation status is small and inconsistent across the cells of the sentencing guidelines grids. Our finding that parole status, as well as other prior record factors, contributes to punishment severity doubly (both formally and informally) is consistent with prior research which has shown that the growth in criminal records has contributed to more severe sentences and longer prison terms among the convicted population (e.g., King, 2019; Shen et al., 2020). Our study, however, is one of the first to isolate the outsized role of current parole status in contributing to new prison sentences in a guidelines context where the contribution of any given element ostensibly should be predictable and proportionate to punishment goals. Isolating which portions of prior record have an exceptional contribution to prison sentences is important as attempts to reduce incarceration without considering the role of criminal record in driving sentences might prove difficult (King, 2019).¹² Our finding that prior punishments contribute to sentence severity contributes to the growing literature on how cumulative disadvantage builds within the justice system (e.g., Johnson, 2015; Kurlychek & Johnson, 2019).

Given that the parole penalty is supposed to be small in the sentencing guidelines, it is not surprising that we find that the formal impact of the parole penalty in Michigan is modest. This finding is in line with the goals of guidelines, which are developed in part to restore “formal rationality” and make punishment more standardized to the case factors, including proportional to current crime severity (Engen et al. 2003; Frase et al., 2015; Johnson & DiPietro, 2012; Savelsberg, 1992). Indeed, most defendants on supervision would not change sentencing guidelines cell

¹² It is also possible that the problem may solve itself as new cohorts who did not experience the crime wave of the 1980s and 1990s start to “age” through the system (Shen et al., 2020).

placement (and, therefore, recommended sentence) as a result of a 10-point reduction in PRV (the value assigned to probation, parole, or being out on bond awaiting adjudication or sentencing on a felony). Among the approximately one third of defendants on parole for whom a 10-point reduction in PRV leads to a different sentencing guidelines cell placement, the average reduction in predicted probability of receiving a prison sentence was slightly less than 5 percentage points (from a base of approximately 60 percent).

In contrast, the informal impact of parole status—after controlling for the expected probability of receiving a prison sentence as driven by the specific sentencing guideline grid and cell placement—is huge and present across the entire range of sentencing guidelines recommendations: where nonimprisonment sanctions are the presumption (intermediate cells), where discretion is greatest as guidelines span nonimprisonment to prison sentences (straddle cells—our primary focus), and where imprisonment is the recommended punishment (prison cells). The informal impact of being on parole is much bigger than the informal impact of being on probation, even though the sentencing commission assigned equal weight to each supervision status in the formal guidelines.

This key finding that the informal parole penalty is large and consistent across the sentencing guidelines grids suggests that not only does informal discretion remain but also that possible stereotypical judgments (Albonetti, 1991, 1997) and “perceptual shorthand” (Steffensmeier et al., 1998) particularly affect those on parole who have an extra-stigmatized identity, even among those convicted of a felony (Opsal, 2011). Those on parole may especially concern court actors in terms of the threat of additional recidivism events (and how they would be viewed by the community at large; Steffensmeier et al., 1998, 2017). Likewise, those on parole, as a result of more application of law in the past (since this supervision status was preceded by imprisonment), may be viewed as less respectable and, therefore, may be subject to more application of law at the time of current sentencing (Black, 1976). Of course, it could be as simple as courtroom actors taking clues about punitiveness from earlier actors’ punishment choices (Kurlychek & Johnson, 2019). Unfortunately, as a result of the limitations of our data we are only able to speculate about the processes that resulted in the large informal parole penalty. This is one area for future research we discuss below.

These same theoretical perspectives also informed our hypotheses that cumulative disadvantage disproportionately affects Black defendants because of their higher rates of being on parole, as well as possibly through different treatment given similar presentence characteristics (e.g., stereotypical judgments leading to harsher penalties of Blacks on parole than of Whites). We found support for our third hypothesis: The penalty added for those on parole contributes substantially to the Black–White gap in prison sentences since more Black defendants were on parole (driven by urban courts). We did not find any evidence, however, in support of our fourth hypothesis as the total difference in prison sentences was primarily associated with different characteristics (e.g., more Blacks have characteristics associated with punitive outcomes), rather than disparate treatment (e.g., Blacks do not appear to be sentenced more punitively when similarly situated as White defendants). Strategies to reduce racial disparity need to address the institutional processes that build cumulative disadvantage (Omori & Peterson, 2020). Fortunately, research has shown that policy reforms can lead to reductions in Black–White disparities in sentences when less weight is placed on prior record during sentencing (MacDonald & Raphael, 2020), racially biased drug laws are amended (King & Light, 2019), or prosecutor behavior changes (Light, 2021).

6.1 | Recommendations for future research

The results of this study partially supported our hypothesis about the effect of past punishments on cumulative disadvantage that were derived from theoretical perspectives on courtroom workgroups (e.g., focal concerns) and the behavior of law. Furthermore, we isolated the specific prior record elements that had an additional informal impact on receiving new prison sentences after controlling for the formal impact of sentencing guidelines scoring. Despite this, several limitations remain, which suggest the following areas for further research.

First, future research should explore the possible informal mechanisms through which prior punishments contribute to sentence severity. Although our findings comport with expectations drawn from the focal concerns perspective, we are unable to test whether courtroom actor beliefs about specific focal concerns, such as defendant blameworthiness or dangerousness, motivate the large informal punishment penalty associated with parole status. Research should do more to understand the orientations of court actors concerning primacy of focal concerns. For example, some courtroom workgroups may take the “blameworthy” view or face resource constraints, which compels them to send defendants to prison, whereas others may be more attentive to the practical consequences of cycles of incarceration on individuals on parole and their families. These courts may be less likely to impose an informal parole penalty on top of its contribution to sentencing guidelines. As awareness of the collateral consequences of imprisonment and the widespread effects on communities more broadly grows (Kirk & Wakefield, 2018; Rose & Clear, 2003; Travis et al., 2014), some courtroom workgroups may actively seek to keep those on parole in the community when possible—such as when their current offense severity and prior record are minor enough to place them in the straddle cells that allow for that discretion. Future research could explore whether some court actors see those on parole through a “cumulative disadvantage” lens and consider the challenges of reestablishing a law-abiding life when facing new charges after exiting prison. A related important area that is entirely outside the scope of this study is the role of revocation practices in contributing to cumulative disadvantage for individuals on supervision who are not formally charged, convicted, and sentenced.

Second, future research should do more to explore and contrast court contextual factors that may influence the role of prior punishment in cumulative disadvantage, especially how rural and urban courts may differ. The local court context plays an important role in courtroom actor interactions, court proceedings, and punishments (e.g., Eisenstein et al., 1988; Ulmer & Johnson, 2004). We observed demographic differences in rural and urban courts, along with rural courts sentencing defendants with straddle cell cases to prison more often. Similarly, prior research in Michigan has shown wide variation in sentences received within individual grid cells across counties (Council of State Governments Justice Center, 2014; see Ridgeway et al., 2020, for an analysis of county-level variation in punishment in New York). Yet we are not able to explore the possible theoretical mechanisms through which informal consequences operate differently in different court contexts. One possible factor is the focal concern of resource constraints (Steffensmeier et al., 1998). Michigan corrections staff have indicated that smaller, poorer counties in Michigan sentence more people to prison in part because the state pays for prison and the county pays for jail (personal communication with authors). The results of the current study suggest *how* cumulative disadvantage builds (through informal parole penalty) but not the *why*—or why it varies by place.

Finally, the following study limitations lead us to a few other recommendations for future research. First, we cannot rule out the possibility that we have failed to include factors in the model considered by the courtroom workgroup that we cannot observe. We condition on a wide

range of individual characteristics (e.g., employment, marital status, attorney type, bond status, and pretrial jail days among others, see appendix B in the online supporting information), but it is possible that some portion of the informal discretion effect of parole is a result of unobserved factors that are correlated with parole but not with probation—such as how the defendants present themselves (e.g., less conventional—*culture* in Black’s (1976) theory). Additional research and replication can shed light on these findings. Second, our results are limited inasmuch as they pertain to a unique time (early 2000s) and place (Michigan) with particular sentencing guidelines. Formal penalties assigned to custody status vary widely across sentencing guideline states (Frase et al., 2015). Future research should estimate whether the consistently large informal parole penalty we estimate in Michigan is present in other guidelines states where the formal penalty is larger since past work has suggested informal discretion is used to lessen the punitive impact of formal sentencing rules (e.g., King, 2019; Ulmer & Johnson, 2017). Similarly, leveraging policy-change-induced variation in sentencing guidelines would be a fruitful area of exploration to see whether informal practices adjust when formal rules change. For example, in 2015 the Michigan Supreme Court made the guidelines advisory, which increases the range of discretion available to judges (*People v. Lockridge*, 2015). It is possible that we might observe even bigger effects of being on parole after this change.

6.2 | Policy implications and conclusion

As a policy choice, it is reasonable to question the use of prior punishments in formal sentencing guidelines or the informal calculus employed by courtroom workgroups in their decision-making. First, as suggested by our results, it may contribute to racial disparities in sentencing (Frase et al., 2015; Hamilton, 2015; Hester et al., 2018). Second, it is unclear whether prior prison or current custody status signal risk of recidivism beyond other measures of prior criminal activity (e.g., counts of arrests, convictions) (Frase et al., 2015; Roberts & Frase, 2019). There is an argument, of course, that those who are on parole should know they are being closely monitored and, therefore, committing any new crimes signals they are “higher risk.” A similar argument, however, could be made for individuals on other forms of supervision (e.g., probation, pretrial) that do not seem to be subject to the same enhanced punishment. Also, the perception of “higher risk” does not necessarily translate to higher actuarial risk.¹³ Research linking custody status to risk of reoffending is much less developed than that linking other elements of prior record, like number of convictions (Frase et al., 2015). Third, given the many decision points that lead up to a prison sentence, prior punishments are more a reflection of prior justice actors’ judgments than they are a pure reflection of defendants’ behavior. Scholars have argued that custody status in particular should be removed from official prior record scoring because they “double count” prior convictions (Hamilton, 2015; Hester et al., 2018). Similarly, legal advocates have noted that “criminal-history enhancements amount to double punishment for prior offenses” and the “government and the public should regard fulfillment of the earlier sentence as a process that ‘wipes the slate clean’” (American Law Institute, 2017, p. 367). There is a reason to be concerned that prior punishments are particularly likely to contribute to cumulative disadvantage for those who have already received harsher treatment along the way, especially racial minorities.

¹³ There is a related concern that widespread use of actuarial risk assessments also contributes to the growth and maintenance of negative outcomes for marginalized populations (Barabas et al., 2017; Hamilton, 2015).

Changing informal sentencing practices may prove more challenging than changing formal sentencing rules. Our results suggest that formal sentencing guidelines fail to effectively constrain the discretion of the individual actors who decide prison sentences. In contrast to earlier work that has suggested discretion is used to lessen the impact of more severe prior criminal records on sentence severity (King, 2019; Kramer & Ulmer, 2002), we found that the extra-guidelines impact of parole status was substantial across the strata of the sentencing guidelines: intermediate, straddle, and prison cells. These results cast doubt on the belief that formal changes in sentencing guidelines might ultimately lead to reductions in incarceration stemming from prior punishments unless the court actors themselves agree with this change in the rules. Other work on the impact of voluntary sentencing guidelines supports this conclusion (Bushway et al., 2012; Ulmer & Johnson, 2017). Ultimately, formal rules that lack the support of the court community workgroup will have little bearing on sentencing decisions. To address cumulative disadvantage driven by prior punishments, efforts must impact sentencing guidelines, as well as courtroom discretion within and beyond these guidelines.

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SUPPORTING INFORMATION

Additional supporting information may be found online in the Supporting Information section at the end of the article.

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