

Racial Disproportionality

In Punishment

Richard S. Frase

University of Minnesota Law School

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What is meant by racial “disproportionality” in punishment? (and at other stages of criminal justice processing)

Racial disproportionality exists whenever a racial or ethnic group is over-represented in prison, or at any stage of criminal justice processing, relative to the number of persons of that group who are found in the general population.

Whenever such disproportionality occurs it is a red flag, requiring further study to ensure that criminal justice decisions are not the result of bias, and that any seemingly race-neutral policy with a disparate racial impact has strong law enforcement or sentencing justification.

How bad is the problem of racial disproportionality in American punishment?

A common measure of racial disproportionality in punishment compares the per capita imprisonment rates of white and non-white offenders, that is:

First, compute the per capita rate for each racial group, for example, the number of white inmates per 100,000 white residents.

Then, compute the ratio of the nonwhite rate to the white rate.

Results: A recent nationwide study (Sentencing Project, 2016) reported that in 2014, for all states combined, the black prison rate was 5.1 times the white rate.

For Minnesota, the black rate was 11.0 times the white rate.

[Both ratios would be even *higher*, if the population bases excluded juveniles.]

Topics For Research, Evaluation, and Reform

1. Identifying the causes of racial disproportionality in criminal justice

- *At which stages of criminal justice processing does disproportionality arise?*
- *What are the sources of disproportionality, at each of these stages?*

2. Evaluating the sources of racial disproportionality, at each stage

- *Bias, overt or implicit (e.g., stereotyping)*
- *Unintended disparate impacts of seemingly race-neutral laws and policies*

3. Reducing racial disproportionalities

- *What have some jurisdictions done to address these problems?*
- *What else can be done?*

1. Identifying the causes of racial disproportionality – Which Stages?

All processing stages contribute to disproportionality, along with system inputs

1. Racial/ethnic differences in criminal behavior
2. Police decisions to investigate and to make an arrest
3. Pretrial detention and release decisions
4. Prosecutor screening and initial charging decisions
5. Charge revisions and plea bargaining
6. Effectiveness of the defense on issues of liability and sentencing
7. Criminal and sentencing laws and sentencing guidelines
8. Sentencing practices (under guidelines: “departure” decisions)
9. Sentence modifications, esp: probation revocation, parole release & revocation
10. Policies and practices that increase the risk of future criminal behavior especially: adverse collateral consequences of conviction and punishment **[→ back to step # 1]**

1. Identifying the causes of disproportionality, which stages (cont'd)

The next slide reports the results of research on racial disparities in Minnesota.

This research shows that substantial racial disparity exists not only at every stage of criminal processing for which we have data, but also in the community, as shown by measures of socio-economic well-being.

Minnesota Disparities in the Community and at Stages of Criminal Processing

(Black and Native American rate as a multiple of the white rate)

	<u>Blacks</u>	<u>Native Americans</u>
2010-12 Poverty rates (% of families)	6.11	5.62
2012 Adult Arrest Rates , per 100,000 adult population, for serious violent and property crimes, plus drugs	7.88	5.14
2012-14 Average annual felony conviction rates per 100,000 adult population	7.55	8.13
2012-14 Average guidelines recommended-prison rates per 100,000 adult population	10.82	9.41
2012-14 Average annual prison-sentence rates per 100,000 adult population	10.70	10.12
2015 Year-end prison population rates per 100,000 adult population	12.11	11.64

1. Identifying causes of racial disproportionality: What *sources*, at each stage?

At least 4 sources of racial disproportionality have been found to operate, at one or more stages of criminal justice processing:

- A. Bias, overt or implicit (e.g., stereotyping)**
- B. Unintended disparate impacts, on non-white offenders, of seemingly race-neutral laws and policies; in particular, the racially-disparate impacts of:
 - 1. Criminal laws, sentencing guidelines, and law enforcement policies**
 - 2. Resource-allocation decisions**
 - 3. Adverse collateral consequences of conviction and punishment****

Topics For Research, Evaluation, and Reform, cont'd

2. Evaluating the sources of racial disproportionality, at each stage of criminal justice processing

- Bias, overt or implicit (e.g., stereotyping) – *these must be eliminated*
- Unintended disparate impacts of seemingly race neutral laws and policies – *which of these laws and policies should be cut back or eliminated, on the grounds that they are unnecessary, not cost-effective, or (like bias) simply wrong in principle?*

3. Reducing racial disproportionalities

- *What have some jurisdictions done to address these problems?*
- *What else can be done?*

Conclusion

- Racial disparities are found at all stages of criminal justice processing.
- The sources of such disparities include actual or implicit bias and several types of disparate impact on non-white offenders.
- Some disparate impacts are necessary, cost-effective, and acceptable in principle but many disparate impacts fail one or more of these three requirements.
- The first step is to identify the stages where the worst disparities are found.
- State and local jurisdictions can then consider applying measures that other jurisdictions have used to address and reduce racial disparities at each stage of processing.
- The scope and seriousness of these problems are great, so policymakers should consider developing and employing additional measures that will reduce racial disparities, or at least stop making them worse.

Resources

Bureau of Justice Statistics, *In Brief: Examining the Changing Racial Composition of Three States' Prison Populations* (2015), <https://www.bja.gov/Publications/CSG-RacialPrisonPop.pdf>

Richard Frase, “What Explains Persistent Racial Disproportionality in Minnesota’s Prison and Jail Populations?” 38 *Crime & Justice* 201 (2009).

Richard Frase & Rhys Hester, “Criminal History Enhancements as a Cause of Minority Overrepresentation,” in: *Criminal History Enhancements Sourcebook* (Robina Institute, 2015), Ch. 12. <http://robinainstitute.umn.edu/publications/criminal-history-enhancements-sourcebook>

Nazgol Ghandnoosh, *Black Lives Matter: Eliminating Racial Inequality in the Criminal Justice System* (The Sentencing Project, 2015), http://www.sentencingproject.org/doc/publications/rd_Black_Lives_Matter.pdf

Ashley Nellis, *The Color of Justice: Racial and Ethnic Disparity in State Prisons* (The Sentencing Project, 2016), <http://www.sentencingproject.org/publications/color-of-justice-racial-and-ethnic-disparity-in-state-prisons>

Thank you!

2. *Evaluating* the sources of racial disparity

Bias, whether overt or implicit, is wrong; it must be eliminated.

But what about the various types of *disparate impact*?

Which ones are unjustified, and on what grounds?

- Some disparities resulting from disparate impact are **completely unnecessary** – they are not associated with any policy benefits.
- Some disparities result from policies that, although they produce benefits, are **not cost effective** (costs and negative consequences outweigh any positive benefits of the policy).
- Some disparities reflect policies that are **unacceptable in principle** even if they seem to be necessary and cost-effective.

2. Evaluating the sources of racial disparity -- which types of *disparate impact* are unjustified, and on what grounds? (cont'd)

- Some disparities resulting from disparate impact are **completely unnecessary** – they are not associated with any policy benefits.

Example: use of un-validated instruments that over-predict risk and/or under-predict treatment needs for non-white offenders.

- Some disparities result from policies that, although they produce benefits, are **not cost effective** (costs and negative consequences outweigh any positive benefits of the policy).

Example: drug-free-school-zone laws that are overbroad spatially, and/or with respect to time of day.

- Some disparities reflect policies that are **unacceptable in principle** even if they seem to be necessary and cost-effective.

Example: racial profiling would be unacceptable even if it were shown to yield more drug seizures than race-neutral enforcement.

3. Reducing racial disparities:

What have some jurisdictions done, to address these problems?

- Apply racial impact projections to existing and proposed criminal laws and penalties
- Decriminalize or reduce enforcement for small amounts of marijuana
- Reduce or eliminate the crack-powder penalty distinction
- Narrow the scope of drug-free school zone laws (apply them a shorter distance away from schools, and only during day-time hours)
- Reclassify some low level felonies as misdemeanors
- Reduce the use of stop and frisk tactics
- Increase pretrial diversion into treatment and social services programs
- Reduce the school-to-prison pipeline (fewer police and referrals to criminal justice)

(continued on the next slide)

3. What have some jurisdictions done, to reduce racial disparities? (cont'd)

- Implement or revise pretrial release risk assessment tools
- Expand resources for appointed defense counsel and defense paralegals
- Provide Spanish language resources
- Have judges instruct jurors on implicit bias
- Eliminate criminal history score components that do not predict risk of re-offending
- Establish shelters and other alternatives to incarceration for low-income juveniles
- Expand community mental health and substance abuse programs
- Increased use of graduated sanctions for youthful probation violators
- Reduce collateral consequences of conviction

3. Reducing racial disparities, cont'd:

What else can be done?

- Identify the stages of system processing where the worst disparities are found.
- Consider changes at each of those stages
Example: since prior-record sentence enhancements have a strong disparate impact on non-white offenders, reduce or put a cap on the size of those enhancements, and/or reduce or cap the weight of racially-disparate score components (e.g., drug convictions) that are strongly influenced by police decisions about how and where to enforce those laws.
- Recognize social disadvantage as a mitigating sentencing factor -- to reflect reduced culpability, and avoid worsening offender disadvantage and raising recidivism risk.
- Give disadvantaged offenders priority access to treatment and community resources -- these are some of the neediest higher-risk offenders, and they are more deserving of scarce resources than non-disadvantaged offenders.