

Racial Disparities in the Criminal Justice System

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Robina in Conversation

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What is meant by racial “disparity” in criminal justice?

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

Another term for this is racial disproportionality.

Topics

1. Identifying the sources of racial disparities in criminal justice

- *At which stages of criminal justice processing do disparities arise?*
- *What are the sources of these disparities?*

2. Evaluating the sources of racial disparity

- *Bias*
- *Unintended disparate impacts*

3. Reducing racial disparities

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

1. Identifying the sources of racial disparity

Question: At which stages of criminal justice processing do disparities arise?

Answer: All processing stages contribute to disparity, 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 sources of disparity -- which processing stages (cont'd)

The next two slides report the results of research on racial disparities in Minnesota, several other states with similar sentencing systems, and nationally (all states combined).

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

Black/White Ratios for Selected Measures, Minnesota vs U.S. **(black % or per capita rate as a multiple of the white rate)**

	<u>Minnesota</u>	<u>All states</u>
2000 Poverty rates (% of families)	6.2	3.4
2002 Arrest Rates per 100,000 population (serious violent + property, plus drug crimes)	9.1	3.2
2002-04 Conviction Rates per 100,000 population (felony crimes)	8.8	4.0
2002-04 Prison-sentence rates per 100,000 pop.	12.1	4.6
2005 Year-end prison population rates per 100,000	12.4	6.0

Source: Richard S. Frase, “What Explains Persistent Racial Disproportionality in Minnesota’s Prison and Jail Populations?” 38 Crime & Justice 201 (2009), Tables 1 and 2.

Regarding socio-economic disparities, see also: www.metrocouncil.org/metrostats (2016).

Black/White Ratios at Several Criminal Justice Stages in Four Sentencing Guidelines States (black per capita rate as a multiple of the white rate)

	1	2	3	4
	Felony	Recommended	Executed Prison	Year-end Prison
	Conviction	Executed Prison	Sentence Imposed	Population
Kansas	4.8	6.2	6.3	8.5
Minnesota	7.4	10.8	11.1	12.7
North Carolina	3.4	5.1	4.4	5.3
Washington	3.6	4.5	4.5	7.3

4-state averages: 4.8 6.7 6.6 8.4

Source: Richard Frase & Rhys Hester, “Criminal History Enhancements as a Cause of Minority Overrepresentation,” in: *Criminal History Enhancements Sourcebook* (Robina Institute, 2015), Ch. 12, Table 12.2.

1. Identifying the sources of racial disparity -- cont'd

At least 4 sources of racial disparity operate at one or more stages of criminal justice processing:

A. Bias

B. Disparate impact, on non-white offenders, of criminal laws and law enforcement policies that on their face appear to be race-neutral

C. Disparate impact of resource-allocation decisions

D. Disparate impact of the adverse collateral consequences of conviction and punishment

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

rd Black Lives Matter.pdf

1. Identifying the sources of racial disparity -- cont'd

A. Bias – sometimes it is overt; more often, it is implicit (stereotyping etc.)

B. Disparate Impact, on non-white offenders, of criminal laws and law enforcement policies that on their face appear to be race-neutral

(examples: criminal history enhancements; some risk assessment tools; crack vs powder-cocaine penalty differences)

C. Disparate Impact of resource-allocation decisions (examples: inadequate budgets for public defense, and to subsidize treatment of indigent offenders; diversion of limited public resources toward punishment and away from effective preventive programs)

D. Disparate Impact of the adverse collateral consequences of conviction and punishment (examples: restrictions on eligibility for employment, and for subsidized housing)

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)
- Implement or revise pretrial release risk assessment tools

(continued on the next slide)

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

- 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

Sources:

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

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>

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.

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.

1. Identifying the sources of racial disparity [*slide # 4*]

Question: At which stages of criminal justice processing do disparities arise?

Answer: All processing stages contribute to disparity, along with system inputs

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Thank you!