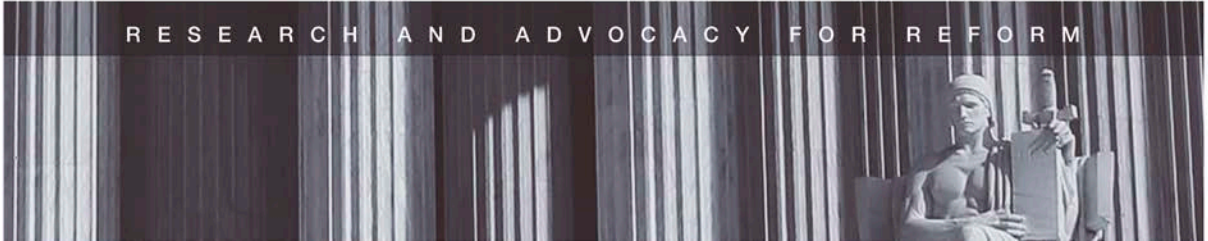




RESEARCH AND ADVOCACY FOR REFORM



Incorporating Racial Equity into Criminal Justice Reform

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There are few areas of American society where racial disparities are as profound and as troubling as in the criminal justice system. In fact, racial perceptions of crime and race-influenced policy development have been intimately tied to the development of mass incarceration. Yet there is growing evidence that the high rate of minority imprisonment is excessive for public safety goals and damaging for family and community structures in high-incarceration neighborhoods.

This briefing paper provides an overview of racial disparities in the criminal justice system and a framework for developing and implementing remedies for these disparities. We first describe the rationale for incorporating racial equity as a goal of an overall criminal justice reform strategy. We then document trends in racial disparity and assess the various causal factors that have produced these outcomes. Next, we identify a selection of best practices for addressing disparities, along with recommendations for implementation. Finally, we provide a guide for establishing rigorous metrics for success.

I. INCORPORATING RACIAL EQUITY AS A GOAL IN CRIMINAL JUSTICE REFORM

Despite substantial progress in achieving racial justice in American society over the past half century, racial disparities in the criminal justice system have persisted and worsened in many respects over this period of time. The reasons for these developments are complex, and include broader socioeconomic shifts in society such as the decline of the manufacturing sector, growing inequality and its disproportionate effect on communities of color, policy initiatives with foreseeable consequences for racial disparity, bias in discretionary decisionmaking, and allocation of resources. Consequently, while blacks and Latinos together comprise 30% of the general population, they account for 58% of the prison population, and 51% of the jail population. In fact, researchers have shown that some of the apparent progress in racial equality, in areas such as educational attainment, is in part a product of incarcerated African American men not being counted in household-based surveys.

While there have been notable efforts to address these disparities, many criminal justice reform initiatives do not prioritize such a goal as central to their strategy. That is, strategies designed to divert offenders from incarceration or to reduce corrections costs frequently do not proactively examine the likely impact of such reforms on existing racial disparities. In part this is due to a belief that reform policies and practices will inevitably benefit offenders across the board. In addition, there is often a perception that such objectives need to be subservient to public safety goals. That is, some would argue that reform initiatives – whether in policing, sentencing, or incarceration – may or may not reduce racial disparity, but that racial fairness needs to be a secondary concern.

In fact, there are fundamental reasons why incorporating such a goal into a reform strategy is not only beneficial to the overall goal of racial justice but to public safety concerns as well. These include the following:

Reducing racial disparity is an element of a public safety strategy

Reform strategies that do not directly tackle racial disparity ignore the multifaceted ways in which public safety is produced. Key among these is the perception of the criminal justice system by the community. In cases such as the large-scale employment of “stop and frisk” tactics in New York City, for example, many youth of color have come to view that the police are not concerned with the safety of their communities, but rather operate as part of a hostile institution that is impeding their life prospects. This in turn affects the receptivity of these young people, as well as others in their communities, to cooperate with law enforcement in crime-reduction activities. This may include reluctance to provide information about neighborhood crime problems, to serve as witnesses in court, or to engage with law enforcement in problem-solving initiatives.

Ongoing racial disparities harm communities of color

Persistent racial disparities in the justice system have been shown to harm both individuals in the system as well as their families and communities. This effect is most pronounced in the dramatically high rate of incarceration of African American males in particular. While in certain circumstances incarceration may serve public safety goals through incapacitating persons who present a threat to the community, both the excessive number and length of prison terms serve to exacerbate the negative consequences of confinement. These include the effect of lengthy prison terms on reentering the labor market, maintaining ties with family and community, and gender disparities which affect family formation and parenting options. In addition, the various collateral consequences of felony drug convictions in particular create additional barriers to securing public housing, welfare and food stamps, and other public benefits – even for those not sentenced to prison. While such issues confront offenders of all racial/ethnic groups, the disparate impact on communities of color exacerbates existing structural inequities.

“Race neutral” reform strategies may inadvertently increase racial disparity

Reform strategies that fail to incorporate an explicit goal of reducing racial disparity not only may fail to achieve such goals, but risk exacerbating racial disparity even if other goals of the initiative may be achieved. As one example, consider the range of alternative sentencing programs being employed in jurisdictions around the nation. Many such programs establish criteria for admission that exclude any defendant with a prior conviction. Such policies almost inevitably will produce disproportionate racial effects, with African Americans being less likely to qualify. This is due to the

fact that African Americans are more likely to have a prior record than white Americans – resulting from both greater involvement in crime and greater scrutiny by law enforcement. The effect is clearly one in which white defendants will disproportionately benefit from access to such programming.

II. OVERVIEW OF RACIAL DISPARITY IN THE CRIMINAL JUSTICE SYSTEM

Racial disparities are produced within both the criminal justice system and the juvenile justice system at each point of contact. Some of these disparities are the product of policy decisionmaking which has foreseeable racial effects that are either not understood or acknowledged by political leaders. The federal crack cocaine mandatory penalties of the 1980s are a prime example in this regard. Other disparities result from racially biased decisionmaking by practitioners, such as cases of racial profiling by law enforcement officers. In many instances, this decisionmaking may be a function of implicit bias – favoring or disfavoring one racial group over others – revealing the effect of unconscious and unintentional stereotypes.

Racial disparity in incarceration

Much of the focus on racial disparity has concerned the dramatic disparities in imprisonment. For quite some time African Americans have been incarcerated at 6-7 times the rate of whites, and Latinos at about 2.5 times the rate of non-Hispanic whites. Disparities in imprisonment should be cause for concern, but do not in themselves reveal the sources of the problem. In broad terms, disparities can be a function of two factors: 1) greater involvement in crime (or certain types of crime) among a particular racial/ethnic group; or, 2) policy and practice decisionmaking within the criminal justice system.

Changing trends in racial disparities

In recent years racial disparities in imprisonment have been declining, somewhat modestly for men, but substantially for women. Between 2000 and 2009 the disparity in incarceration between black men and white men (non-Hispanics) declined by 16.9%, from 7.7 to 1 down to 6.4 to 1. Among women this disparity was cut in half, from a ratio of 6 to 1 down to 2.8 to 1. This shift came about as a result of both *declining* black rates of incarceration and *rising* white rates of incarceration.

These changes illustrate the importance to reform strategies of striving to both reduce the overall level of incarceration (in absolute count, or as a rate per 100,000 of the general population) and the ratio of racial disparity (a comparison of rates of incarceration). Just as it is possible to reduce the absolute level of imprisonment while not having any effect on racial disparity (or even experience a

rise in disparity) so is it possible to reduce racial disparities without affecting incarceration levels (for example, if a rise in white incarceration outpaces a decline in black incarceration).

A recent study of the juvenile justice system illustrates these dynamics. The National Council on Crime and Delinquency analyzed data from five geographically diverse counties engaged in juvenile justice reform in the period 2002–2012, a period when the number of juveniles in residential placement nationally declined by about 40%. The study found that of the juveniles placed in secure confinement during this period, the proportion who were youth of color increased from 12.4% in 2002 to 22.3% in 2012.

III. CAUSES OF RACIAL DISPARITY

Like an avalanche, racial disparity grows cumulatively as people traverse the criminal justice system. The roots of this disparity pre-exist criminal justice contact: **socioeconomic inequality** contributes to people of color committing certain violent and property crimes – especially the most serious – at higher rates. But this underlying racial disparity is exacerbated by three features of the criminal justice system. First, **resource allocation decisions** handicap low-income defendants, who are disproportionately people of color. Second, a variety of **apparently race-neutral criminal justice policies** in fact have a disparate racial impact. Finally, **implicit racial bias** leads criminal justice practitioners to punish people of color more severely than whites. This section elaborates on these four key causes of racial disparity in the criminal justice system and illustrates their impact.

1) Socioeconomic inequality contributes to racial differences in crime rates

People of color are more likely than whites to experience **economic disadvantage** that is compounded by **racial inequality**. These forces erode economic and social buffers against crime, making people of color more likely to commit more serious property and violent offenses, but not drug offenses.

- Over half of the jail population in 2013 was non-white. In 2002, 44% of jail inmates **lacked a high school degree**. In the month prior to their arrest, 29% were **unemployed**, and 59% reported **earning less than \$1000/month**.
- Higher rates of geographically concentrated socioeconomic disadvantage contribute to higher rates of violent and property crimes among racial minorities. In 2012, African Americans represented 13% of the U.S. population. But they comprised 39% of arrests for **violent crimes** (49% for murder and nonnegligent manslaughter) and 29% of arrests for **property crimes**. Victimization surveys suggest that, especially for the most serious

crimes, the race of those arrested resembles those of the people who have committed crimes.

- **Drug offending** does not differ substantially by race. Surveys by federal agencies show that both recently and historically, whites, blacks, and Hispanics have used illicit drugs at roughly **similar rates**. Drug users also generally purchase drugs from people of the same race or ethnicity. But socioeconomic inequality leads people of color to disproportionately use and sell drugs **outdoors**, where they are more readily apprehended by police.

2) Resource allocation decisions handicap low-income people

Key segments of the criminal justice system are **underfunded**, leading to worse outcomes for low-income defendants who are disproportionately people of color. Moreover, many criminal justice policies and practices **disadvantage** defendants with **limited resources**.

- Pre-trial detainees comprise over 60% of jail inmates. Seventy percent of pre-trial releases require **money bond**, an especially high hurdle for low-income defendants, who are disproportionately people of color. Blacks and Latinos are more likely than whites to be denied bail or to be imposed a money bond that they cannot pay. They are often assessed to be higher safety and flight risk because they are more likely to experience socioeconomic disadvantage and to have criminal records. But racial minorities also fare worse than comparable whites, due to implicit racial bias. Pre-trial detention has been shown to increase the odds of conviction, and detained defendants are also more likely to accept less favorable plea deals, and are more likely to be sentenced to prison and with longer sentences.
- Most states inadequately fund their indigent defense programs. While there are many high quality **public defender** offices, in far too many cases indigent defendants are represented by public defenders with excessively **high caseloads**, or by **assigned counsel** with **limited experience** in criminal defense.
- Due to limitations in **publicly funded treatment options**, there are fewer sentencing alternatives available to low-income defendants, who cannot afford to pay for treatment programs as an alternative to confinement.
- **Community supervision** and **re-entry** programs are underfunded, and re-entry is further obstructed by the **collateral consequences** of a criminal conviction. Too many parole and probation systems offer supervision with little support. Moreover, a criminal

conviction creates overwhelming odds of securing steady employment, and those with felony drug convictions are disqualified from welfare benefits and public housing in many areas. Consequently, three of four prisoners are arrested within 5 years of their release, and half are re-imprisoned. Because of their higher rates of incarceration, people of color are disproportionately affected by these shortcomings in policy.

3) Disparate racial impact of ostensibly race-neutral policies

A myriad of criminal justice policies and practices that appear to be **race-neutral** collide with broader socioeconomic patterns to create a **disparate racial impact**. **Policing practices** and **sentencing laws** are two key sources of unintentional racial inequality.

Police tactics that cast a wide net in neighborhoods and on populations associated with high crime rates disproportionately affect racial minorities. Consequently, people of color are more likely to be **arrested** even for behavior that they do not engage in at higher rates than whites. This greater level of scrutiny also contributes to higher rates of **recidivism** among non-whites.

- **Hot-spot and stop, question, and frisk** tactics result in greater scrutiny of young men of color. A recent study found that 38% of white men reported having been arrested by age 23, in contrast to 49% of African Americans. Racial differences in offending may account for some of this disparity, but differential enforcement plays a crucial role, as discussed next.
- Almost 1 in 3 people arrested for **drug law violations** is black, although drug use rates do not differ by race and ethnicity. A recent ACLU report found that blacks were 3.7 times more likely to be arrested for **marijuana possession** than whites in 2010. This disparity expands at later stages of the criminal justice system so that over **2 in 3** people in state prisons for drug offenses are **people of color**.

Race-neutral **sentencing** laws that are designed to more harshly punish certain classes of offenders, or to carve out others from harsh penalties, often have a disparate impact on people of color. This occurs because of how these **sentencing** laws interact with broader racial differences in our society and within the criminal justice system.

- Some policies disadvantage **lower income individuals**, who are disproportionately people of color. Examples include **risk assessments** that require employment for pre-trial release, or **probation or parole requirements** to report at locations where there is little public transportation.

- **Drug-free school zone laws** mandate sentencing enhancements for people caught selling drugs near school zones. The expansive geographic range of these sentencing enhancements coupled with high urban density has disproportionately affected residents of urban areas, and particularly those in high-poverty areas – who are largely people of color. A study in New Jersey found that 95% of persons subject to these enhancements were African American or Latino. All 50 states and the District of Columbia have some form of drug-free school zone law.
- **Diversion programs** and **alternative courts** disproportionately bar people of color from because they frequently disqualify those with past convictions.
- “**Three strikes and you’re out**” and other **habitual offender** laws disproportionately affect people of color, who are more likely to have criminal records.

4) Implicit racial bias among criminal justice professionals

Implicit racial bias is the unintentional and unconscious racial bias that affects individuals’ decisions and behaviors. Psychological experiments have shown that these biases are **pervasive in our society**, and are held even by people who **disavow overt prejudice**. Studies of criminal justice outcomes also reveal widespread implicit bias among **criminal justice professionals**: people of color fare differently than whites even when accounting for other relevant factors including class, offense type, and criminal history.

In **experimental research** such as video simulated shooter studies, subjects are asked to quickly identify and shoot armed suspects, or to press another button to not shoot unarmed suspects. Participants more quickly and accurately decided to shoot an armed target when that person was African American, but more quickly and accurately chose not to shoot if the unarmed target was white. A group of police officers that completed this experiment was quicker to shoot at armed black suspects than at armed white suspects.

Studies of **criminal justice outcomes** also reveal that criminal justice professionals, like other members of society, make decisions that are influenced by implicit biases. Researchers have focused most on analyzing the extent to which implicit bias affects the work of police officers, prosecutors, and judges because of their significant impact on criminal justice outcomes.

- **Police**: In recent years, overall rates of **traffic stops** have not differed by race, but police are more likely to pull over people of color for **discretionary** reasons. Whites are more

likely than blacks and Hispanics to be pulled over for speeding while racial minorities are more likely to be stopped for a record check, vehicle defect, or for no stated reason – what some researchers call **investigatory stops**. Class differences, measured by car value, did not account for these disparities. Once pulled over, blacks and Hispanics were three times as likely as whites to be **searched**, and blacks were twice as likely as whites to be **arrested** during a traffic stop.

- **Prosecutors:** Prosecutors are more likely to charge people of color with crimes that carry heavier sentences than whites under **mandatory minimum** and **habitual offender** laws. For example, federal prosecutors are twice as likely to charge black defendants with offenses that carry mandatory minimum sentences than otherwise-similar whites. State prosecutors are also more likely to charge black rather than similar white defendants under habitual offender laws.
- **Judges:** Judges are more likely to **sentence** people of color than whites to prison and jail and to give them **longer sentences**, even after accounting for differences in crime severity and criminal history. Research from the 1990s revealed that the race penalty is harshest for certain categories of people and offenses: it particularly affects men and the young, and is more pronounced for **less serious offenses**. In effect, young black men are perceived as being more dangerous because of their socioeconomic characteristics and race.
- **Others:** Unconscious racial bias has been found in many other corners of the criminal justice system. A study in Washington state found that in narrative reports used for sentencing, **juvenile probation officers** attributed the problems of white youth to their social environments but those of black youth to their attitude and personality. **Defense attorneys** may exhibit racial bias in how they triage their heavy caseloads. Studies of **mock jurors** have shown that people even exhibited skin-color bias in how they evaluated evidence: they were more likely to view ambiguous evidence as indication of guilt for darker skinned suspects than for those who were lighter skinned.

In recent decades a number of scholars, including Alfred Blumstein and Michael Tonry, have sought to quantify how much of the racial disparity in the prison population stems from crime rates, and how much is produced by the criminal justice system. Over various time periods, these studies have concluded that between 61-80% of black overrepresentation in prison is explained by higher rates of arrest (as a proxy for involvement in crime). The least racial disparity exists for the most serious offenses, and the greatest for the least serious. Other scholars have found wide variation among the states in the degree to which arrest disparities explain incarceration disparities.

As first articulated by Blumstein in his study showing that 80% of the incarceration disparity could be explained by arrest, the remaining 20% of the disparity might be a function of racial bias (sometimes described as “unwarranted disparity”), legally relevant variables (such as prior criminal history), or a combination of such factors. But even to the extent that a significant proportion of racial disparity appears to be related to higher arrest rates, this should not lead to a conclusion that all such disparity is “warranted.” To take the most high profile example, federal mandatory sentencing penalties for crack cocaine offenses disproportionately affected African Americans because this drug law has been disproportionately enforced among African Americans.

IV. BEST PRACTICES FOR REDUCING RACIAL DISPARITY

The most substantial work in addressing racial disparity has been undertaken in the juvenile justice system. Accordingly, this section reviews best practices from initiatives such as the MacArthur Foundation’s Models for Change, the Annie E. Casey Foundation’s Juvenile Detention Alternatives Initiative, and the W. Haywood Burns Institute for Juvenile Justice Fairness and Equity. Also included are initiatives to reduce racial disparity in the adult justice system.

1) Addressing socioeconomic inequality that underlies differential crime rates

Given the constraints to eliminating the socioeconomic inequality that contributes to differential crime rates, advocates have had success in increasing utilization of existing resources and limiting the collateral consequences of criminal convictions.

- **Maximize utilization of available community resources:** Pima County, AZ

Officials and community groups helped increase the utilization of community resources by creating geocoded maps to identify communities with high proportions of youth referred to detention and then developing **community asset maps** to find available program services for at-risk youth in those areas.

- **“Ban the Box”:** 12 states and 60 cities and counties including CA, IL, MD, NYC, and Atlanta

A criminal record is a strong **barrier to employment**, and therefore to successful re-entry. To reduce this collateral consequence, many jurisdictions have passed laws or issued administrative orders to remove the question about conviction history from initial job applications and to delay a background check inquiry until later in the hiring process. These

reforms usually apply only to public sector employers, but are sometimes extended to the private sector as well.

- **Opting out of or modifying welfare and food stamp ban for people with drug convictions**

Advocates have been urging states to exercise their option of eliminating another barrier to re-entry: denial of **federal welfare and food stamp benefits** to people convicted in state or federal courts of felony drug offenses. These bans primarily affect low-income women of color. The 1996 Personal Responsibility and Work Opportunity Reconciliation Act which created the ban, also permitted states to opt out or modify its terms. To date, 13 states have fully opted out of the welfare ban and 9 from the food stamp ban, with additional numbers of states opting out in part (by making it dependent on type of drug offense or enrollment in treatment).

2) Reallocating resources to create a fair playing field

Investing in public services and limiting the financial outlays required from defendants have helped to reduce racial disparity in the criminal justice system.

- **Offering Spanish language resources:** Maricopa County, AZ and Santa Cruz County, CA

Maricopa County significantly improved outcomes in the Driving Under the Influence (DUI) Court, by creating a separate **Spanish-speaking court**. The court achieved an 88% graduation rate, higher than the 66% rate for participants in English-speaking DUI court. Graduates of the DUI court have to complete at least 20 weeks of treatment, education, and counseling, reach 6 months of sobriety, and be attending school or employed.

Santa Cruz County's probation department addressed difficulties of communicating with Latino families by increasing the number Spanish-speaking staff to match the proportion of such youth at the detention center. The department also doubled the number of youth diversions by **creating programs** to meet the needs of Latino youth, designing programs to meet regional needs across the county, and **expanding bilingual staff** at a local community provider. Overall, these efforts helped lead to a 25% reduction in the average daily detention population, and a simultaneous 22% reduction in the Latino representation in the juvenile hall population.

- **Expanding resources to support pre-trial release:** Cook County, IL

Under-resourced, appointed counsel often struggle to **gather information supporting pre-trial release** to present at custody or bail hearings. The Cook County Public Defender's Office established the Detention Response Unit in 1996 to improve case outcomes for minority youth. The unit consisted of two paralegals who interviewed detained youth prior to their custody hearings. The paralegals helped add a larger social narrative to the court process by checking on community ties and stressing to families the importance of attending the custody hearing.

- **Establishing alternatives to incarceration for low-income defendants:** IL, PA, WI, NC

In Berks County, Pennsylvania, between 2007 and 2011, officials were able to reduce the number of youth in secure detention, most of whom were youth of color, by 67% in part by **increasing reliance on alternatives**. These included non-secure shelters for youth who can't safely return home, evening reporting centers, electronic monitoring, and expanded use of evidence-based treatment programs.

In 2004, Illinois expanded alternative community programs and decreased reliance on detention. By 2007, commitments had been reduced by 44% across the state's four pilot sites. The sites created a wide variety of programs, including Aggression Replacement Training, Functional Family Therapy, a community restorative board, teen court, and substance abuse treatment. For every \$1 spent on the programs, \$3.55 in incarceration costs was avoided.

Other jurisdictions have reduced the proportion of youth of color in detention by adopting **graduated sanctions** for probation violations. In Rock County, Wisconsin, graduated sanctions and incentives for probation violators, such as Aggression Replacement Training and evening reporting, helped drop the percentage of youth of color in the total detention population from 71% to 30%. Similarly, in Union County, North Carolina, the use of graduated sanctions for youth who violated probation helped to decrease the representation of youth of color in the total detention population by 32%.

3) Minimizing disparate racial impact of ostensibly race-neutral policies

Through careful data collection and analysis at various points throughout the criminal justice system, localities have been able to discover and address sources of racial bias.

- **Assess racial impact:** IA, CT, OR, MN, and Multnomah County, OR

Jurisdictions have been able to reduce racial disparities in confinement by documenting racial bias inherent in certain **risk assessment instruments (RAI)** used for criminal justice decisionmaking. The development of a new RAI in Multnomah County, Oregon led to a greater than 50% reduction in the number of youth detained and a near complete elimination of racial disparity in the proportion of delinquency referrals resulting in detention. Officials examined each element of the RAI through the lens of race and **eliminated potential sources of bias**, such as references to “gang affiliation” since youth of color were disproportionately characterized as gang affiliates often simply due to where they lived.

Similarly, a review of the **RAI** used in consideration of pretrial release in Minnesota’s Fourth Judicial District helped eliminate sources of racial bias. Three of the nine indicators in the instrument were found to be **correlated with race**, but were **not significant predictors** of pretrial offending or failure to appear in court. As a result, these factors were removed from the instrument.

Iowa, Connecticut, and Oregon have passed legislation requiring a **racial impact analysis** before codifying a new crime or modifying the criminal penalty for an existing crime. Minnesota’s sentencing commission electively conducts this analysis. This proactive approach of **anticipating disparate racial impact** could be extended to county and city legislatures and incorporated into police policies.

- **Address Upstream Disparities:** New York City, Clayton County, GA

In 2014, the District Attorney of Brooklyn, New York informed the New York Police Department that he would **stop prosecuting minor marijuana arrests** so that “individuals, and especially young people of color, do not become unfairly burdened and stigmatized by involvement in the criminal justice system for engaging in nonviolent conduct that poses no threat of harm to persons or property.”

Officials in Clayton County, Georgia reduced **school-based juvenile court referrals** by creating a system of graduated sanctions to **standardize** consequences for youth who committed low-level misdemeanor offenses, comprising the majority of school referrals. The reforms resulted in a 46% reduction in school-based referrals of African American youth.

- **Repeal laws with racially disparate impacts:** IL, NC, OR

Through persistent efforts, advocates in Illinois were able to secure the **repeal** of a 20-year-old law that required the **automatic transfer** of 15- and 16-year-olds accused of certain drug offenses **within 1,000 feet of a school or public housing**. Advocates established a broad coalition of supporters who emphasized that the law was racially biased, unnecessary, and unfair, causing youth of color to comprise 99% of those automatically transferred.

North Carolina's **Racial Justice Act** enabled commutation of death sentences based on statistical evidence that race had played a role in sentencing. Academic research on case processing led to the commutation of several death sentences to life without parole. But as a result of divisive state politics on the issue, the legislature subsequently repealed the law.

In Portland, Oregon, the public defender's office led an effort to defeat a 15-year-old ordinance which had a disproportionate impact on African Americans. The ordinance excluded individuals arrested for certain drug crimes in "**Drug Free Exclusion Zones**" from any public right of way or park.

4) Addressing implicit racial bias among criminal justice professionals

Establishing objective guidelines to standardize decisionmaking, ensuring that decisionmakers have access to the most complete information possible, and providing training on racial disparities can mitigate the negative impact of implicit bias.

- **Eliminating racial disparities in charging decisions:** Lancaster County, PA, Mecklenburg County, NC, Milwaukee, WI, New York, NY, San Diego, CA

The Vera Institute of Justice Prosecution and Racial Justice (PRJ) program has worked with various jurisdictions to reduce unwarranted racial and ethnic disparities caused by **prosecutorial decisionmaking**. In Milwaukee, prosecutors were filing drug paraphernalia charges against 73% of black suspects, compared to 59% of white suspects. The prosecutor's office was able to eliminate these disparities by reviewing data on outcomes, stressing diversion to treatment or dismissal, and requiring attorneys to consult with supervisors prior to filing such charges.

- **Establishing objective criteria and guidelines for decisionmaking:** Dorchester, MA, Multnomah County, OR, Saint Louis County, MN

In Dorchester, 52% of nonwhite defendants arrested in a school zone for a drug crime received an enhanced charge, while only 15% of whites received such a charge. Based on

these findings, judicial leadership worked with police and prosecutors to develop **guidelines** to more fairly handle **school zone cases**.

Similarly, Multnomah County instituted a “**sanctions grid**” for probation violations that minimized **staff inconsistencies**, while encouraging sanctions other than detention. The changes resulted in an immediate reduction in the detention population and were part of a broader effort that largely eliminated the racial disparity in the proportion of referrals resulting in detention.

- In Saint Louis County, Minnesota, when making bail determinations, judges did not **have access to a defendant’s bail report**, which contained important personal background information, forcing them to rely exclusively on the name of the arrestee, the current charge, and the arrestee’s prior criminal history in the state. Local officials perceived the system to be biased against minority defendants, releasing whites on their own recognizance twice as often as other racial groups, and imposing money bond on African Americans more often and in a greater amount than on whites. Racial disparities remained even when controlling for offense severity level, number of felony charges, and the defendant’s criminal history. Changes were made so that in all felony cases, judges only made bail determinations once a bail report had been provided. The judges also received training on best practices in making bail determinations.

V. IMPLEMENTATION STRATEGIES AND METRICS FOR SUCCESS

Reforms might rely on pioneers for their introduction, but they must acquire broader institutional support in order to be effective and have longevity. Representatives of all key decisionmakers and interested parties – policymakers, practitioners, and community groups – should be included in the development and implementation of reforms. This collective approach can pinpoint sources of disparity, identify solutions and weigh their costs, carry out implementation, and develop monitoring and accountability practices. Institutionalizing reforms in this way can also ensure that they are funded on an ongoing basis and continue to be pursued after changes in leadership. Public education can also help to expand demand and support for reforms.

There are several ways by which program success in reducing racial disparity can be measured:

- *Process evaluation* – Have the relevant actors in a jurisdiction engaged in the development and implementation of a strategy to reduce disparity? Has there been collaboration among them in analyzing the causes of disparity and developing remedies? One reason for conducting such an analysis is that factors beyond the control of the initiative – such as political reaction

to a local “crime wave” – may be contributing to or exacerbating racial disparity despite successful implementation of the reform plan.

- *Data analysis* – Key measures for assessing impact are: 1) overall change in the number of people of color incarcerated or other measures (arrest, conviction, probation revocation, etc.); 2) overall change in racial disparity in incarceration rates or other measures.
- *Assessing impact at decisionmaking points* – Most jurisdictions will require collaborative strategies that involve changes in policy or practice at each decisionmaking point in the system. Therefore, in order to identify progress or lack thereof it will be useful to assess changes in disparity at each stage so as to identify those components of the justice system that are making progress toward reducing disparity or a need to revise the overall strategy in light of evaluation feedback.

Measuring change in race and criminal justice outcomes

Analyzing impact on racial disparity within the justice system requires not only access to comprehensive data, but also a framework for measuring success. A key threshold question in this area is whether an initiative is designed to reduce the *absolute number* of people of color in the justice system or the *degree of racial disparity*. These are both laudable goals, but potentially very different in what the outcomes look like.

Racial disparity in incarceration (or at other stages of the justice system) is generally viewed as the ratio of the *rate* (per population) of incarceration of one racial group compared to another. So if blacks are incarcerated at a rate six times that of whites this does not mean that there are six times *as many* blacks in prison, but rather that a black person is six times as *likely* to be in prison as a white person.

Consider a scenario that illustrates how reducing incarcerated populations does not necessarily reduce racial disparity. Suppose we have a prison system of 200 people, 150 of whom are black and 50 of whom are white. Therefore, there are three times as many blacks as whites in prison (in absolute numbers, not rates). A program initiative then reduces the overall numbers by half, so that there are now 100 people in prison – 75 are black and 25 are white. In this case, the number of individuals of both races has been cut in half, but the racial disparity is still at 3 to 1. While it may be troubling that the racial disparity has not changed there are nonetheless far fewer African Americans (and whites) behind bars, so from the perspective of reducing the consequences of criminal justice control over people of color such a development would be constructive overall.

Reductions in racial disparity can come about in various ways

Initiatives designed to reduce racial disparity frequently aim to accomplish this goal by reducing the number of people of color at a particular stage of the criminal justice system. For example, the 2010 federal legislation scaling back the penalties for crack cocaine reduced the racial disparity of persons incarcerated for drug offenses since African Americans were heavily overrepresented for this offense.

But a recent report by The Sentencing Project demonstrates the complexity of assessing changes in racial disparity. The analysis showed that in the period 2000–2009 the racial disparity in imprisonment between black and white women dropped by half, from a ratio of 6 to 1 down to 3 to 1, a dramatic change in a relatively short period of time. But this shift came about because of two contrasting trends: a substantial *decline* in the number of black women in prison, but a large *rise* in the number of incarcerated white women. Thus, while the decline in racial disparity is quite welcome, advocates for reduced incarceration of women are not heartened by the replacement of one group of women in prison by another.

Isolating the effects of interventions from external changes

A strategy for evaluating the success of an initiative to reduce racial disparities needs to take into account a number of factors. A key issue in this regard is establishing a means of isolating the impact of the reform strategy from other changes that may be occurring simultaneously in the political or socioeconomic environment.

As an example, consider the substantial decline in crime rates across the nation since the mid-1990s. Overall, the crime rate has declined by about 40% in this period, with substantial reductions in all parts of the country. While there is debate among researchers regarding the contributing factors producing this outcome, many political leaders and criminal justice officials have been quick to claim credit for this reduction. Among law enforcement leadership there are claims that policing strategies such as “stop and frisk” or “hot spots” policing have been responsible for the crime drop. But given that cities without these strategies also experienced substantial crime drops, it seems clear that such practices were at best only one aspect of the overall explanation for the decline.

Recent developments in drug use and policing suggest how broader social forces can complicate measures of racial disparity. Consider an evaluation of a local court system’s sentencing outcomes as they relate to incarceration for drug offenses. In many jurisdictions we now see a rising number of whites being sent to prison, along with a declining number of African Americans. This might be a function of more inclusiveness in treatment programs, but could also be related to increased arrests for heroin and prescription drug offenses. Since whites are far more likely to be represented in

arrests for these drugs than for many other drug offenses, these broader shifts may be more likely explanations of the changing racial composition in incarceration than the treatment initiative.

Such observations do not suggest that certain changes in policing or treatment had no effect on crime or sentencing. But they do tell us that it is likely that broader developments in society and policy were likely to be contributors to these changing trends. Therefore, to the extent possible impact assessments should try to incorporate analyses of historical trends, as well as trends in neighboring jurisdictions, and/or nationally in order to determine the particular effect of reform initiatives.

Victim/offender issues as they relate to racial disparity

Another complexity in measurement results from the racial dynamics of victims and offenders in the justice system. A substantial body of research documents that African American defendants receive harsher treatment in the criminal justice system than whites, controlling for relevant criminal justice factors. Conversely, it is also well documented that cases involving white victims receive greater scrutiny and punishment than do cases involving black victims. This has been illustrated most prominently in research on the racial dynamics of capital punishment, whereby persons convicted of killing a white person are about four times as likely to receive a death sentence as those who kill a black person.

The implications of this for evaluating success in reducing disparity can be seen in the following example. Suppose we are trying to examine the impact of prosecutorial charging practices on racial disparity and we find that that in cases of simple assault blacks are more likely than whites to have the charges dropped. This would appear at first to be decisionmaking that benefits African American defendants, which it does. But since many of these crimes are intraracial, it may be the case that the race of the victim is more consequential in the outcome of the case. That is, an African American's victimization may not be taken as seriously as that of a white victim, and so race of victim should also be taken into account.

Availability of data for measurement and analysis

Data on race in the criminal justice system is considerably more available and of higher quality than in prior decades, but significant gaps still remain. At the national level, the Bureau of Justice Statistics (BJS) provides fairly comprehensive imprisonment data by race (white and black), often correlated with offense of conviction and/or gender. Data on racial groups other than African Americans is often either not gathered or reported. Additional racial categories have recently become available for jail inmates (including American Indian and Asian), but this information is not tied to gender and conviction offense.

For Latino/Hispanic ethnicity, BJS has for more than a decade identified populations in prison and jails as three mutually exclusive categories of (non-Hispanic) white, (non-Hispanic) black, and Hispanic. Given the rapid growth of Latinos in the population it is particularly important to analyze trends in incarceration by changes in the *rate* of imprisonment, as opposed to the *number* of prisoners whenever possible. To illustrate, from 2000 to 2009 the *number* of Hispanic females in state and federal prison rose by 75%. But since the overall population of Latinos increased substantially during this period, the *rate* of incarceration rose by a much more modest 23%.

Nationwide jail and prison trends are driven by the largest jurisdictions, and data on jail inmates are not disaggregated by state as they are for state prisoners. Because nationwide jail figures mask a great deal of regional variation it is crucial to analyze state and local data. Data on race at the state or local level is generally considered to be reasonably accurate, but this is not always the case in regard to ethnicity.

For the purpose of assessing the impact of work in local jurisdictions it is generally helpful to have access to data at key decisionmaking points, such as arrest, arraignment, plea negotiations, and sentencing. Unfortunately, the availability and accuracy of such data varies significantly by jurisdiction. Typical problems include: police arrest reports may record the race of an arrestee, but not ethnicity; plea offers by prosecutors are unlikely to be recorded in any systematic way; sentencing decisions will be noted in an individual case file, but not necessarily reported comprehensively by jurisdiction.

Because of these and other data limitations it will not always be possible to develop comprehensive statistical measures of progress toward reducing disparity. But in virtually all jurisdictions there will be sufficient data to explore a variety of measures that can provide a sense of broad trends in racial disparity.

VII. CONCLUSION

This briefing paper has reviewed trends in racial disparity in the criminal justice system, identified its causes, and presented a selection of best practices from past reforms. Criminal sentencing for racial minorities – both in its vast scale and its disproportionate rate relative to whites – has been harmful to public safety and damaging to communities of color. Criminal justice policy can be, and has been, improved through reforms that target the causes of this disparity: socioeconomic inequality that precede criminal justice contact, resource-allocation decisions in the criminal justice system, race-neutral laws and policies that have a disparate racial impact, and implicit racial bias. Reforms include reducing barriers to re-entry, expanding resources for alternative sentencing, conducting racial impact assessments to reconsider and repeal discriminatory laws, and making discretionary decisionmaking informed and accountable. With declining crime rates, increased concern about public budgets, and growing moral ambivalence about the War on Drugs, we may be beginning a new chapter in American criminal justice. With a clear understanding of the problems and an assessment of successful efforts to date, we can create more just outcomes.



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