



## How America Can Correct Systematic Racial Biases in Criminal Justice

Nazgol Ghandnoosh, The Sentencing Project

Blacks and Latinos make up more than half, 56%, of the people held in U.S. jails and prisons – far exceeding their 30% share of the overall American population. A number of factors propel this disparity, including economic disadvantages that affect people and communities long before defendants find themselves in the criminal justice system. But important features of the justice system itself also produce an accumulation of racially skewed results. Between 2007 and 2009, Black men received federal sentences that were 14% longer than those for white men with similar arrest offenses, criminal histories, and other prior characteristics. And similar racial disparities have also been documented in local and state-level criminal proceedings.

The sources of racial disparities within criminal justice can be complex and subtle – and we can only correct injustices if we untangle root causes. In a recent report for The Sentencing Project, I outline three major sources of systematic racial disparity in criminal justice processes and outcomes; and I also highlight recent initiatives various jurisdictions have taken to address and rectify these inequities.

### How Sentences Systematically End Up Unequal by Race

Important sources of racially unequal outcomes cluster in three major areas: bias in practitioners' use of discretion, laws with inherently racially unequal impact, and decisions that place excessive financial burdens on defendants.

- **Criminal justice practitioners' use of discretion is – often unintentionally – influenced by racial bias.** Police officers, prosecutors, judges, and even public defenders make decisions about arrests, charging, sentencing, and case triage, respectively, that put non-white defendants at systematically greater risk for longer prison sentences. In a *Yale Law Journal* article, Sonja B. Starr and M. Marit Rehavi show that decisions by prosecutors have been the “dominant procedural sources of disparity” in federal sentencing. Prosecutors were twice as likely to charge Black defendants, compared to otherwise similar whites, with offenses that carried mandatory minimum sentences. Similar patterns emerge in state-level criminal cases. When mandatory sentences were originally established, supporters hoped they would eliminate sentencing disparities by taking away judges' discretion. But in practice, creating mandatory sentences for certain crimes just shifts a lot of discretion from judges to the prosecutors and police officers who make the first decisions about people entering the justice system.
- **Ostensibly race-neutral laws and policies can have a disparate racial impact.** For example, “drug-free school zone laws” mandate longer sentences for people convicted of selling drugs near school zones. The zones can include a wide circle around schools in very densely populated urban high-

poverty areas where people of color disproportionately live. A study in New Jersey found that 96% of persons subject to school-zone sentencing enhancements in that state were African American or Latino. All 50 states and the District of Columbia have some form of drug-free school zone law.

- **Requiring significant financial outlays from defendants places Blacks and Latinos – who are disproportionately low-income – at a disadvantage.** Pretrial detention practices are one example. When charged defendants cannot afford to put up money to get bail, they may end up sitting in jail until trial, even if they would pose no further danger to the community. Pretrial detention has been shown to increase the odds of conviction, and people who are detained awaiting trial are also more likely to accept less favorable plea deals, be sentenced to prison, and receive longer sentences. Seventy percent of pretrial releases require money bond, an especially high hurdle for low-income defendants.

## Correcting Underlying Sources of Racial Disparity

Racial disparities in criminal justice are not intractable. In fact, more than 20 states have designed initiatives to address key problems. Here are examples of three recent reforms:

- **To address the biased use of discretion:** In Milwaukee, prosecutors previously filed drug paraphernalia charges against 73% of Black suspects but only 59% of white suspects arrested for the same offense. Working with the Vera Institute of Justice, prosecutors were able to eliminate racial disparities by reviewing data on outcomes, stressing diversion to treatment or dismissals on a more racially consistent basis, and requiring attorneys to consult with supervisors prior to filing each charge.
- **To reduce the disparate racial impact of policies and laws:** The state of Indiana amended its drug-free school zone sentencing laws, which had imposed especially harsh penalties on Indianapolis defendants who were more than three-quarters African American. Reform components included reducing drug-free zones from 1,000 feet to 500 feet to account for urban density, and requiring a reasonable presumption that minors could have been expected to be present when the charged drug offense occurred. Connecticut, Delaware, Kentucky, Massachusetts, New Jersey, and South Carolina have also amended their laws in similar fashion.
- **To create a more equal economic playing field:** In 2014, New Jersey reformed its bail system to emphasize risk assessment over monetary bond fees, a reform that is expected to lead to more defendants released pending their trials. Previously, the decision to detain defendants was based on their ability to post bail regardless of the risk that they might commit new offenses before trial. Judges may now release lower-risk indigent individuals without requiring money bail, and they may deny pretrial release for high-risk individuals even if they can afford bail.

As these encouraging examples show, many jurisdictions are developing programs and policies to eliminate known systematic sources of racial bias in criminal laws and procedures. Concerned citizens and officials across the United States must now expand the scale and increase the speed of these reform efforts.

Read more in Nazgol Ghandnoosh, "**Black Lives Matter: Eliminating Racial Inequity in the Criminal Justice System**," **The Sentencing Project**, February 2015.