

Racial Disparity in the Justice System: More Than the Sum of Its Parts

Bias Infects System from Investigation to Incarceration

BY ERIC LOTKE

Yesterday, approximately 800 African American baby boys were born in America. Unless something changes, roughly 250 of them will serve at least a year in prison during their lives.

The size of the American prison system is almost as notorious as its racial disproportion. African American men are confined at seven times the rate of White men. Altogether, more than 2 million people are currently locked in American prisons or jails. Nearly two-thirds of them are minorities and 173,000 are women. Many people believe that the disparities arise because minorities commit more crime, but it is not so simple. African Americans constitute roughly 12 percent of the nation's population and 13 percent of the nation's drug users, but 57 percent of those in state prison for a drug crime. In comparison, White people constitute roughly 69 percent of the nation's population and 68 percent of the nation's drug users, but only 23 percent of inmates in state prison for a drug crime.

This prison disparity does not occur all at once. Rather, it follows from countless small decisions made at every stage of the criminal justice process. Each decision compounds the disparity from the decision before and delivers additional disparity downstream. Each of these decisions could be made differently. In the words of Louisiana State Senator Donald Cravins, "Step by step, we have created a monster."

Racial profiling is one of the first steps. Along Interstate 95 in Maryland, for example, African Americans make up 20 percent of motorists but 75 percent of people pulled over by police. Yet the rate at which African Americans exceed the speed limit is the same as it is for Whites and, once searched, African Americans are found

in possession of illegal drugs at the same rate as Whites.

Much of this activity is self-fulfilling. If more African Americans are searched, then more contraband will be found on African Americans and more of them will be sent to prison. Thus, the raw numbers weigh against African Americans even though probability tells a different story. An analysis by the Customs Service of searches in airports in New York City in 1998 and 1999 found that 43 percent of people searched were minorities. However, illegal material was found on 6.7 percent of Whites, 6.3 percent of African Americans and just 2.8 percent of Latinos. With commendable self-awareness, the Customs Service then changed its practice to exclude any consideration of race, focusing only on suspicious behavior. The result? In 2000, the Customs Service conducted 61 percent fewer searches than in 1999 but the seizures of cocaine, heroin and ecstasy all increased. The "hit rates" for Whites and African Americans more than doubled and for Latinos it more than quadrupled — demonstrating that law enforcement can focus more effectively on people more likely to be guilty and spare innocent people needless harassment.

The Decision to Prosecute

After the arrest comes the decision to prosecute. The same set of facts can be prosecuted as an aggravated assault, a simple assault, disorderly conduct, or dismissed altogether. These decisions, too, reflect racial disparities.

The *Miami Herald* recently reviewed nearly 800,000 felony cases in Florida, and found that White suspects arrested for drug crimes were given a "withhold of adjudication" break—meaning they pleaded guilty,

but without having a conviction registered or getting a criminal record—nearly twice as often as African Americans. The *Herald* recounts the story of Tim Carter and Richard Thomas, arrested in separate incidents three months apart in nearly the same location. Police found one rock of cocaine on Carter, who is White, and a crack pipe with cocaine residue on Thomas, who is Black. Both men claimed drug addictions and both men potentially faced five years in prison. Carter, however, had his prosecution withheld and the judge sent him to drug rehabilitation. Thomas was convicted and went to prison. "A lot of times, Black defendants are viewed as criminals, while the White defendant is viewed as having a drug problem," Thomas's lawyer Ronnie Adili told the *Herald*.

Prosecutors' choices directly affect the sentence, as happens with the federal mandatory minimum infamous for imposing the same harsh prison term on 5 grams of crack cocaine as on 500 grams of powder cocaine. Approximately 97 percent of all federal crack prosecutions between 1992 and 1994 were of minorities. The U.S. Sentencing Commission determined in 1992 that only minorities were being prosecuted for crack offenses in more than half of the federal judicial districts that handled crack cases. Not one single White person was prosecuted for crack by federal prosecutors in Los Angeles between 1988 and 1994. These findings are remarkable partly because of the disparity and severity of crack sentencing in federal law, and partly because more Whites use crack than African Americans.

Decisions on granting bail also lead to racial imbalance. People released on bail have an advantage. They can participate in their own defense and they have less

incentive to accept unfavorable plea bargains. Yet the bail decision, too, seems to be infected by racial disparity and is not explainable by the severity of the offense or risk of flight. The *Hartford Courant* in Connecticut found that African American and Hispanic men paid twice the bail of White men accused of the same offense. The Florida Department of Corrections found that young unemployed African American men arrested on “public order” offenses were three times more likely to be kept in jail than unemployed Whites arrested on the same charges. In New York State, the Division of Criminal Justice Services found that one-third of all minorities accused of felonies would have been released before arraignment if they were treated the same as similarly situated White suspects.

Plea Bargaining

Plea bargaining also is infected by racial disparities. The vast majority of cases are not settled in trial but in deals under which the defendant pleads guilty in return for a lighter sentence. Available evidence indicates that Whites are routinely offered better deals than minorities. A study by the *San Jose Mercury News* of 700,000 California cases in 1991 found that of 71,668 adults who had no prior record and were charged with a felony, one third of Whites had their charges reduced to a misdemeanor or less. Only a quarter of African Americans and Hispanics received such reductions. In drug abuse cases, for which treatment without prosecution was an option, 20 percent of White people got treatment, compared to 14 percent of similarly situated African Americans and 11 percent of similarly situated Latinos.

The criminal sentence is like the punchline to a joke. There are many other parts, but in the end it all comes down to the sentence. In the justice process, the punchline is that minorities fare worse at every stage in the process and then fare worse again at sentencing.

The Justice Policy Institute recently

studied the impact of the “three-strikes-you’re-out” law in California, which is now 10 years old. Analysis revealed that among people serving prison sentences of 25 years to life under this law, the rate of three-strikes sentences for African Americans is 12 times as high as the rate for White felons. Moreover, these do not appear to be dangerous or violent individuals. Nearly two-thirds of people sentenced under three-strikes committed nonviolent offenses, suggesting that they could have been sentenced differently.

Similar disparities seem to arise in every context. Examining the juvenile justice system, a study by Building Blocks for Youth found that African Americans with no prior incarceration experience are 48 times more likely than similarly situated White youth to be sentenced to juvenile prison for drug offenses and that the Whites confined had shorter sentences. Even in application of the death penalty, where the stakes are highest and the need for fairness is most acute, disparities are the order of the day. The classic study by David Baldus, a University of Iowa law professor, found that African Americans who killed White people were sentenced to death seven times more frequently than White people who killed African Americans.

Some of the disparity might, of course, have seemingly race-neutral explanations. African Americans tend to be worse off financially, so they must rely on overworked public defenders rather than private counsel. They might not be able to afford bail even if race did not affect the amount. Careful statistical analysis reduces the racial correlation somewhat, but doesn’t change the big picture. “The system feeds on poor people,” says Senator Cravins. And, of course, the lower income status of African Americans is directly and seriously affected by generations of embedded, often hidden, racial bias.

That bias creates an insidious spiral. A police officer who pulls over a motorist with an active warrant is more likely to make an arrest, and a judge sentencing a person with a prior criminal record is likely to increase

the sentence. Yet these decisions can be self-perpetuating. The African American motorist might not have had the warrant if the earlier case hadn’t been stacked against him; the defendant with the prior record might not have been convicted if he could have made bail. Thus, each contact with the justice system makes the subsequent contact more likely and more forceful. Economic disadvantage might explain some of the disparity — but it is hard to get ahead with a felony record and probation obligations. In communities where half the young men are under judicial supervision on any given day — as research has shown is now the case in the District of Columbia and Baltimore — the justice system perpetuates its own future.

To help reverse that course, Maryland State Delegate Obie Patterson, chairman of the Maryland Legislative Black Caucus, sponsored legislation that diverts nonviolent drug offenders into treatment instead of prison. “We’ve made some progress, but we still have a long way to go,” says Patterson.

Pushed by the high cost of incarceration, states around the country are amending earlier “tough on crime” approaches with a new emphasis on programs like those Patterson advocates. Two reports by Judith Greene, one for the Justice Policy Institute (www.justicepolicy.org) and one for Families Against Mandatory Minimums (www.famm.org) document a trend among states to reform mandatory sentencing laws, shorten sentences, reform parole policies, close prisons and pass laws diverting people accused of nonviolent offenses from prison into treatment.

Says Greene: “The silver lining in the state fiscal crisis is the incentive to adopt more effective responses to the problems of crime and drug abuse. If prisons are used more wisely in the future, that should help reduce racial disparity too.” ■

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