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## The Presence of Racial Disparities at Every Decisional Phase of the Criminal Legal System

Nadia Woods

*Loyola University Chicago School of Law*

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## The Presence of Racial Disparities at Every Decisional Phase of the Criminal Legal System

Nadia Woods

Despite wielding a “color-blind” Constitution that bars discrimination on the basis of race, the U.S. criminal legal system is plagued by bias such that it routinely exacerbates racial disparities and socioeconomic inequality.<sup>1</sup> Systematic racial segregation and rising poverty levels within communities of color interacted to create the social conditions leading up to the crime waves of recent decades, as well as the corresponding tough-on-crime legislation that had ever-evolving impacts on communities of color while only *marginally* improving public safety.<sup>2</sup> This truth necessitates an acknowledgement that the disparate treatment experienced by people of color in the criminal legal system, Black people especially, is a symptom of pervasive and systemic racism.

Racial disparity, in the context of the criminal legal system, refers to the phenomena of a racial or ethnic group’s proportion within the control of the system being greater than the proportion of such groups in the general population.<sup>3</sup> These disparities, such as Black people only making up approximately 13% of the U.S. population but comprising nearly half the population of currently incarcerated people,<sup>4</sup> have long infected every step of the criminal justice process.<sup>5</sup> The repercussions of systematic and widespread racial biases can be observed in the overrepresentation of Black people at all decisional stages of criminal processing, from arrest to pretrial detention, sentencing (including capital punishment), confinement, and wrongful conviction.<sup>6</sup>

While there is variance in academic conclusions regarding the ultimate *cause* of this injustice, social science research consistently shows that racial bi-

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<sup>1</sup> See Theodore Johnson, *How Conservatives Turned the ‘Color-Blind Constitution’ Against Racial Progress*, THE ATLANTIC (2019).

<sup>2</sup> Katherine J. Rosich, *Race, Ethnicity and the Criminal Justice System*, WASHINGTON, D.C., AMERICAN SOC. ASSOC. September 1, 7 (2007); See also National Research Council, *The Growth of Incarceration in the United State: Exploring Causes and Consequences* (2014).

<sup>3</sup> The Sentencing Project, *Reducing Racial Disparity in the Criminal Justice System: A Manual for Practitioners and Policymakers*, at 1.

<sup>4</sup> Rebecca-Fielding Miller, *The Interaction of Race and Gender as a Significant Driver of Racial Arrest Disparities for African American Men*, 97 JOURNAL OF URBAN HEALTH 112, 113 (2020).

<sup>5</sup> Joseph Guzman, “California Police Stop Black Drivers at Higher Rates, Analysis Finds”, The Hill, January 3, 2020 at 1.

<sup>6</sup> Katherine J. Rosich, *supra*, note 2.

ases and discrimination occur in various places and times throughout justice processing, such that these differences in treatment accumulate and foster racially disparate outcomes.<sup>7</sup>

### POLICING

Historical cultural narratives of people of color, particularly those concerning Black men, increase their vulnerability to aggressive policing.<sup>8</sup> Police stops and their search decisions suffer from persistent racial bias, especially against Black and Hispanic suspects,<sup>9</sup> making Black people far more likely to be arrested than any other racial group in the United States.<sup>10</sup> Additionally, police officers' use of force—regardless of lethality—differs as a function of suspect race such that Black suspects receive harsher treatment than their white counterparts.<sup>11</sup> Consequently, despite making up only 15% of the United States population, Black people constitute roughly 40% of the suspects who have been shot and killed by U.S. police officers.<sup>12</sup> Compounding the issue, fourth amendment law has expanded permissible contact between people of color and police officers, facilitating one of several dynamics that enables racial profiling and legitimizes police violence.<sup>13</sup> Overpolicing and specialized treatment, and the subsequent overexposure of Black people to the police, necessarily results in the overrepresentation of Black people in the criminal legal system.

### PRETRIAL DETENTION & PLEA DEALS

Pretrial detention procedures systematically disadvantage marginalized communities.<sup>14</sup> Shortly after a person is arrested and/or accused of having

<sup>7</sup> Katherine J. Rosich, *supra*, note 2.

<sup>8</sup> Rebecca-Fielding Miller, *supra* note 4; See also The Sentencing Project, *Reducing Racial Disparity in the Criminal Justice System: A Manual for Practitioners and Policymakers*, at 6. (In 2006, Black people constituted 14% of drug users, while representing 35% of those arrested for drug offenses.)

<sup>9</sup> Emma Pierson, *A large-scale analysis of racial disparities in police stops across the United States*, *NATURE, HUMAN BEHAVIOUR* 736, 736 and 738 (2020).

<sup>10</sup> Brad Heath, *Racial Gap in U.S. Arrests*, *USA TODAY* 1, 2 (2014).

<sup>11</sup> Kendra Scott, *A Social Scientific Approach toward Understanding Racial Disparities in Police Shooting: Data from the Department of Justice (1980-2000)* *JOURNAL OF SOCIAL ISSUES* 701, 702 (2017).

<sup>12</sup> *Id.*

<sup>13</sup> Devon W. Carbado, *From Stopping Black People to Killing Black People: The Fourth Amendment Pathways to Police Violence*, 163 (2017).

<sup>14</sup> Hagan, John and Alberto Palloni. *Sociological Criminology and the Mythology of Hispanic Immigration and Crime*. *SOCIAL PROBLEMS* 617, 619 (1999).

committed a crime, a judge is given wide discretion to determine whether that person will be detained in jail or released back into society while awaiting their trial. 43% of Black people accused of a crime, in comparison to 34% of their white counterparts, are detained pretrial.<sup>15</sup> Being held in detention while awaiting trial increases the chances of conviction, and makes it more likely that defendants will accept less favorable plea deals, be sentenced to prison, and receive longer prison sentences.<sup>16</sup> Further, 70% of pretrial releases require money bonds<sup>17</sup>, therefore increasing the pressure on low-income individuals (who are disproportionately people of color) to accept less favorable plea deals.<sup>18</sup>

Although the criminal legal system theoretically guarantees the right to trial, the majority of defendants waive that right by accepting a plea deal.<sup>19</sup> In fact, 90-95% of all cases result in plea bargaining, a process during which prosecutorial discretion is known to cause racial discrepancies in sentencing outcomes.<sup>20</sup> The enormous amount of discretion afforded to prosecutors, coupled with the necessity of relatively quick decisions without full case information, creates a situation whereby both prosecutors and judges rely on stereotypical perceptual cues regarding race.<sup>21</sup>

### SENTENCING

Racial disparities in sentencing are found in almost every crime category, making Black people more likely to be sentenced to prison, to receive longer prison sentences, and to obtain fewer benefits via downward departures from sentencing guidelines.<sup>22</sup> The intersection of mandatory sentencing and policy initiatives influenced by racial bias has had a negative and compound effect on

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<sup>15</sup> Frank McIntyre and Shima Baradaran, *Race, Prediction and Pretrial Detention*, JOURNAL OF EMPIRICAL LEGAL STUDIES 741, 742 (2013).

<sup>16</sup> The Sentencing Project, *Report of The Sentencing Project to the United Nations Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia, and Related Intolerance*, March 2018.

<sup>17</sup> *Id.*

<sup>18</sup> Nazgol Ghandnoosh, *Black Lives Matter: Eliminating Racial Inequity in the Criminal Justice System*, THE SENTENCING PROJECT (2015).

<sup>19</sup> Andrew E. Taslitz, *The Guilty Plea State*, CRIM. JUST. 4 (2008).

<sup>20</sup> Lindsay Devers, Ph.D., *Plea and Charge Bargaining*, BUREAU OF JUSTICE ASSISTANCE (2011).

<sup>21</sup> Lisa Stolzenberg, Stewart J. D'Alessio and David Eitle, *Race and Cumulative Discrimination in the Prosecution of Criminal Defendants* RACE AND JUSTICE 275, (2013).

<sup>22</sup> Spohn, Cassia C. 2000. *Thirty Years of Sentencing Reform: The Quest for a Racially Neutral Sentencing Process*, 3 CRIMINAL JUSTICE 427 (2000).

marginalized communities. People of color are less likely than white offenders to receive a sentence that keeps them in their communities to participate in alternative programming, rather than being incarcerated in a prison.<sup>23</sup> Worst yet, Black defendants are *22 times* more likely to be sentenced to the death penalty for crimes when the victims are white, rather than Black — a type of bias the Supreme Court has conceded as “inevitable.”<sup>24</sup>

Although typically proposed as efforts to deter crime and decrease unwarranted disparities in the criminal legal system, criminal justice initiatives have not stopped race and ethnicity from playing a role in contemporary sentencing outcomes. Since the 1970s, impulsive crime control policies such as mandatory minimum sentencing, truth-in-sentencing, sentencing guidelines, and “3-strikes” legislation have been enacted widely at both the state and federal levels.<sup>25</sup> Discriminatory policies and practices have the most severe effect on, and have been concentrated in staggering proportions on, one group: young Black men from inner cities and low-income communities.<sup>26</sup> Thus, young Black men, particularly those who are unemployed, are more likely than their white counterparts to be sentenced to prison and receive longer sentences, even when similarly situated.<sup>27</sup>

### COLLATERAL CONSEQUENCES

Inconsistent treatment in policing, arrests, and sentencing necessarily leads to racial disparities among those experiencing the collateral consequences of criminal convictions. Once you’ve been convicted of a crime and labeled a felon by society, terminated historic forms of discrimination suddenly become legal.<sup>28</sup> Felony convictions, in large part because of stigma, function to exclude people from employment, decrease the quality of their family lives, prevent

<sup>23</sup> The Sentencing Project, *Reducing Racial Disparity in the Criminal Justice System: A Manual for Practitioners and Policymakers*, at 16.

<sup>24</sup> Bryan Stevenson, *Why American Prisons Owe Their Cruelty to Slavery* THE 1619 PROJECT 1, (2019).

<sup>25</sup> Katherine J. Rosich, *supra*, note 2 at 5.

<sup>26</sup> *Id.*

<sup>27</sup> See David B. Mustard, *Racial, Ethnic, and Gender Disparities in Sentencing. Evidence from the U.S. Federal Courts*, 44 J. L. & ECON. 285, 311 (2001). See also Cassia C. Spohn, *Thirty Years of Sentencing Reform: The Quest for a Racially Neutral Sentencing Process*, NATIONAL INSTITUTE OF JUSTICE, POLICIES, PROCESSES, AND DECISIONS OF THE CRIMINAL JUSTICE SYSTEM 427, 443 (2000).

<sup>28</sup> *Id.*

access to welfare programs, strip voting rights, and much more.<sup>29</sup> In fact, 1 in 13 voting-age Black Americans has been disenfranchised in the U.S. as a result of a conviction.<sup>30</sup> Thus, felony convictions effectively operate to create a permanent underclass of people, and these people are disproportionately Black.<sup>31</sup>

When a person is arrested, the impact extends to their family and community members, with an ultimate result of recidivism and more incarceration generally.<sup>32</sup> A study of Wisconsin probationers indicates that Black people were nearly three times as likely as white people to be revoked from probation, especially for drug offenses.<sup>33</sup> Disproportionate contact with the criminal justice system, largely due to more aggressive policing and prosecution of people of color, is one reason why collateral consequences disproportionately impact Black people.

### THE JUVENILE LEGAL SYSTEM

The racial disparities seen in the adult criminal legal system are also reflected in the juvenile system. Increases in drug arrests in the 1990's, combined with policy initiatives that encouraged the use of incarceration as punishment, had a particularly severe effect on minority children and their early involvement in the criminal legal system.<sup>34</sup> Where 1 in 3 Black men can expect to be incarcerated at some point in their lifetimes, approximately 50% of them experience their first arrest before their 23rd birthday.<sup>35</sup> Within the context of schools, Black students are suspended and expelled at rates that vastly exceed the punishment of white students for the same behavior.<sup>36</sup> Youth cannot be held in detention longer than 30 days without a set court date or sentence, but

<sup>29</sup> Traci Schlesinger, *Racial Disparities in Pretrial Diversion: An Analysis of Outcomes Among Men Charged with Felonies and Processed in State Courts*, 3 RACE AND JUSTICE 210, 211 (2013).

<sup>30</sup> Erin Kelley, *Racism & Felony Disenfranchisement: An Intertwined History*, BRENNAN CENTER FOR JUSTICE (2017).

<sup>31</sup> See Alexander, Michelle, *The New Jim Crow: Mass incarceration in the Age of Colorblindness* (1st ed.). New York, NY: The New Press (2010).

<sup>32</sup> Tracey L. Meares, *The Increasing Significance of Genes: Reproducing Race*, 92 Nw. U. L. REV. 1046, 1052 (1998).

<sup>33</sup> Wisconsin Office of Justice Assistance (2008). *Commission on Reducing Racial Disparities in the Wisconsin Justice System Final Report*.

<sup>34</sup> *Supra*, note 2 at 6.

<sup>35</sup> *Supra*, note 4.

<sup>36</sup> Bryson Stevenson, *Why American Prisons Owe Their Cruelty to Slavery* THE 1619 PROJECT 1, (2019).

nonetheless pretrial detention is surprisingly common in juvenile delinquency cases.<sup>37</sup>

The experience of being stopped and searched by police carries a particularly high risk for youth, given the potential to compromise their emotional and mental well-being.<sup>38</sup> Subjecting a community to a regime of aggressive stops contributes to the likelihood of criminal behavior in children and young adults, consequently increasing their exposure to the criminal legal system.<sup>39</sup> Black youth are more likely than their white counterparts to be referred to juvenile court (rather than diversion programs), waived to adult court, detained pre-trial, and locked up at disposition.<sup>40</sup> Black youth are also more likely to be arrested for a drug trafficking offense, even though white youth's self-reported experiences of using and selling drugs are at rates greater than that of Black youth.<sup>41</sup> Despite purported efforts to mitigate racial disparity over the past few decades, Black youth are still overrepresented at all stages of case processing within the juvenile legal system, and are frequently funneled into the similarly disparate adult criminal legal system.<sup>42</sup>

#### THE RESPONSIBILITY OF THE LEGAL PROFESSION

As seen in too many court opinions, there is a blatant disconnect between the perspective used during legal analysis and the reality that exists outside of those pages. Specifically in criminal and equal protection opinions, Supreme Court Justices typically operate within their perception of the world where bias and abuse of power by law enforcement officers and prosecutors are rare occurrences, and where individuals are presumed to know that they may refuse a

<sup>37</sup> Zoom Interview with a Cook County juvenile justice advocate who wishes to remain anonymous (Oct. 23, 2020). See also Wendy Sawyer, *Youth Confinement: The Whole Pie 2019*, PRISON POLICY INITIATIVE (2019).

<sup>38</sup> Dylan B. Jackson, Pd.D., Chantal Fahmy, Ph.D., Michael G. Vaughn, Ph.D., and Alexander Testa, Ph.D., *Police Stops Among At-Risk Youth: Repercussions for Mental Health*, JOURNAL OF ADOLESCENT HEALTH 627, 627 and 628 (2019).

<sup>39</sup> Susan A. Bandes, *The Mismeasure of Terry Stops: Assessing the psychological and emotional harms of stop and frisk to individuals and communities*, 37 BEHAVIORAL SCIENCES & THE LAW 2 (2019).

<sup>40</sup> *Id.* at 1.

<sup>41</sup> Leah Floyd et al., *Adolescent Drug Dealing and Race/Ethnicity: A Population-Based Study of the Differential Impact of Substance Use on Involvement in Drug Trade*, Am. J Drug Alcohol Abuse (2010).

<sup>42</sup> *Supra*, note 2 at 9.

police officer's search request without any dire consequences.<sup>43</sup> However, in the real world of criminal law enforcement, there is overwhelming empirical evidence demonstrating the disparate treatment of many marginalized communities, especially Black people.<sup>44</sup>

The United States is home to less than five percent of the world's population, and yet nearly one-quarter of the world's incarcerated people are caged in America.<sup>45</sup> With the knowledge that the criminal legal system discriminates against Black people at every juncture, and the reality that plea deals constitute the vast majority of felony convictions, lawyers have a collective responsibility to ensure that the contemporary criminal legal system functions consistently with our rights and values.<sup>46</sup>

### CONCLUSION

Based on the aforementioned reasons, racial disparities and discrimination within the criminal legal system are not likely to shrink without intentional and significant efforts to address the plethora of inadequacies that lead to this broad display of injustice. Mitigation of these harms and reform of the systems causing them cannot occur without discussing the reality of the criminal legal system as it exists now and acknowledging the relevance of racially disparate treatment throughout all criminal pleadings and proceedings.

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<sup>43</sup> See Donna Coker, *Forward: Addressing the Real World of Racial Injustice in the Criminal Justice System*, 93 THE JOURNAL OF CRIMINAL LAW AND CRIMINOLOGY 827 (1973).

<sup>44</sup> *Id.* At 829.

<sup>45</sup> Michelle Ye Hee Lee, "Does the United States Really Have 5 Percent of the World's Population and One Quarter of the World's Prisoners?," WASHINGTON POST, April 30, 2015.

<sup>46</sup> Alec Karakatsanis, *Policing, Mass Imprisonment, and the Failure of American Lawyers*, 128 HARV. L. Rev. F 253, (2015).