

## Can Judges Reduce Racial Disparities in the Criminal Justice System?

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For decades, researchers and policymakers have been concerned about the disproportionate presence of blacks and Latinos in the criminal justice system. While a large proportion of these racial disparities can be explained by greater criminal involvement among blacks and Latinos, researchers continue to find that, after controlling for differences in criminal behavior and other legally-relevant factors, minorities are treated more punitively than similarly-situated whites from arrest to sentencing in numerous jurisdictions. Consequently, researchers suggest that racial disparities arise not just from disproportionate criminal involvement or the disparate impact of facially neutral laws but also from differential treatment by criminal justice officials, such as police officers, lawyers, probation officers, and judges.

While researchers have theorized how criminal justice officials' biases and stereotypes may result in differential treatment, researchers have little understanding of how officials make sense of the social problem of racial disparities and how, if at all, they work to address the problem.

From December 2013 to March 2015, we interviewed 59 state-level judges in a Northeastern state, where blacks and Latinos are disproportionately represented in the criminal justice system. Although blacks and Latinos each comprised less than 10 percent of the state population in 2014, they each comprised about 25 percent of its incarcerated population. For additional insight, we also interviewed prosecutors, public defenders, and private attorneys and conducted fieldwork within upper and lower courthouses across the state. Our interviews focused on court officials' decision-making from arraignment to sentencing.

### Judges' Explanations of Racial Disparities

A nontrivial number of judges we interviewed attribute racial disparities to differences in criminal offending rates alone, often highlighting the roles of poverty and family dysfunction in shaping defendants' criminal trajectories prior to contact with the criminal justice system. These judges attribute disparities to the disparate impact of facially neutral laws that criminalize behaviors in which they believe blacks and Latinos happen to be disproportionately involved because of their socioeconomic positions and the neighborhoods in which they live.

Perhaps surprisingly, however, the majority of judges in our sample attribute racial disparities, at least in part, to differences in treatment by court officials or police officers at some point along the

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<sup>1</sup>Read more in Clair, Matthew and Alix S. Winter. 2016. "How Judges Think about Racial Disparities: Situational Decision-Making in the Criminal Justice System." *Criminology*, 54 (2).

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criminal justice process. Many of these judges believe that court and law enforcement officials, including themselves, might have implicit biases against people of color. These judges also attribute disparities to what they believe to be police officers' and departments' differentially harsh enforcement of laws in majority minority neighborhoods.

### **Judges' Strategies for Dealing with Racial Disparities**

Judges report two groupings of strategies for dealing with racial disparities at different stages of the criminal court process. We define these two sets of strategies as “noninterventionist” and “interventionist.”

Noninterventionist strategies defer to other actors (e.g., prosecutors and defense attorneys) in decision-making. These strategies usually involve judges considering their personal differential treatment of defendants, but not addressing possible differential treatment by other actors or the disparate impact of their own decisions or of the criminal justice process as a whole.

Interventionist strategies, by contrast, contest other actors in decision-making. These strategies usually involve judges not only considering their own differential treatment of defendants but also questioning possible differential treatment by other actors, as well as (sometimes) addressing the disparate impact of their own decisions and of the criminal justice process as a whole.

Each set of strategies manifests in particular ways at particular stages of the criminal court process—from arraignment to plea negotiation to jury selection to sentencing. For example, at arraignment, a judge employing a noninterventionist strategy defers to prosecutors in bringing charges and to both prosecutors and defense attorneys in the setting of bail, often setting bail in between the recommendations of each side. By contrast, a judge employing an interventionist strategy at arraignment may keep records of prosecutors' differential charging histories, dismiss a charge on the basis of differential treatment, or set a lower bail amount than either the defense or prosecution recommends when he or she perceives a disparate pattern of bail requests for non-legal reasons.

State judges who employ interventionist strategies recount taking the following steps to mitigate racial disparities:

- At arraignment, judges report keeping records of the types of situations/defendants attached to particular charges. Based on these records, judges report actively inquiring into disparities in charging decisions.
- At bail hearings, judges report soliciting detailed information about the socio-economic status (SES) of defendants when not already available, so as to set informed bail amounts that will ensure defendants return for trial.
- At the plea stage, judges report keeping records of the types of situations/defendants typically attached to particular dispositions. Based on these records, judges report actively inquiring into the nature of agreed-on pleas that appear disparately punitive.
- At jury selection, judges report keeping tallies of the presence of potential minority jurors in the jury pool and actively questioning whether racial bias may be involved in their own removal of a minority juror for cause and/or in counsel's peremptory strike of a minority juror.

- Judges report choosing a minority juror as the foreperson of the jury when possible, especially when the defendant is a minority.
- At sentencing, judges report considering the merits of a “social adversity” defense, whereby they account for mitigating factors such as poverty and racial discrimination that may have contributed to the convicted defendant’s criminal behavior. This enables judges to give broader consideration to why a black or Latino defendant may have a lengthier criminal record than a white defendant charged with the same crime.
- Judges report considering creative ways to make alternative sentences—such as drug rehabilitation—as available to low-SES defendants as they are to their more affluent peers.

At each stage of the criminal court process that we studied, only a small number of judges in our sample report employing interventionist strategies that would mitigate possible differential treatment by other criminal justice officials.

### **Implications: How Might Judges Contribute to Racial Disparities?**

The judges we spoke with do not express explicitly racist attitudes, at least not in the interview setting or in courthouse observations. Indeed, many judges acknowledge that they may have racial and class biases that may contribute to racial disparities. And as noted earlier, most judges in our sample believe racial disparities arise from at least some form of differential treatment by criminal justice officials.

Although most judges in our sample identify differential treatment as one cause of racial disparities, judges’ use of noninterventionist strategies likely contributes to disparities. Most judges in our sample find it appropriate to account for only their own possible differential treatment of criminal defendants (noninterventionist) and not that of other actors nor the disparate implications of poverty and racial inequality prior to contact with the criminal justice system (interventionist). By deferring to other actors in the system, judges who employ noninterventionist strategies may unintentionally allow for the reproduction of racial disparities that emanate at earlier stages of the criminal justice process, such as through the actions and possible biases of the police, prosecutors, and defense attorneys, as well as through the social adversities faced by many black and Latino criminal defendants. However, by employing interventionist strategies, a small number of judges more actively work to combat disparity-producing legal practices, policies, and decisions.