

Taking Steps to Address Racial Disparities in Sentencing



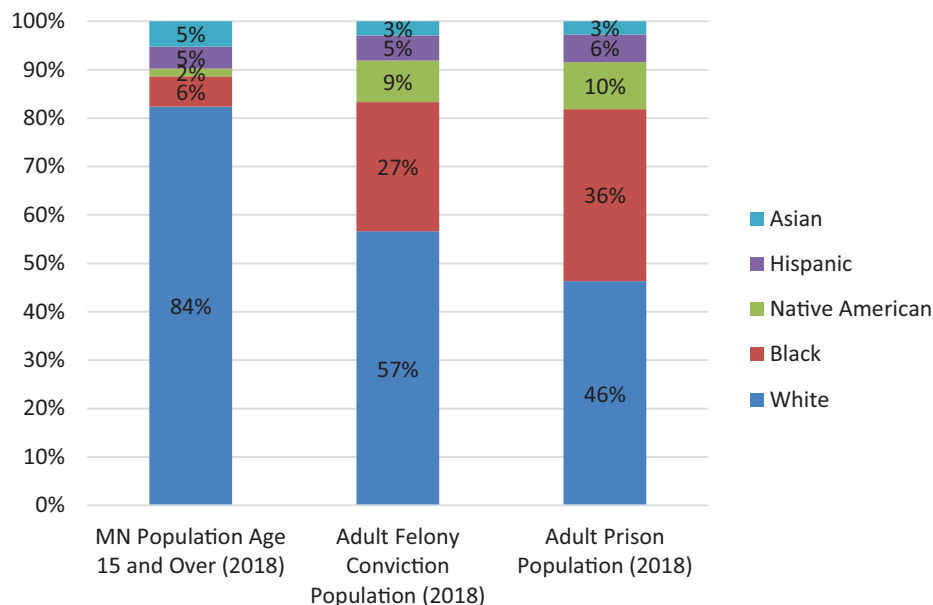
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On May 25, 2020, George Floyd was killed during an arrest in Minneapolis, Minnesota. His death set off a series of protests in Minneapolis, Saint Paul, and other cities across the nation, which expressed the extreme frustration of people who had been subject to years of racism, oppression, and unfairness in the treatment of people of color. Racial disparities exist in many corners of our nation, but none so omnipresent as in the criminal justice system. In Minnesota, for example, in 2018, people age fifteen and older who were Black were an estimated 6% of the total state population, yet they comprised 27% of the population of individuals convicted of felony offenses, and 36% of the prison population (Figure 1). Similar disparities can be seen for people who are Native American. Though I would not expect the proportions to be exactly equal across the three populations, if there were no bias in the system, I would expect the numbers to be similar. The fact that they are so disproportionate tells us that insidious forces are at work.

As protesters filled the streets, I too began to wonder what I could do to break the cycle of racial disparity in the criminal justice system. At the same time, as chair of the Minnesota Sentencing Guidelines Commission, I was prepping for the next meeting of the Commission. The meeting was originally scheduled for June 4—just ten days after George Floyd’s death—and it felt hypocritical to continue with business as usual. When a memorial service for Mr. Floyd was announced for the same date, I delayed the meeting one week, to June 11. And in that time, I came to realize that my desire to do something and my role as chair were linked. What I could do as chair was to set in motion a commitment by the Commission to review the Minnesota Sentencing Guidelines for racial impact. I did so by delivering the remarks shown in Box 1, after which the Commission voted to engage in a review of its policies to ensure that they were neutral with respect to race, gender, social, and economic status.

Figure 1:
Comparing Populations by Race in Minnesota



Source: Minnesota Sentencing Guidelines Commission Demographic Impact Statement, https://mn.gov/msgc-stat/documents/racial-impact-statements/2020/HF2013-1CE_MJThresholds.pdf

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Box 1: Remarks Delivered to Minnesota Sentencing Guidelines Commission, June 11, 2020

To: Members of the Sentencing Guidelines Commission
From: Kelly Lyn Mitchell, Chair
Re: Undertaking a Systematic Review of Our Policies

A few weeks ago, we witnessed the death of George Floyd. His death was tragic and unjust, and it has served to expose the many injustices that people of color experience in our community. It has also sparked frank discussions about racial disparity. Though Minnesota is often touted as one of the best places to live in the U.S., that reality is only true if you are white. I'm not originally from Minnesota, but twenty years ago I *chose* to live here because of all the wonderful things this state has to offer. I want Minnesota to be a place where *every* person in our community feels that way, so I've been asking myself what role the Sentencing Guidelines Commission has in moving forward from this point.

The Minnesota Sentencing Guidelines Commission was the first in the nation to adopt the practice of preparing racial impact notes in 2008 to inform the Legislature when proposed changes to the law had the potential to impact some citizens more than others. I have personally witnessed legislative committees taking that information to heart and deciding against proposed changes when they would more harshly affect people who are Black.

It's time to turn the microscope on ourselves. Structural racism occurs in part when we take for granted the just nature of our policies; when we assume that the differences we see in outcomes between citizens who are white and citizens who are Black, Native American, Hispanic, or Asian are driven by factors that are beyond our control. But the truth is that some of those differences flow from the policy choices that we make. For that reason, I am calling upon the Sentencing Guidelines Commission to undertake a systematic review of our policies for racial impact; a deliberate analysis to determine whether our policies have a disparate impact by race, and if so, to determine what changes should be made to reduce those effects.

There is no quick fix to the issue of racial disparities in our State. It will take all of our efforts in multiple arenas of state and local policy to begin to address it. Similarly, our review of the Sentencing Guidelines should not be rushed. It will take some time to review our policies and determine their effects. I am not looking for any quick fixes here, nor am I suggesting that this will be a review that we can complete before the next legislative session. What I am suggesting is that there is no time to waste in getting started. I'd like to begin this review now and work on it deliberately and thoughtfully so that when we reach this point next year, we have a clearer view of the role of our Sentencing Guidelines in affecting racial disparities, and thoughtful proposals for addressing those disparities.

When I was first starting out in my career, I worked as a staff attorney in the Judicial Branch, and in that role, I had the pleasure of working in the same division as Deb Dailey, who was, I think, the longest serving Executive Director of the Sentencing Guidelines Commission before moving to her position as Research Manager for the Branch. She was a great mentor to me, and some of the words she said to me early in my career have stuck with me and have shaped how I approach my work. She recognized that disparities often already exist at the very start of the court case, brought on by processes that precede court involvement. But then she would say, "We can't change who comes through the door, but we have to ask ourselves, are we making it worse?" I think that's our task with the Sentencing Guidelines. We can't change the racial makeup of who receives convictions—that's not our role—but we can ask ourselves, are we making it worse?

I am well aware that the enabling statute for the Minnesota Sentencing Guidelines Commission states that our primary consideration should be public safety. I submit to you that racial injustice is a threat to public safety. Criminal justice policies that disproportionately affect specific groups of people have a cascading effect that amplifies disadvantages in all areas of life. We know that people who are convicted of crimes face numerous collateral consequences that affect their ability to complete their education, obtain jobs, and make a decent living. These disadvantages affect not only the person caught up in the criminal justice system, but also their families, and their children. And when our policies concentrate these disadvantages into communities of color, we run the risk of disenfranchising and marginalizing entire communities for generations. To serve public safety, then, is to be parsimonious with our policies; to ensure that we carefully consider the manner in which we are holding people accountable for their crimes; and to recommit to the principle that has been written in our guidelines since the very beginning: "Sentencing should be neutral with respect to the race, gender, social, or economic status of convicted felons." Minn. Sent. Guidelines § 1.A.2 (2019).

Kelly Lyn Mitchell
Chair, Sentencing Guidelines Commission

Table 1: Distribution of Discretion in Sentencing

| Level | Locus of Discretion | Mechanisms That Affect Decision Making and Discretion | Desired Result | Actual or Unintended Result | Ways to Identify or Address Racial Disparity |
|-----------------------|---|---|--|--|--|
| Institutional (Macro) | State level (e.g., Legislature, Sentencing Guidelines Commission) | Criminal laws, Sentencing Guidelines, Rules of Criminal Procedure, case law | Race-neutral legal framework | Racial disparity in application (e.g., policies that affect some racial groups more than others) | Review the racial impact of laws and remove or change provisions that have a disparate impact; utilize racial impact notes to evaluate proposed laws and rules |
| Organizational (Meso) | Court communities | Case processing, daily interactions, “going rates” | Efficiency | Coercion to settle cases; different “going rates” based on race | Slow cases down; analyze plea agreement practices by race; bring system actors together to examine and question current going rates |
| Individual (Micro) | Case level; individual actors (e.g., judges, probation officers) | Routine, bias, stereotypes | Equal treatment (uniformity and proportionality) | Racially disparate outcomes for similar cases | Analyze decision making of individual actors (e.g., prosecutors, judges); provide implicit bias training |

To understand why I chose this path, it is important to understand that racial disparities in sentencing are not solely the product of individual acts of discretion. Rather, they are the cumulative result of multiple types of discretion exercised at the state, court, and individual levels through policies, practices, and individual acts. Table 1 shows my conception about how discretion in sentencing and punishment is spread across these different levels, and how each can result in racially disparate sentences. What follows is a brief discussion about how the exercise of discretion at each level can result in racial disparities in sentencing.

At the macro-level are policies, laws, rules, and guidelines that serve as the framework for decision making in sentencing. Reitz refers to the discretion exercised at this level as “systemic discretion” because it involves substantive policy choices “that will govern punishment decisions for whole categories of cases.”¹ Examples include defining crimes, establishing maximum punishments, and enacting mandatory minimum sentences.² At this level, policy language that seems innocuous and racially neutral on its face can have devastating effects when the policy operates differently for whole categories of people. Differing punishments for crack and powder cocaine are an example of a macro-level policy choice with a racially disparate impact. Minnesota addressed the crack/powder cocaine disparity more than twenty years before it was addressed in the Federal Sentencing Guidelines, and an examination of these events is instructive in how a high-level policy review can uncover racial disparities.

In *State v. Russell*,³ the Minnesota Supreme Court took up an equal protection challenge regarding the punishment ranges for possession of crack and powder cocaine. At the time, possession of three grams of crack cocaine was

punishable by up to twenty years in prison while possession of a similar amount of powder cocaine was punishable by up to five years in prison.⁴ These statutory maximum punishments translated to a presumptive four-year prison sentence for possession of crack cocaine and a presumptive probation sentence for possession of powder cocaine under the Sentencing Guidelines.⁵

Testimony at the underlying *Russell* trial revealed that nearly everyone charged with possession of crack cocaine was Black and over three-quarters of those charged with possession of powder cocaine were white.⁶ Thus, people who were Black were routinely punished much more severely than people who were white. Moreover, testimony at trial demonstrated that the rationales put forth during legislative hearings for these differing punishments—that the differing drug weights were the amounts that typically indicated dealing rather than drug use, that crack had stronger physiological effects than powder, that crack made its users more dangerous—were based on little more than anecdote.⁷

The *Russell* case offers a prime example of how policy choices can breed racial disparity. In this case, the punishment policy seemed neutral on its face, but it was not neutral in application.⁸ It sounded neutral to impose a harsher sentence for a seemingly more dangerous drug, until one realized that conclusions about the differences between crack and powder cocaine were based on assumptions and grounded in racial bias. But such an effect would never have been uncovered if someone had not thought to question the state-level policy. This is the type of disparity for which we need to periodically review and question our policy decisions. And to combat such disparity, we need to think critically about *why* we are making specific policy choices.

Court communities operate at the meso-level within the policies set at the macro-level. Courts can be conceived of as communities because they are shared workplaces in which actors in multiple roles from different organizations—judges, prosecutors, defense attorneys, probation officers—come together to perform the common function of case processing.⁹ As Ulmer explains, “the boundaries of court communities are not established by formal organizational structures, but by lines of communication, participation, and influence in case processing.”¹⁰ Each actor within the court community works according to the norms of their organization—the prosecutor’s office, the judicial branch—but those norms are also tempered and developed through interaction with the other actors, as well as within the political and social context of the larger community within which the court is situated.

Within the context of criminal sentencing, a key outcome of court communities is the development of “going rates,” which are “rules of thumb as to the standard charges, implicit or explicit guilty plea concessions, and sentencing outcomes flowing from routine offenses and circumstances.”¹¹ Going rates are what allow the courts to function, providing shortcuts or road maps for how most cases will be handled, and reserving litigation for a select few cases. Going rates develop over time through patterns of interaction that become sedimented into norms and expectations that constrain all participants in individual cases.¹²

But there are different going rates across courts. Because each court is its own community, each has different norms, born of interactions between specific organizations and people in specific places, within the context of unique political and social settings. This is why sentencing disparities differ from county to county and from metro to rural areas. For example, in his study of three counties in Pennsylvania following the enactment of the Pennsylvania Sentencing Guidelines, Ulmer found that the nature of the court community heavily influenced the effect of the guidelines.¹³ In one affluent suburban county, all of the parties knew each other well and had developed strong going rates for crimes based on shared conservative ideology and years of interaction.¹⁴ These going rates continued to remain paramount following enactment of the guidelines, with the guidelines being used primarily only in cases in which court community actors felt the going rates could not easily be applied. By contrast, in another large urban county where there was little familiarity between the parties because of the county’s large size and high turnover within offices, the guidelines *became* the going rate.¹⁵ Thus, the impact of the court community can be so strong that it can override or diminish the impact of statewide laws and procedures.

Going rates contribute to racial disparity when there are different going rates for people based on race or when race affects who is seen as deserving of punishment or leniency. For example, Van Cleve found that in Cook County, whiteness allowed white defendants charged with drug crimes to be seen as “ill” and “hitting rock bottom,”

whereas non-white defendants were seen as drug dealers and “criminal.”¹⁶ Given that there are different going rates for dealing drugs versus possessing or using drugs, if race determines how one’s case is viewed, it will also affect which going rate is applied, and therefore which punishment is meted out. Thus, to identify and root out racial disparities at the court community level, court community actors must be willing to periodically question the going rates and how they are applied. Moreover, they must agree that “because we have always done it that way” is not an acceptable reason for maintaining current practice.

Finally, at the micro-level are individual decisions and acts of discretion. Examples of decisions at this level include charging decisions by prosecutors and decisions by judges to sentence in accord with the guidelines or to depart from them. As Reitz notes, decisions at this level have a “telescoping quality,” imposing “new limits on later decision makers.”¹⁷ For example, the prosecutor’s initial charging decision establishes the maximum possible punishment and sets the universe of plea bargaining options, including things such as pleading to a lesser offense or dropping an allegation that triggers a mandatory minimum sentence. Individual decisions are not made in a vacuum; there are still interdependencies among court actors. But at this level, racial disparity can result when individual acts of discretion are colored by racial stereotypes or bias.

For example, Albonetti posited a theory of bounded rationality to explain judicial disparity in sentencing.¹⁸ As Albonetti explains, judges strive to make rational sentencing decisions. But they face uncertainty because they are unable to accurately predict which individuals will commit crimes in the future. In order to achieve some measure of rationality, judges form patterned responses based on their understanding of what causes individuals to commit crimes and their judgments about whether the propensity of those individuals to commit crimes is temporary or lasting. However, because judges lack information, their judgments about the potential for recidivism are informed by stereotypes that link race, gender, and earlier case-processing decisions (e.g., whether the person received bail, whether the person pleaded guilty or went to trial) to the likelihood of future criminality. Thus, “[d]iscrimination and disparity in sentencing decisions . . . may be the product of judicial attempts to achieve a ‘bounded rationality’ in sentencing by relying on stereotypical images of which defendant is most likely to recidivate.”¹⁹ To identify and root out racial disparity at the individual level, we have to be willing to examine our own biases and stereotypes, and to reflect on how those biases might impact the manner in which we exercise discretion.

If we are to truly dismantle racial disparities in the criminal justice system, we need to understand how they are produced at all three levels—state (macro), court community (meso), and individual (micro)—and develop strategies to root out disparities going forward. In this brief discussion, I have focused primarily on decisions and acts of discretion that affect sentencing, but the same structure

could be used to examine other aspects of the criminal justice system like policing, prosecution, and conviction.

The Minnesota Sentencing Guidelines Commission has set in motion the process to examine the macro-level discretion we exercise to establish sentencing policy through the guidelines. The Commission needs to know if there are aspects of the criminal history score or myriad other policies within the guidelines that affect people who are Black or Native American differently than people who are white. But the Commission will only ferret that out if we are willing to challenge our assumption that the policies we have in place now are neutral and just. If we learn that our policies are driving racial disparities in sentencing, the Commission can work to change those policies. But even then, our work will be but one step in a series of changes that must occur at the state, court community, and individual levels to reduce racial disparities in sentencing.

Notes

- ¹ Kevin R. Reitz, *Modeling Discretion in American Sentencing Systems*, 20 L. & Pol'y 389, 392 (1998).
² *Id.*

- ³ *State v. Russell*, 477 N.W.2d 886 (Minn. 1991).
⁴ *Id.* at 887.
⁵ *Id.*
⁶ *Id.* at 887, n.1.
⁷ *Id.* at 889–90.
⁸ Thus, the Minnesota Supreme Court held that the statutory distinction between crack and powder cocaine violated the Equal Protection Clause of the Constitution. *Russell*, 477 N.W.2d at 889–91.
⁹ Jeffery T. Ulmer, *Social Worlds of Sentencing: Court Communities Under Sentencing Guidelines* 26 (SUNY Press 1997).
¹⁰ *Id.*
¹¹ *Id.* at 27.
¹² *Id.*
¹³ *Id.* at 173.
¹⁴ *Id.*
¹⁵ *Id.*
¹⁶ Nicole Gonzales Van Cleve, *Crook County: Racism and Injustice in America's Largest Criminal Court* 65–66 (Stanford University Press 2016).
¹⁷ Reitz, *supra* note 1, at 393.
¹⁸ Celesta A. Albonetti, *An Integration of Theories to Explain Judicial Discretion*, 38 Soc. Probs. 247 (1991).
¹⁹ *Id.* at 250.